RENDERED: MARCH 2, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

MODIFIED: MAY 11, 2007; 2:00 P.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002600-MR

SCOTT CALIHAN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CI-02781

POWER MARKETING DIRECT, INC.,
D/B/A PMD FURNITURE DIRECT;
ROYAL HERITAGE HOME FURNISHINGS;
AND POWER MARKETING DIRECT — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON, JUDGE; EMBERTON AND KNOPF, SENIOR JUDGES.[1]

ABRAMSON, JUDGE: Scott Calihan appeals from a December 1, 2005 order of the Fayette Circuit Court dismissing his complaint against Power Marketing Direct, Inc. (PMD), an Ohio corporation in the business of selling retail furniture through licensed

[1] Senior Judges Thomas D. Emberton and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

dealers located in defined territories. Calihan became a PMD dealer in July 2001 when he executed a license agreement awarding him a Kentucky sales territory comprising Lexington and the seven surrounding counties (the License Agreement). The parties' relationship soured, and in May 2005 PMD notified Calihan that it was terminating his license. Calihan then brought suit in Fayette Circuit Court seeking both declaratory relief from a non-compete clause in the License Agreement and monetary relief for alleged breach of contract and tortious interference with Calihan's efforts to sell hot tubs. Relying on a choice of forum clause allegedly included in the License Agreement, the trial court dismissed Calihan's claims without prejudice. Appealing from that dismissal, Calihan contends that the trial court erred by failing to give due consideration to his allegations that the entire License Agreement was fraudulently induced and more particularly that the choice of forum clause was fraudulently inserted into the agreement after it had been executed. The first of these allegations does not entitle Calihan to relief, but because the second allegation raises a factual dispute left unresolved by the trial court, we must vacate the trial court's order and remand for an appropriate hearing.

Attached to PMD's amended motion to dismiss was a nine-page "License Agreement" that identifies the parties by name in the first paragraph of page one, contains Calihan's signature and that of PMD's president at the top of page nine, and includes at paragraph 27 the following choice of law and forum clause:

> The Licensor and the Licensee agree that the laws of the State of Ohio shall govern this Agreement. Further, the Licensee and the Licensor each agree that any action, claim or demand arising under or as a result of this Agreement shall be filed in

> Franklin County, Ohio and the Licensee hereby agrees and consents to the jurisdiction of any court located in Franklin County, Ohio.

PMD asserted that pursuant to this clause Calihan was obliged to bring his suit in Ohio and that accordingly his Kentucky action should be dismissed. In response, Calihan filed an amended complaint in which he alleges that the License Agreement was fraudulently induced. He also attached to his supplemental response to PMD's motion an affidavit which states:

> I was not told by PMD of any "Choice of Law and Forum" Provision preventing me from suing in Kentucky when I signed the Agreement. The Agreement I signed did not contain any provision cutting off my right to sue in Kentucky, and I would not have freely agreed to such a provision considering my Lexington residency.

Following a brief oral argument at which Calihan's attorney voiced these allegations but was not given an opportunity to prove them, the trial court implicitly upheld the choice of forum clause and dismissed Calihan's suit.

As the parties note, Kentucky is among the large majority of jurisdictions that treats contractual choice of forum provisions as presumptively valid and enforceable unless it is clearly shown that the provision is "unfair or unreasonable." *Prezocki v. Bullock Garages, Inc.,* 938 S.W.2d 888 (Ky. 1997) (endorsing *Restatement (Second) of Conflict of Laws* § 80 (1971)). *See* Francis M. Dougherty, "Validity of Contractual Provision Limiting Place or Court in which Action May Be Brought," 31 ALR4th 404 (1984). Among the reasons courts have found for refusing to enforce such clauses are (1) that the inclusion of the clause itself (not the formation of the overall contract of which

the clause is a part) was induced by fraud or overreaching, *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 94 S.Ct. 2449, 41 L. Ed. 2d 270 (1974); *Preferred Capital, Inc. v. Associates in Urology,* 453 F.3d 718 (6th Cir. 2006); *Clark v. Power Marketing Direct, Inc.,* 192 S.W.3d 796 (Tex.App. 2006); *Golden Palm Hospitality, Inc. v. Stearns Bank National Association,* 874 So.2d 1231 (Fla.App. 2004); (2) that enforcement of the clause "would result in an inconvenience of forum so serious as to deprive [the complainant] of [his] opportunity for a day in court," *Wilder v. Absorption Corporation,* 107 S.W.3d 181, 185 (Ky. 2003); and (3) that enforcement would contravene a strong public policy of the forum state. *Prudential Resources Corporation v. Plunkett,* 583 S.W.2d 97 (Ky.App. 1979).

Not surprisingly, Calihan does not contend that Franklin County, Ohio constitutes a gravely inconvenient forum (*cf. Preferred Capital, Inc. v. Associates in Urology,* 453 F.3d at 724, noting with respect to a Pennsylvania defendant that "Ohio and Pennsylvania are neighboring states, and while Defendant may have to travel a few hours, it cannot be said to be 'manifestly and gravely inconvenient' for Defendant to have to defend this case in Ohio."). Nor does Calihan contend that his complaint, which asserts ordinary claims for breach of contract, tortious interference, and fraud, implicates such strong public policies of this state as to overcome the presumptive enforceability of his agreement to litigate in Ohio. It is clear that Calihan can obtain a fair hearing in the Ohio courts.

Calihan contends, however, that the choice of forum clause should not be enforced either because the entire License Agreement was induced by false representations--to the effect that the agreement was a mere formality and would not be enforced--or because the choice of forum clause was not in the document Calihan signed. With respect to this former contention, fraud in the inducement, as noted above, will invalidate a choice of forum clause only if the fraud induced the forum clause itself. "[A] party should not be permitted to escape a forum-selection provision by merely calling the validity of the entire contract into question." *Lambert v. Kysar,* 983 F.2d 1110, 1121 (1st Cir. 1993) (citation and internal quotation marks omitted). *See also Scherk v. Alberto-Culver Co., supra,* and the other cases cited with it.

Relying on *American Advertising Distributors, Inc. v. American Cooperative Advertising, Inc.,*639 S.W.2d 775 (Ky. 1982), Calihan argues that the rule in Kentucky is different, that here challenging the validity of the entire contract is sufficient to escape a choice of forum clause. In *American Advertising,* however, the Court did not invalidate the forum selection clause, but ruled only that the clause involved in that case did not apply to a fraud in the inducement claim because that claim did not "aris[e] out of" the parties' written agreement. *Id.* at 776. More recently, in *Kentucky Farm Bureau Mutual Insurance Companies v. Henshaw,* 95 S.W.3d 866 (Ky. 2003), our Supreme Court ruled that a choice of forum clause did apply to a civil rights claim where the relationship giving rise to the claim was established by the contract, and the contract was apt to "influence any subsequent litigation." *Id.* At 868. In *Louisville Peterbilt, Inc. v*

Cox, 132 S.W.3d 850 (Ky. 2004), moreover, our Supreme Court held that an arbitration clause, which is similar, of course, to a choice of forum clause, applied to and was not invalidated by a claim that the contract in which it appeared had been fraudulently induced.

In the present case, the forum clause embraces not just claims arising out of the License Agreement, but "any action, claim or demand arising under *or as a result* of this Agreement." (emphasis supplied). Calihan's claims, including his fraud in the inducement claim, certainly arise "as a result" of his agreement with PMD and it is equally certain that the License Agreement will influence any subsequent litigation. The trial court did not err, therefore, by ruling that PMD's choice of forum clause applies to Calihan's fraud claim and was not invalidated by it. *Cf. Clark v. Power Marketing Direct, Inc., supra* (construing this same PMD choice of forum clause and likewise holding that it is broad enough to encompass a fraud in the inducement claim).

Calihan's other contention, that the License Agreement he signed did not contain the choice of forum clause, is an allegation, apparently, that PMD removed the signature page from the agreement Calihan executed and attached it to a different agreement containing the choice of forum provision. The trial court erred, Calihan maintains, by not permitting him an opportunity to prove this allegation and thus by enforcing a choice of forum clause that was fraudulently obtained.

Reluctantly we agree that Calihan's allegation requires a hearing and a finding by the trial court as to whether the agreement Calihan executed included the

choice of forum clause. In *Prezocki v. Bullock Garages, Inc., supra,* our Supreme Court indicated that factual disputes bearing on the validity and enforceability of such clauses require the trial court to hear and resolve the disputes. Here, although the record includes only an unsigned, unnotarized affidavit alleging that the choice of forum clause was inserted into the agreement after it had been executed, Calihan asserts, and PMD does not dispute, that his response to PMD's Motion to Dismiss was accompanied by a properly executed affidavit raising that issue. PMD counters by pointing out that many circumstances in this case tend to belie Calihan's allegation that the agreement was altered post-execution, but this Court is not authorized to make credibility determinations or findings of fact. Under *Prezocki v. Bullock Garages, Inc., supra,* Calihan is entitled to a hearing on his allegation that the agreement was altered.

In sum, choice of forum clauses are presumptively valid means for parties to a contract to apportion the inconvenience of any ensuing litigation. Absent a strong showing that the clause itself was borne of misconduct, that the chosen forum would deprive a party of his day in court, or that enforcement of the clause would contravene our strong public policy, such clauses will be enforced and the parties held to their bargain. Although Calihan's general fraud-in-the-inducement claim does not escape the choice of forum clause asserted in this case, his allegation that that clause was the product of PMD's post-execution misconduct requires a hearing. Accordingly, we must vacate the December 1, 2005 order of the Fayette Circuit Court and remand for the additional proceeding. If, following the hearing, the trial court finds that the agreement

Calihan executed did not include the choice of forum clause, then Calihan's Fayette Circuit Court Complaint should be permitted to go forward. If, on the other hand, the court finds that Calihan's agreement did include the clause, then the order dismissing Calihan's Complaint should be reinstated.

ALL CONCUR.

BRIEF FOR APPELLANT:

M. Scott McIntyre
Cincinnati, Ohio

Leslie Dean
Lexington, Kentucky

BRIEF FOR APPELLEE:

Wm. Eric Minamyer
Cincinnati, Ohio