Rel: April 5, 2024

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0454

Ex parte COWS USA, LLC, et al.

PETITION FOR WRIT OF MANDAMUS

(In re: Alabama Relocation Services, Inc., and Patricia Buchannan

v.

COWS USA, LLC, et al.)

(Mobile Circuit Court: CV-22-900275)

MENDHEIM, Justice.

COWS USA, LLC ("COWS"), Trailpods Acceptance Corporation ("Trailpods"), Michael Frank, Ana Frank, and Leonard Rosenberg ("the COWS defendants") petition this Court for a writ of mandamus directing the Mobile Circuit Court to vacate its May 17, 2023, order denying their motions to dismiss the claims asserted against them in a complaint filed by Alabama Relocation Services, Inc. ("ARS"), and Patricia Buchannan and to enter an order dismissing those claims. We grant the petition.

I. Facts

ARS is a moving and storage company based in Mobile. Buchannan is ARS's vice president and a Mobile resident. COWS, whose name stands for "Containers on Wheels," is a Florida limited-liability company that sells portable storage containers to homes and businesses in North America. According to ARS's second amended complaint, which is the operative complaint for purposes of the circuit court's order that denied the COWS defendants' motions to dismiss, Michael and Ana Frank are a married couple and Florida residents who own COWS. Trailpods is a Florida corporation. Rosenberg is a former COWS employee and a Florida resident.

ARS and Buchannan allege that on February 9, 2021, when Rosenberg was a COWS employee, he contacted Buchannan in an effort to convince her to have ARS become a COWS dealership. They assert that Rosenberg explained that becoming a COWS dealership grants a company the exclusive right to use COWS equipment and branding in a designated geographic area. ARS and Buchannan further allege that part of the dealership package requires a company that becomes a COWS dealer to lease the needed equipment -- COWS containers and a special trailer to transport the containers -- from Trailpods and to finance the purchase of COWS equipment through Ascentium Capital, LLC ("Ascentium"), which COWS appointed as its "designee" to receive payments for COWS.

On March 11, 2021, ARS, through Buchannan, and COWS, through Ana Frank, executed a "Dealership Agreement" providing that ARS would be the exclusive COWS dealer in Mobile and Baldwin Counties. The Dealership Agreement provided that COWS would furnish 24 COWS containers and 1 trailer to ARS. ARS agreed to pay COWS $16,500 for the trailer, $1,100 for technology set-up, and $30,000 for the price of the territory. On the same date, ARS executed with Trailpods an "Equipment

Lease Agreement," which stated that Trailpods owned the subject COWS containers and that it was leasing the containers to ARS. As part of the Equipment Lease Agreement, ARS also executed with Ascentium a "Rental Agreement" that referenced Trailpods and the Equipment Lease Agreement. ARS and Buchannan allege that on March 12, 2021, Ascentium paid COWS $147,400 for the purchase of the COWS containers.

According to ARS and Buchannan, ARS subsequently made five monthly required payments to Ascentium totaling $20,232.90. ARS and Buchannan allege, however, that "[a]t no time during those five (5) months of payments were the COWtainers, or any other promised COWS equipment, manufactured, purchased, or ordered. Ascentium was collecting rent, taxes and insurance premiums from [ARS] for containers that did not exist and that were not even ordered." ARS and Buchannan further allege that COWS told them that the equipment would be ready in 12-16 weeks, but that the equipment was never delivered.

On February 22, 2022, ARS and Buchannan commenced this action in the Mobile Circuit Court asserting claims against COWS, Trailpods, Ascentium, the Franks, and other defendants who have since been

dismissed from the action. ARS and Buchannan asserted that, at the time of the filing of the complaint, ARS had paid COWS a total of $17,600, that it had paid Ascentium $20,232.90 in lease payments for the COWS containers, and that Ascentium had paid COWS $147,400 for those containers, but that COWS had not performed any of its responsibilities under the Dealership Agreement.

On March 30, 2022, Ascentium filed a motion to dismiss the claims asserted against it on the ground that ARS and Buchannan had failed to state a claim for which relief could be granted against Ascentium. The Rental Agreement between ARS and Ascentium contained a forum-selection clause that provided: "[ARS] consent[s] to the non-exclusive jurisdiction [of] courts located in California in any action relating to this Agreement. [ARS] waive[s] any objection based on improper venue and/or forum non conveniens and waive[s] any right to a jury trial." However, Ascentium did not mention that forum-selection clause in its motion to dismiss or in any of its subsequent filings in the circuit court.

On April 11, 2022, COWS, Trailpods, and the Franks filed a motion to dismiss the claims asserted against them in ARS and Buchannan's complaint. COWS, Trailpods, and the Franks argued, among other

things, that venue was improper in the Mobile Circuit Court because the Dealership Agreement contained a mandatory and exclusive outbound forum-selection clause that required disputes between the parties to be brought in Miami-Dade County, Florida.[1] Specifically, that forum-selection clause provided:

> "20.2 Venue. Subject to Section 20.3 and 20.4 below,[2] the parties agree that any action brought by either party against the other in any court, whether federal or state, shall be brought in the City of Miami, in Dade County, Florida. The parties agree that this Section 20.2 shall not be construed as preventing either party from removing an action from state to federal court; provided, however, that the venue shall be as set forth above. [ARS] hereby waive[s] all questions of personal jurisdiction or venue for the purpose of carrying out this provision. Any such action shall be conducted on an individual basis, and not as part of a consolidated, common, or class action."

(Emphasis added.)

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[1]"'An "outbound" forum selection clause is one providing for trial outside of Alabama, while an "inbound" clause provides for trial inside Alabama.'" Ex parte PT Sols. Holdings, LLC, 225 So. 3d 37, 40 n.2 (Ala. 2016) (quoting Professional Ins. Corp. v. Sutherland, 700 So. 2d 347, 348 n.1 (Ala. 1997) (plurality opinion)).

[2]Section 20.3 of the Dealership Agreement contains a presuit mediation requirement. Section 20.4 contains a "non-exclusive remedy" provision. The parties do not dispute that neither of those sections affect the applicability or lack thereof of the Dealership Agreement's forum-selection clause in this instance.

On May 4, 2022, ARS and Buchannan filed a response in opposition to the motions to dismiss. With respect to COWS, Trailpods, and the Franks' invocation of the Dealership Agreement's forum-selection clause, ARS and Buchannan argued that the clause should not be enforced because it was "seriously inconvenient" to ARS and Buchannan. On May 6, 2022, the circuit court entered an order that granted ARS and Buchannan permission to file an amended complaint.

On May 27, 2022, ARS and Buchannan filed their first amended complaint, which asserted several new claims against Ascentium and against COWS, Trailpods, and the Franks. One of the new claims against Ascentium alleged abuse of process based on the fact that Ascentium had filed a counterclaim against ARS and Buchannan seeking $162,809.72 in damages for alleged unpaid rental payments and sales, use, and property taxes related to the 24 COWS containers.

On June 7, 2022, COWS, Trailpods, and the Franks again filed a motion to dismiss the claims asserted against them in the first amended complaint, and they once again invoked the Dealership Agreement's forum-selection clause as one ground for that motion. On June 8, 2022, Ascentium filed a "Partial Motion to Dismiss" all claims asserted against

it in the amended complaint except a claim of breach of contract. Instead of filing a written response to the motions to dismiss, ARS and Buchannan, on July 6, 2022, filed what they called "Supplementary Evidentiary Material in Response to Defendants' Motion[s] to Dismiss."

After what COWS, Trailpods, and the Franks deemed to be unnecessary delays by the circuit court with respect to ruling on their motion to dismiss, on September 28, 2022, those defendants filed a petition for a writ of mandamus with this Court seeking an order requiring the circuit court to dismiss the action as to them based on the Dealership Agreement's forum-selection clause. COWS, Trailpods, and the Franks also sought from this Court a stay of the proceedings in the circuit court pending resolution of the petition for a writ of mandamus. On October 20, 2022, this Court issued an order denying the petition for a writ of mandamus and the request for a stay of the circuit-court proceedings.

On November 22, 2022, the circuit court reset the hearing on the motion to dismiss filed by COWS, Trailpods, and the Franks for March 10, 2023. The circuit court also permitted limited discovery to proceed regarding jurisdictional issues.

On January 5, 2023, ARS and Buchannan filed a second amended complaint that added Rosenberg as a defendant. On January 17, 2023, COWS, Trailpods, and the Franks filed a motion to dismiss the claims asserted against them in the second amended complaint in which they argued, among other things, that the Dealership Agreement's forum-selection clause required dismissal of the action as to the claims against them. On February 6, 2023, Rosenberg filed a separate motion to dismiss the second amended complaint that he based, in part, on the Dealership Agreement's forum-selection clause. On January 17, 2023, Ascentium filed a motion to dismiss the second amended complaint in which it incorporated the arguments contained in its motion to dismiss the first amended complaint. On March 9, 2023, ARS and Buchannan filed another "Supplemental Response to Defendants' Motions to Dismiss" that did not make additional arguments against the enforcement of the Dealership Agreement's forum-selection clause.

On May 17, 2023, the circuit court entered an order denying the COWS defendants' motions to dismiss the claims asserted against them in the second amended complaint. That order did not explain the circuit court's reasoning for its decision. On the same date, the circuit court

entered an order denying Ascentium's motion to dismiss the second amended complaint.

The COWS defendants petition this Court for a writ of mandamus concerning the circuit court's denial of their motions to dismiss the second amended complaint.

II. Standard of Review

> "We have held that a petition for the writ of mandamus is the proper method for obtaining review of an order denying a motion to dismiss seeking the enforcement of an outbound forum-selection clause. Ex parte CTB, Inc., 782 So. 2d 188, 190 (Ala. 2000). …
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> "….
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> "It is well-settled that mandamus is an extraordinary writ, requiring a showing that there is '(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' Morrison Restaurants[, Inc. v. Homestead Village of Fairhope, Ltd.], 710 So. 2d [905,] 907 [(Ala. 1998)] (quoting Ex parte Alfab, Inc., 586 So. 2d 889, 891 (Ala. 1991)). … This Court has recognized that outbound forum-selection clauses actually '"implicate the venue of a court...."' Ex parte CTB, Inc., 782 So. 2d at 190 (quoting and approving language from dissent in O'Brien Eng'g Co. v. Continental Machs., Inc., 738 So. 2d 844, 849 (Ala. 1999) (See, J., dissenting)). Therefore, an outbound forum-selection clause raises procedural issues and is governed by the law of the forum jurisdiction -- in this case,

> the law of Alabama.[3] See, e.g., Ex parte Procom Servs., Inc., 884 So. 2d 827 (Ala. 2003) (deciding the validity of an outbound forum-selection clause under Alabama law despite a choice-of-law clause in the contract stating that Texas law governed disputes between the parties). In Alabama, we review the trial court's decision on the enforcement of such a clause to determine whether the trial court exceeded its discretion in deciding not to enforce the outbound forum-selection clause. See Ex parte Procom Servs., 884 So. 2d at 830."

F.L. Crane & Sons, Inc. v. Malouf Constr. Corp., 953 So. 2d 366, 372-73 (Ala. 2006).

III. Analysis

The COWS defendants contend that the circuit court erred by declining to dismiss ARS and Buchannan's second amended complaint because, they say, § 20.2 of the Dealership Agreement contains a

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[3]Section 20.1 of the Dealership Agreement contains a choice-of-law provision that dictates that the Dealership Agreement "shall be interpreted and construed exclusively under the laws of the state of Florida, which laws shall prevail in the event of any conflict of law (without regard to, and without giving effect to, the application of Florida choice-of-law rules) …." Based on its wording, § 20.1 concerns the law applicable to the interpretation of § 20.2 -- the forum-selection clause -- not the law concerning the enforceability of the forum-selection clause, which is governed by Alabama law. In any event, the COWS defendants assert that, "[b]ecause Florida law does not differ in any material respects to Alabama law on any of the issues raised in this petition, [the COWS] Defendants will rely upon and cite exclusively to Alabama law." Petition, p. 8 n.2. ARS and Buchannan likewise rely exclusively on Alabama law in their arguments.

mandatory outbound forum-selection clause that requires any action between these parties concerning the Dealership Agreement to be filed in Miami, Florida. As we recounted in the rendition of the facts, the pertinent language in § 20.2 states that "the parties agree that any action brought by either party against the other in any court, whether federal or state, shall be brought in the City of Miami, in Dade County, Florida." ARS and Buchanan do not dispute the plain language or meaning of § 20.2. Instead, they contend that "[t]he enforcement of the forum selection clause would be both grossly unfair and unreasonable under the circumstances of this case." Respondents' brief, p. 11.

> "It is well established that an outbound forum-selection clause
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> > "'"will be 'upheld unless the party challenging the clause clearly establishes that it would be unfair or unreasonable under the circumstances to hold the parties to their bargain.' Ex parte CTB, Inc., 782 So. 2d [188,] 190-91 [(Ala. 2000)]. The showing is sufficient where it is clearly established '"(1) that enforcement of the forum selection clause[] would be unfair on the basis that the contract[] [was] affected by fraud, undue influence, or overweening bargaining power or (2) that enforcement would be unreasonable on the basis that the

> chosen ... forum would be seriously inconvenient for the trial of the action."' Id. at 191 ...."
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> "'Ex parte Leasecomm Corp., 886 So. 2d [58,] 62-63 [(Ala. 2003)] (emphasis omitted). The Court has noted that "[t]he burden on the challenging party is difficult to meet." Ex parte D.M. White Constr. Co., 806 So. 2d [370,] 372 [(Ala. 2001)].'
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> "Ex parte PT Solutions Holdings, LLC, 225 So. 3d 37, 42 (Ala. 2016)."

Ex parte International Paper Co., 285 So. 3d 753, 757 (Ala. 2019).

> "When an agreement includes a clearly stated forum-selection clause, a party claiming that [the] clause is unreasonable and therefore invalid will be required to make a clear showing of unreasonableness. In determining whether such a clause is unreasonable, a court should consider these five factors: (1) Are the parties business entities or businesspersons? (2) What is the subject matter of the contract? (3) Does the chosen forum have any inherent advantages? (4) Should the parties have been able to understand the agreement as it was written? (5) Have extraordinary facts arisen since the agreement was entered that would make the chosen forum seriously inconvenient? We state these items not as requirements, but merely as factors that, considered together, should in a particular case give a clear indication whether the chosen forum is reasonable."

Ex parte Northern Cap. Res. Corp., 751 So. 2d 12, 14 (Ala. 1999).

ARS and Buchannan do not now, and did not in the circuit court, discuss any of the factors articulated by this Court in Ex parte Northern

Capital Resource Corp. Likewise, ARS and Buchannan did not argue in the circuit court, and do not contend in this Court, that enforcement of the Dealership Agreement's forum-selection clause would be unfair because the Dealership Agreement was affected by fraud, undue influence, or overweening bargaining power.[4] Instead, ARS and Buchannan's opposition to enforcement of the Dealership Agreement's forum-selection clause rests entirely upon their contention that requiring them to file their claims against the COWS defendants in Miami, Florida, would be seriously inconvenient for the trial of the action.

> "Such a 'serious inconvenience' arises if enforcement of the forum-selection clause '"would result in two lawsuits involving similar claims or issues being tried in separate courts."' [Ex parte Leasecomm Corp.,] 886 So. 2d [58,] 63 [(Ala. 2003)] (quoting Alpha Sys. Integration, Inc. v. Silicon Graphics, Inc., 646 N.W.2d 904, 909 (Minn. Ct. App. 2002)) (emphasis omitted)."

[4]ARS and Buchannan do insinuate throughout their brief that enforcement of the Dealership Agreement's forum-selection clause would be unfair because allegedly COWS has accepted thousands of dollars in payments from ARS and Ascentium but "COWS has provided no trailer, not a single container, and has performed absolutely ZERO of its obligations under the [Dealership] Agreement." Respondents' brief, p. 11 (capitalization in original). However, those allegations concern the merits of ARS and Buchannan's claims, not whether enforcement of the Dealership Agreement's forum-selection clause would be unfair or unreasonable as a matter of procedure.

F.L. Crane & Sons, 953 So. 2d at 373. However, this Court has tempered that understanding by noting that

> "'"[i]nconvenience" sufficient to void a forum-selection clause is present where a "trial in that forum would be so gravely difficult and inconvenient that the challenging party would effectively be deprived of his day in court."' Ex parte Leasecomm Corp., 886 So. 2d [58,] 62-63 [(Ala. 2003)] (quoting Ex parte Rymer, 860 So. 2d 339, 342 (Ala. 2003))."

Ex parte PT Sols. Holdings, LLC, 225 So. 3d 37, 46 (Ala. 2016).

ARS and Buchannan do not dispute that all the COWS defendants may invoke the Dealership Agreement's forum-selection clause, but they note that the COWS defendants never argued that Ascentium was bound by that forum-selection clause and that Ascentium never sought to enforce the forum-selection clause contained in the Rental Agreement. ARS and Buchannan therefore contend that, "as to Ascentium, venue is proper in the Circuit Court of Mobile County, Alabama." Respondents' brief, p. 3. ARS and Buchanan further argue that this fact means that

> "[e]nforcement of the [Dealership Agreement's] forum-selection clause would result in the prosecution of two separate lawsuits -- one in Miami-Dade Florida and the other in the Circuit Court of Mobile, Alabama. Requiring the prosecution of multiple lawsuits in multiple states involving the same or similar issues creates serious inconvenience and, therefore, would be completely contrary to the policy of Alabama, which favors liberal joinder of parties and claims for resolution in one action."

Respondents' brief, p. 12.

In support of the foregoing argument, ARS and Buchannan rely upon Ex parte Leasecomm Corp., 886 So. 2d 58 (Ala. 2003).

> "In Leasecomm, the plaintiff, on behalf of a purported class, sued three entities based on their alleged involvement in a joint scheme to defraud the class members. Specifically, the plaintiff alleged that the defendants had engaged in a scheme to trick the class members into signing 'worthless' leases of computer equipment, under the guise of paying tuition for Internet-business training, and to provide one of the defendants with access to the members' bank accounts so it could make improper deductions for lease payments. This Court described the alleged scheme as 'a single transaction.' 886 So. 2d at 65. One of the defendants moved the trial court to dismiss the claims against it pursuant to a forum-selection clause requiring litigation to proceed in Utah, and the other defendants moved for dismissal of the claims against them based on a forum-selection clause requiring litigation to proceed in Massachusetts. The trial court refused to enforce the forum-selection clauses. On appeal, this Court pointed to persuasive precedent from the Minnesota Court of Appeals, in which that court refused to enforce a forum-selection clause that would have split the plaintiff's 'intertwined' claims against multiple defendants and would have '"result[ed] in two lawsuits involving the same or similar issues creating serious inconvenience."' 886 So. 2d at 64 (quoting Personalized Marketing Serv., Inc. v. Stotler & Co., 447 N.W.2d 447, 452 (Minn. Ct. App. 1989) (emphasis omitted)). The Court in Leasecomm determined that the plaintiff's claims against the separate defendants in that case, like the claims in Stotler, were 'inextricably intertwined' and that 'enforcement of the forum-selection clauses ... would split the claims and require litigation of the intertwined issues in forums far removed, not only from Alabama, in which the

> cause of action arose, but from each other.' 886 So. 2d at 65 (emphasis omitted). Thus, the trial court did not exceed its discretion in denying the defendants' motions to dismiss."

Castleberry v. Angie's List, Inc., 291 So. 3d 37, 43-44 (Ala. 2019).

ARS and Buchannan argue:

> "The present matter is the equivalence of the Ex parte Leasecomm case. This matter involves a purchase agreement, a lease agreement and a lease financing agreement that contain competing forum selection clauses. The Complaint alleges that each and every Defendant conspired and collectively and individually made promises to rent, lease or otherwise provide these so-called US manufactured portable containers as a part of a single transaction, all of which were supposed to culminate in the establishment of a Mobile, Alabama exclusive dealership for the territory covering Mobile and Baldwin Counties, knowing all along that they were never going to provide such containers so that a dealership could ever actually be established and operate. Thus, the claims against the Defendants are so 'inextricably intertwined' that the enforcement of either or both of the forum selection clauses would require the splitting of the claims in two foreign, remote states, which is contrary to the policy of Alabama. Accordingly, the trial court did not abuse its discretion in denying [the COWS defendants'] Motions to Dismiss based upon the [Dealership Agreement's] forum selection clause."

Respondents' brief, pp. 18-19.

The problem for ARS and Buchannan is that, unlike in Ex parte Leasecomm, there are not two mandatory outbound forum-selection clauses at issue in this case. As the COWS defendants note:

> "The clause in the Ascentium Rental Agreement is an optional or permissive clause pursuant to which the parties consented to the non-exclusive jurisdiction of the courts in California. Not only did Ascentium 'not raise[] the forum selection clause of its "Rental Agreement" as a defense' as noted by [ARS and Buchannan] (Plaintiffs' Brief at p. 19), there is no competing mandatory forum selection clause in that agreement to be raised."

Reply brief, p. 11. Thus, the clear "serious inconvenience" that was present in Ex parte Leasecomm -- in which two defendants invoked different mandatory outbound forum-selection clauses that would have required the plaintiff to litigate in two separate forums on opposite sides of the country (Utah and Massachusetts) -- simply does not exist in this case. The only mandatory outbound forum-selection clause in this case is in the Dealership Agreement, and it requires actions between the parties to that agreement to be brought in Miami, Florida. ARS and Buchannan contend that "the problem presented by competing forums in separate states still exists" because Ascentium has consented to jurisdiction in Mobile County. Respondents' brief, p. 19. However, ARS and Buchannan concede that Ascentium does business in Florida, and so it could have been sued there. See Respondents' brief, p. 19. Consequently, the only reason claims in this action may end up in separate forums is because of ARS and Buchannan's own choice to commence their action in Mobile

County despite the requirement stated in § 20.2 of the Dealership Agreement. Those circumstances cannot be quantified as a "serious inconvenience" to ARS and Buchannan.

In sum, the Dealership Agreement's outbound forum-selection clause unequivocally requires actions between COWS and ARS to be commenced in Miami, Florida. ARS and Buchannan had a "difficult" burden to "clearly establish" that the enforcement of the Dealership Agreement's forum-selection clause would be unreasonable under the circumstances. See Ex parte International Paper Co., 285 So. 3d at 757. We conclude that ARS and Buchannan failed to meet that burden because any inconvenience that arises from enforcement of the Dealership Agreement's forum-selection clause was created by their choice to commence this action in Mobile County, and, unlike the situation in Ex parte Leasecomm, the prospect of trying cases in Florida and Alabama is not "'so gravely difficult and inconvenient that [ARS and Buchannan] would effectively be deprived of [their] day in court.'" Ex parte Leasecomm, 886 So. 2d at 63 (quoting Ex parte Rymer, 860 So. 2d 339, 342 (Ala. 2003)). Accordingly, the circuit court exceeded its

discretion in denying the COWS defendants' motions to dismiss the claims asserted against them.

IV. Conclusion

The COWS defendants have demonstrated a clear legal right to have the claims asserted against them dismissed on the basis that venue in the Mobile Circuit Court is improper because of the Dealership Agreement's outbound forum-selection clause. Therefore, we direct the circuit court to vacate the portion of its May 17, 2023, order denying the COWS defendants' motions to dismiss the claims asserted against them in ARS and Buchannan's second amended complaint and to enter a new order dismissing ARS and Buchannan's claims asserted against the COWS defendants, without prejudice, pursuant to Rule 12(b)(3), Ala. R. Civ. P.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Shaw, Wise, Bryan, Sellers, Stewart, Mitchell, and Cook, JJ., concur.