Conditionally granted and Opinion Filed September 12, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00690-CV

IN RE BAMBU FRANCHISING LLC, BAMBU DESSERTS AND DRINKS, INC., AND BAMBU IP, LLC, Relators

Original Proceeding from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-05683

MEMORANDUM OPINION

Before Justices Francis, Brown, and Whitehill
Opinion by Justice Whitehill

This original proceeding involves the enforceability of a contractual forum selection clause to claims asserted under the Texas Deceptive Trade Practices Act (DTPA). The clause states that all matters arising under the agreement shall be brought in San Jose, California. Relators complain that the trial court abused its discretion by refusing to enforce the clause and denying their motion to dismiss. The real party in interest maintains that the clause does not apply to the tort claims asserted below. We conditionally grant the writ.

I. BACKGROUND

Relator Bambu Franchising LLC ("Bambu") is the franchisor of Vietnamese-style beverage and dessert restaurants. The real party in interest (Plaintiff below) Bamboo Dynasty, LLC ("Dynasty") obtained from Bambu the right to use the Bambu trademark and operating system (including recipes, training, and ingredient access) for a Bambu restaurant in Grand

Prairie, Texas. The franchise relationship was consummated through three agreements. One of those agreements, the Business Agreement, includes the following forum selection clause:

> Any lawsuit relating to any matter arising under this agreement shall be initiated in a State or Federal Court located in San Jose, California.

The other agreements included similar clauses, but Bambu relies solely on the clause found in the Business Agreement here. Section 10.7 of the Business Agreement also designates California law as the law governing the agreement and construction of the rights of the parties under the agreement. Section 10.7 further provides that Dynasty "irrevocably consents to the jurisdiction, venue and to the service of process, pleadings, and notices in connection with any and all actions and processes in the State and Federal Courts located in the County of Santa Clara, California."[1]

Dynasty sued Bambu below for DTPA violations, alleging Bambu failed to make certain required disclosures and failed to pay a $25,000 bond required by the Texas Business Opportunity Act. Dynasty claims that Bambu sold it a "business opportunity" and represented that Dynasty would earn or likely earn a profit in excess of the purchase price. According to Dynasty, Bambu then failed to register the opportunity with the Texas Secretary of State and failed to establish a statutorily-required trust account or irrevocable letter of credit. Dynasty also argues that Bambu misrepresented to Dynasty that the transaction was a license of intellectual property and not a business opportunity. Bambu moved to dismiss based on the forum selection clause. Bambu argued that Dynasty's claims are subject to the forum selection clause because they arise under the Business Agreement. Bambu further contended that for Dynasty to prevail on its claims, Dynasty must prove that the agreements triggered the statutory disclosure requirement because the transaction involved the sale of a business opportunity. Bambu asserted

[1] San Jose, California is located within Santa Clara County. https://www.sccgov.org/sites/scc/pages/about-the-county.aspx (last visited September 5, 2017).

Dynasty would have no claims against Bambu but for the agreements. The trial court denied the motion to dismiss and this original proceeding followed.

II. ANALYSIS

A. Applicable Law

Forum-selection clauses provide parties with an opportunity to contractually preselect the jurisdiction for dispute resolution. *Pinto Tech. Ventures, L.P. v. Sheldon*, No. 16-0007, 2017 WL 2200357, at *5 (Tex. May 19, 2017) (citing *In re AIU Ins. Co.*, 148 S.W.3d 109, 111 (Tex. 2004) (orig. proceeding)). Mandamus relief is available to enforce forum-selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute. *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009) (orig. proceeding) (per curiam).

Forum-selection clauses are generally enforceable and presumptively valid. *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding) (per curiam); *In re Int'l Profit Assocs.*, 274 S.W.3d at 675. Failing to give effect to contractual forum-selection clauses and forcing a party to litigate in a forum other than the contractually chosen one amounts to " 'clear harassment' ... injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics...." *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010) (orig. proceeding) (quoting *In re AutoNation, Inc.*, 228 S.W.3d 663, 667-68 (Tex. 2007) (orig. proceeding)).

A party attempting to show that such a clause should not be enforced bears a heavy burden. *In re ADM Inv'r Servs., Inc.*, 304 S.W.3d 371, 375 (Tex. 2010) (original proceeding); *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 232 (Tex. 2008) (orig. proceeding) (per curiam) (citing *In re AIU Ins. Co.*, 148 S.W.3d at 113); *In re Laibe Corp.*, 307 S.W.3d at 316. A trial court abuses its discretion in refusing to enforce a forum-selection clause unless the party

opposing enforcement meets its heavy burden of showing that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. *In re ADM Inv. Servs., Inc.*, 304 S.W.3d at 375; *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 15–17 (1972).

Texas law applies in original proceedings in which the parties seek to enforce a forum-selection clause, even if the contract also contains a choice-of-law clause selecting the application of another state's substantive law. *In re Lisa Laser USA, Inc.*, 310 S.W.3d at 883, n. 2; *In re AIU Ins. Co.*, 148 S.W.3d at 111. Further, the determination of whether mandamus relief is available is a matter of procedure, and the law of the forum state applies to procedural questions. *Arkoma Basin Expl. Co. v. FMF Assocs. 1990–A, Ltd.*, 249 S.W.3d 380, 387 & n. 17 (Tex. 2008). Accordingly, Texas law applies to the determination of whether mandamus relief is available in this case and whether the forum selection clause is enforceable. *See In re Lisa Laser USA, Inc.*, 310 S.W.3d at 883, n. 2.

B. Did the trial court abuse its discretion by denying Bambu's motion to dismiss?

To determine if the trial court abused its discretion, we must first decide if Dynasty's extra-contractual claims are matters arising under the Business Agreement such that the forum selection clause is enforceable in the underlying proceeding. If the clause applies to the underlying claims, we must then determine whether Dynasty established an exception to the general rule of enforceability. We agree with Bambu that Dynasty's claims are subject to the forum selection clause and that Dynasty did not meet its heavy burden to avoid enforcement of the clause.

1. Do Dynasty's claims arise under the Business Agreement?

The Texas Supreme Court recently held that business tort claims were subject to the forum-selection clause in a shareholders agreement. *Pinto Tech. Ventures, L.P.*, 2017 WL 2200357, at *9. We conclude that the supreme court's analysis in *Pinto Technology Ventures* applies equally here. In *Pinto Technology Ventures, L.P.*, the plaintiffs, two shareholders, asserted business tort claims related to the alleged dilution of their equity interests against the majority shareholders and certain corporate officers. 2017 WL 2200357, at *2. The shareholders agreement included a forum selection clause in which the parties agreed to resolve "any dispute arising out of this Agreement" in Delaware. *Id.* at *3. There, as here, the shareholders asserted no contract claims. *Id.* at *2. Instead, they asserted claims for fraud, breach of fiduciary duty, minority-shareholder oppression, Texas Blue Sky Law violations, and conspiracy. *Id.* The defendants moved to dismiss based on the forum selection clause, and the trial court granted the motion. *Id.* at *3–4. In a split decision, the court of appeals reversed, holding the forum-selection clause inapplicable to the dispute because an "arising out of" forum-selection clause applies only when the claims would not exist "but for" the agreement containing the clause. *Id.* at *4. The court determined that the shareholders' claims did not arise out of the agreement because the rights and obligations underlying the claims were derived from statutes and common law. *Id.*

The Texas Supreme Court reversed and rejected the court of appeals' determination that the business tort claims did not arise from the agreement. *In re Pinto Tech. Ventures*, 2017 WL 2200357, at *9. The court held that the shareholders' business tort claims were subject to the forum-selection clause. *Id.* The court first noted that the use of the term "dispute" instead of "claim" in the clause established that the clause applied beyond claims for breach of the agreement. *Id.* at *7. "Dispute" refers to a conflict or controversy whereas a "claim" means the

assertion of an existing right or a demand for money, property, or a legal remedy to which one asserts a right. *Id.* Here, the clause states that any "matter" arising under the agreement "shall be initiated in a State or Federal Court located in San Jose, California." "Matter" is analogous with "dispute" in this context and, therefore, shows an agreement that the forum selection clause will apply to matters other than breach of contract claims. *See id.*; *see also Robbins & Myers, Inc. v. J.M. Huber Corp.*, No. 05-01-00139-CV, 2002 WL 418206, at *2 (Tex. App.—Dallas Mar. 19, 2002, no pet.) (mem. op.) (agreement to litigate any disputes "based on any matter arising out of or in connection with" the contract in New York applied to the plaintiff's claims, "all of which concern representations appellees allegedly made to induce R & M to enter into the contract"); *see also In re Bloom Bus. Jets, LLC*, 522 S.W.3d 764, 769 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding) (forum-selection clause providing that any litigation "involving" the agreement "shall be adjudicated" in a court in Pitkin County, Colorado, was "broad enough to encompass claims beyond those that arise under the contract in the strict sense of being based on the contract's terms, including claims that merely affect or relate to the contract.").

The *Pinto* court also held that a but-for relationship between the disputes and the shareholders agreement was "evident" because the shareholders' extra-contractual statutory and tort claims involved the same operative facts as a breach of contract claim and related to rights purportedly promised under the agreement. *Pinto Tech. Ventures*, 2017 WL 2200357, at *8. As the court noted, the non-contractual claims were "integral to the dispute's resolution" and, although "shareholders and corporations can have relationships without an agreement like the one at issue here, we cannot ignore the reality that an agreement, in fact, governs their relationship and Sheldon's and Konya's alleged grievances emanate from the existence and operation of that agreement." *Id.* at *9. The same is true here. Dynasty's extra-contractual claims emanate from the Business Agreement, and the rights and representations in dispute are

related to that agreement. Indeed, to prevail on its statutory claims, Dynasty must prove the scope of the agreement and establish that the agreement involved a business opportunity rather than a license agreement. Dynasty's claims arise from the business relationship that was struck through the agreements and will require review and interpretation of the agreements by the trial court or trier of fact for Dynasty to prevail. On this record, a but-for relationship is evidence between the claims asserted below and the Business Agreement. Dynasty's artful pleading does not remove its claims from the scope of the forum selection clause. *See, e.g., Pinto Tech.*, 2017 WL 2200357, at * 2, 9 (rejecting "master of complaint" argument and noting that parties may not avoid forum selection clauses through artful pleading).

2. Is the clause mandatory and unambiguous?

Dynasty also argues that the provisions are permissive or at least ambiguous. These arguments are unavailing. The provision uses the mandatory word "shall" and is, therefore, mandatory. *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 615 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("The use of 'shall' generally indicates a mandatory requirement."). The provision is also unambiguous, stating that "any matter arising under this Agreement shall be initiated in" a court in San Jose, California.

3. Did Dynasty establish an exception to the general rule of enforceability?

Having found that the underlying claims are subject to the forum selection clause, we turn to whether Dynasty established an exception to the general rule of enforceability. A trial court abuses its discretion in refusing to enforce a forum-selection clause unless the party opposing enforcement meets its heavy burden of showing that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. *In re ADM Inv. Servs., Inc.*, 304

S.W.3d at 375; *M/S Bremen*, 407 U.S. at 15–17. Dynasty did not seek to establish any of these exceptions, and the record does not show that any of them apply. As such, the trial court abused its discretion by denying the motion to dismiss.

III. CONCLUSION

The trial court clearly abused its discretion by denying Bambu's motion to dismiss, and Bambu lacks an adequate remedy on appeal. Accordingly, we conditionally grant the petition for writ of mandamus. We order the trial court, within fifteen (15) days of the date of this opinion, to make written rulings (i) vacating the trial court's May 18, 2017 order denying relators' motion to dismiss, and (ii) granting relators' motion to dismiss. A writ will issue only if the trial court fails to comply with this opinion and the order of this date.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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