STATE OF MICHIGAN

COURT OF APPEALS

AMERICORP FINANCIAL, L.L.C., d/b/a PARATA FINANCIAL, Plaintiff-Appellant, v OATTS DRUG COMPANY and MARK C. COOPER, Defendants-Appellees.	UNPUBLISHED August 31, 2010 No. 289060 Oakland Circuit Court LC No. 2008-090635-CZ

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

In this breach of contract action, plaintiff Americorp Financial, L.L.C. (Americorp) appeals as of right a circuit court order dismissing the case based on forum non conveniens. We reverse and remand for further proceedings, and decide this appeal without oral argument pursuant to MCR 7.214(E).

In July 2007, plaintiff and defendant Oatts Drug Company (Oatts) entered into an equipment lease agreement concerning a pharmaceutical dispensing system. Defendant Mark C. Cooper, who owns Oatts, personally guaranteed the lease payments. Americorp is a Michigan corporation, while defendants are located in Georgia. The "Law" paragraph of the lease reads as follows:

> THIS AGREEMENT SHALL BE CONSTRUED, GOVERNED, INTERPRETED, AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF MICHIGAN . . . AND SHALL BE DEEMED TO BE FULLY AND SOLELY EXECUTED, PERFORMED, AND/OR OBSERVED IN THE STATE OF MICHIGAN . . . . THE PARTIES HERETO EXPRESSLY CONSENT TO PERSONAL JURISDICTION OF THE STATE OF MICHIGAN OR IF THIS AGREEMENT IS ASSIGNED, WHERE THE ASSIGNEES CORPORATE HEADQUARTERS IS LOCATED AND LESSEE HEREBY CONSENTS TO PERSONAL JURISDICTION AND VENUE IN THAT COURT AND WAIVES ANY RIGHT TO TRANSFER VENUE IN ANY ACTION OR PROCEEDING BROUGHT IN ANY COURT THEREIN, STATE OR FEDERAL, ARISING FROM OR ALLEGING FACTS ARISING FROM THE TRANSACTIONS CONTEMPLATED HEREIN, AND LESSEE AND

> ANY GUARANTOR HEREBY EXPRESSLY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING ARISING HEREUNDER.

The parties agree that this paragraph constitutes a forum selection clause governed by MCL 600.745.

In April 2008, Americorp sued defendants in the Oakland Circuit Court, alleging breach of contract and seeking recovery under the Cooper's personal guaranty. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), or, "in the alternative," sought dismissal "under the doctrine of forum non-conveniens." Defendants averred that MCL 440.1105 of Michigan's Uniform Commercial Code precluded Michigan jurisdiction of the controversy, and that under MCL 600.745(2)(b) Michigan did not qualify as "a reasonably convenient place for the trial of the action."

In a bench opinion, the circuit court denied defendants' motion for summary disposition under MCR 2.116(C)(7) on the ground that "the parties consented to personal jurisdiction in Michigan." However, the circuit court found dismissal of the case appropriate "based on forum non conveniens" grounds; the court reasoned as follows:

> . . . [T]he connection between the dispute and the state of Michigan is insufficient. While the witness may be located in Michigan, there's not a matter of public interest that weighs in favor of the Court retaining it.
>
> Further, should plaintiff be successful and obtain a judgment, the collection efforts would be all undertaken in Georgia. So it's granted.

The circuit court subsequently denied Americorp's motion for reconsideration.

This Court reviews for an abuse of discretion a circuit court's decision whether Michigan is a "reasonably convenient" place for trial under MCL 600.745(2)(b). *Lease Acceptance Corp v Adams*, 272 Mich App 209, 223; 724 NW2d 724 (2006). An abuse of discretion occurs when a circuit court chooses a result that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). If a circuit court's decision regarding MCL 600.745(2)(b) falls within the principled range of outcomes, we must affirm the ruling. *Lease Acceptance Corp*, 272 Mich App at 223.

Our Legislature set forth in MCL 600.745(2) the following:

> If the parties agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state shall entertain the action if all the following occur:
>
> (a) The court has power under the law of this state to entertain the action.

(b) This state is a reasonably convenient place for the trial of the action.

(c) The agreement as to the place of the action is not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.

(d) The defendant is served with process as provided by court rules.

In *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 345; 725 NW2d 684 (2006), this Court emphasized that public policy in this state "favors the enforcement of contractual forum-selection clauses and choice-of-law provisions." Consequently, "[a] party seeking to avoid a contractual forum-selection clause bears a heavy burden of showing that the clause should not be enforced," on the basis of a ground contained in MCL 600.746. *Id*. at 348.

With respect to MCL 600.745 governing forum selection clauses, defendants in their motion to dismiss contested the propriety of Michigan jurisdiction only on the basis that Michigan was not "a reasonably convenient place for the trial of the action." MCL 600.745(2)(b).

> The basic principle of forum non conveniens is that a court may resist impositions of its jurisdiction even if that jurisdiction is properly invoked. . . . After a party moves for dismissal on the basis of forum non conveniens, the court must consider two things: (1) whether the forum is inconvenient and (2) whether a more appropriate forum exists. If no more appropriate forum exists, the court cannot resist jurisdiction. [*Lease Acceptance Corp*, 272 Mich App at 226.]

In *Lease Acceptance Corp*, *id*. at 226-228, this Court explained that the factors delineated in *Cray v Gen Motors Corp*, 389 Mich 382, 396; 207 NW2d 393 (1973), supply a useful framework "for evaluating whether Michigan is a reasonably convenient place for a trial in each particular case, for the convenience of the parties is the underlying goal of both the statute and the common-law doctrine." The *Cray* factors incorporate the following considerations:

1. The private interest of the litigant.

a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;

b. Ease of access to sources of proof;

c. Distance from the situs of the accident or incident which gave rise to the litigation;

d. Enforcibility (sic) of any judgment obtained;

e. Possible harassment of either party;

f. Other practical problems which contribute to the ease, expense and expedition of the trial;

g. Possibility of viewing the premises.

2. Matters of public interest.

a. Administrative difficulties which may arise in an area which may not be present in the area of origin;

b. Consideration of the state law which must govern the case;

c. People who are concerned by the proceeding.

3. Reasonable promptness in raising the plea of *forum non conveniens*. [*Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 605-606; 719 NW2d 40 (2006), quoting *Cray*, 389 Mich at 396.]

Defendants' brief in support of dismissal based on forum non conveniens asserted, "The equipment is located in Georgia and the Defendants are both from the state of Georgia. The only reason the case was filed in Michigan is because the Agreement stated that any action should be filed in the home state of the interest holder of the equipment." In the circuit court's bench ruling, it made no specific mention of MCL 600.745 or the *Cray* factors. Rather, the court reasoned that (1) an insufficient connection existed between Michigan and the parties' dispute, (2) the public interest did not weigh in favor of jurisdiction in Michigan, and (3) any future collection efforts would occur in Georgia. However, the forum-selection clause in the lease agreement unambiguously established a connection between Michigan and the parties' subsequent contractual dispute. Similarly, "Michigan's public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions." *Turchek*, 272 Mich App at 345. And despite that future collection efforts would take place in Georgia, defendants put forward no facts reasonably tending to show any possible inconvenience associated with execution of the judgment in their home state.

> . . . [I]nconvenience, insofar as it is within the contemplation of the parties at the time of contracting, should not render a forum-selection clause unenforceable. Where the inconvenience of litigating in another forum is apparent at the time of contracting, that inconvenience is part of the bargain negotiated by the parties. Allowing a party who is disadvantaged by a contractual choice of forum to escape the unfavorable forum-selection provision on the basis of concerns that were within the parties' original contemplations would unduly interfere with the parties' freedom to contract and should generally be avoided. [*Turchek*, 272 Mich App at 350.]

In summary, because defendants have not sustained their burden of demonstrating any inconvenience attendant to having Michigan as the forum state for the parties' dispute, the circuit court erroneously dismissed this case. We conclude that the circuit court abused its discretion by resting its ruling on irrelevant jurisdictional considerations.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher