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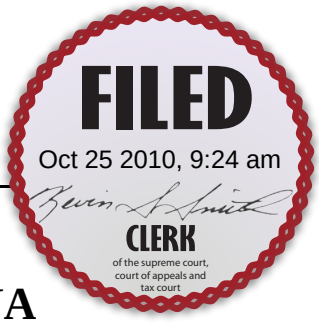

IN THE
COURT OF APPEALS OF INDIANA

RUNNINGMAN, LLC,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 18A02-1003-PL-383
	)	
THE NAGSAK COMPANY OF WEST LAFAYETTE, INC., JOSHUA NAGY and ROBERT SAK,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Thomas A. Cannon, Jr., Judge
Cause No. 18C05-0904-PL-7

October 25, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Runningman, Inc. ("Runningman"), appeals the dismissal of its complaint against The Nagsak Company of West Lafayette, Inc. ("Nagsak"), Joshua Nagy, and Robert Sak. We affirm.

FACTS AND PROCEDURAL HISTORY

In late 2007, Runningman negotiated with Nagsak for the purchase of a Pita Pit franchise in West Lafayette, Indiana. Nagsak prepared a Letter of Intent to Purchase, but the parties never executed it. The parties did execute a Purchase Agreement on January 3, 2008, which included a forum selection clause dictating that all contract-related litigation be conducted in Michigan.

On April 4, 2009, Runningman initiated a lawsuit against Nagsak, Nagy, and Sak for breach of contract, fraudulent inducement, and violation of the Indiana Franchise Disclosure Act. The complaint was premised on the Letter of Intent to Purchase. Nagsak moved to dismiss for lack of jurisdiction under Trial Rule 12(B)(1) and failure to state a claim upon which relief can be granted under Rule 12(B)(6). The trial court dismissed Runningman's complaint.

DISCUSSION AND DECISION

The standard for reviewing a ruling on a motion to dismiss for lack of subject matter jurisdiction depends on whether the trial court resolved disputed facts and, if so, whether it conducted an evidentiary hearing or ruled on a paper record. *Johnson v. Patriotic Fireworks,*

Inc., 871 N.E.2d 989, 992 (Ind. Ct. App. 1997).[1] If the facts before the trial court are not disputed, the question of subject matter jurisdiction is one of law that we review *de novo*. *Id.* Likewise, if the facts are disputed but the trial court rules on a paper record, the standard of review is also *de novo*. *Id.*

The facts in this case are not disputed, so we review *de novo* the applicability of the forum selection clause in the Purchase Agreement. *See City of Greenwood v. Town of Bargersville*, 930 N.E.2d 58 (Ind. Ct. App. 2010) (construction of terms of a written contract is a question of law that is reviewed *de novo*). Forum selection clauses are enforceable if they are reasonable and just under the circumstances, there is no evidence of fraud or overreaching such that the agreeing party would be deprived of its day in court, and the provision was freely negotiated. *Jallali v. Nat'l Bd. of Osteopathic Med. Examiners, Inc.*, 908 N.E.2d 1168, 1173 (Ind. Ct. App. 2009), *trans. denied.*

Runningman argues the forum selection clause in the Purchase Agreement, which requires all litigation to take place in the State of Michigan, does not apply because its claim was based on the Letter of Intent to Purchase, which contains no forum selection clause. The trial court granted Nagsak's motion to dismiss because it found the Letter of Intent to Purchase and Purchase Agreement to be "intertwined and interrelated" into a "single transaction that give[s] rise to plaintiff's claim[s] against the defendant." (Appellant's App. at 8.) We agree with the trial court's assessment.

[1] We note Nagsak filed a motion to dismiss under Rule 12(B)(1). However, our review is of Rule 12(B)(2), lack of personal jurisdiction, as it is more closely related to the issues contained in a forum selection clause. Nevertheless, the standard of review and result are the same.

Runningman relies on *Jallali*, but *Jallali* is distinguishable. Jallali, a resident of Florida, filed a claim against the National Board of Osteopathic Medical Examiners ("NBOME") regarding a number of online tests he completed towards certification as an osteopathic physician. NBOME provided evidence Jallali consented to the forum selection clause in clickwrap agreements[2] he was required to acknowledge before taking two tests, but there was no evidence he consented to a forum selection clause before any of his other seven tests. We held Jallali was bound by the forum selection clause only in the two clickwrap agreements he acknowledged; the other seven exams were entirely separate transactions for which no binding forum selection clause was acknowledged. *Id.* at 1174.

Here, the Letter of Intent to Purchase and Purchase Agreement were not "entirely separate transactions." Rather, both documents addressed transfer of ownership of the Pita Pit from Nagsak to Runningman. This situation is more like *Dexter Axle Co., v. Baan USA, Inc.*, 833 N.E.2d 43 (Ind. Ct. App. 2005).

In *Dexter Axle*, we adopted the reasoning of *Am. Patriot Ins. Agency, Inc. v. Mut. Risk Mgmt., Ltd.*, 364 F.3d 884, 889 (7th Cir. 2004), *reh'g denied, reh'g en banc denied*. There, multiple documents arguably were part of the same transaction, but only one contained a forum selection clause. The Seventh Circuit held:

> The Shareholder Agreement happens to be the only site of the forum-selection clause, but no reason has been suggested for why the parties would have wanted disputes under that agreement to be litigated in Bermuda but not

[2] A "clickwrap" agreement is one that appears on an internet webpage and requires that a user consent to any terms and conditions by clicking on a dialog box on the screen in order to proceed with the transaction. *Feldman v. Google, Inc.*, 513 F.Supp.2d 229, 236 (E.D.Pa. 2007).

> disputes under the other pieces of the jigsaw puzzle. The Mutual defendants that are the signatories of the other contracts with the plaintiff are all affiliates of Mutual Holdings, the signatory of the Shareholder Agreement; all worked together to create and administer the insurance program; and disputes arising under the other contracts therefore "concern" the Shareholder Agreement.

Id.

As in *Am. Patriot*, the same parties were involved in the Letter of Intent to Purchase and the Purchase Agreement, both documents addressed the transfer of the business interests of Nagsak to Runningman, and there is no apparent reason why the parties would want disputes arising under the two documents resolved in different forums. Thus, the trial court did not err when it found the forum selection clause in the Purchase Agreement applied to both documents because they were "intertwined and interrelated."

Runningman also argues that if the forum selection clause is valid, the dismissal does not apply to Sak and Nagy individually, as they were named in their individual capacities as perpetrators of the fraud alleged in Runningman's complaint. The assertion of a claim of fraud instead of breach of contract does not defeat a forum selection clause. *Id.* Therefore, any action regarding the Letter of Intent to Purchase or the Purchase Agreement must be filed in Michigan per the forum selection cause.[3]

[3] As the trial court's dismissal was proper for lack of personal jurisdiction, we need not address whether dismissal also was proper under Rule 12(B)(6).

CONCLUSION

The trial court did not err in dismissing Runningman's complaint against Nagsak, Nagy, and Sak based on the forum selection clause contained in the Purchase Agreement.

Affirmed.

BAILEY, J., and BARNES, J., concur.