DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

THE SOLOMON LAW GROUP, P.A.,

Appellant,

v.

DOVENMUEHLE MORTGAGE, INC.,

Appellee.

No. 2D21-360

December 8, 2021

Appeal from the Circuit Court for Hillsborough County; Emily Peacock, Judge.

Stanford R. Solomon and Laura H. Howard of The Solomon Law Group, P.A., Tampa, for Appellant.

Gary S. Rosner, Evan S. Rosenberg, and Timothy R. Scolaro of Ritter Chusid, LLP, Coral Springs, for Appellee.

LUCAS, Judge.

The Solomon Law Group (Solomon) appeals the dismissal of its breach of contract counterclaim against Dovenmuehle Mortgage,

Inc. (DMI), following entry of a final judgment in favor of Solomon on DMI's complaint for professional negligence and breach of fiduciary duty. Although the circuit court had exercised jurisdiction over DMI's complaint in Hillsborough County, the court determined that a forum selection provision in a retainer agreement between the parties divested it of jurisdiction to hear Solomon's breach of contract counterclaim in that same forum. We reverse.

DMI had retained Solomon to represent Universal American Mortgage Company, LLC (Universal),[1] in a residential mortgage foreclosure action against two homeowners in Pasco County. Solomon's representation was pursuant to a Foreclosure/Bankruptcy Attorney Services Agreement (Services Agreement) executed in June of 2012. The Services Agreement set forth the terms and conditions of Solomon's representation in various foreclosure cases, including the Pasco County litigation on behalf of Universal. Pertinent here, the Services Agreement included a forum selection provision, which read as follows:

> The laws of the State of Illinois excluding its conflicts of law principles shall govern this Agreement. The Parties

[1] DMI was a subservicer for Universal, which was a servicer of the loan.

> hereby irrevocably consent to the exclusive jurisdiction of, and venue in, any federal or state court of competent jurisdiction located in Cook County, Illinois, for the purposes of adjudicating any matter arising from or in connection with this Agreement.

The litigation in Pasco County did not go well for Universal; after a trial and appeal, the homeowners secured a money judgment against Universal.[2] Notwithstanding the forum selection provision, DMI filed a complaint against Solomon Law in the Hillsborough County Circuit Court alleging professional negligence and breach of fiduciary duty. Solomon filed an answer, affirmative defenses, and a counterclaim for breach of contract and open account, claiming there were unpaid fees under the Services Agreement. DMI moved to dismiss Solomon's counterclaim. DMI argued that the forum selection clause in the Services Agreement required Solomon's counterclaim on that agreement to be litigated in Illinois.

At the hearing, DMI's counsel maintained that the forum selection clause was a matter of subject matter jurisdiction. The

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[2] The underlying facts of the foreclosure lawsuit were recounted in *Derouin v. Universal American Mortgage Co., LLC*, 254 So. 3d 595 (Fla. 2d DCA 2018). The homeowners' money judgment comprised largely of attorneys' fees and costs.

circuit court appeared to agree with DMI's argument. The court acknowledged that Solomon's counterclaim would have been compulsory under Florida Rule of Civil Procedure 1.170(a) but concluded it had to be brought in a Cook County, Illinois, court. The court dismissed Solomon's counterclaim, and the litigation proceeded to final judgment on DMI's complaint.

Solomon now appeals its counterclaim's dismissal. We review the court's dismissal of Solomon's claim de novo. *See, e.g.*, *Gold Crown Resort Mktg. Inc. v. Phillpotts*, 272 So. 3d 789, 792 (Fla. 5th DCA 2019) ("The trial court's ruling on a motion to dismiss based on the interpretation of a contractual forum selection clause is reviewed de novo as a matter of law."); *Ill. Union Ins. Co. v. Co-Free, Inc.*, 128 So. 3d 820, 822 (Fla. 1st DCA 2013) ("We review the trial court's order denying a motion to dismiss based on the interpretation of a forum selection clause *de novo*.").

Our analysis begins with what lies at the heart of this appeal—a forum selection clause.[3] In *Manrique v. Fabbri*, 493 So. 2d 437,

[3] In their briefs, the parties cite to both Florida and Illinois law, but neither side has taken a definitive position as to which State's law should be applied to this appeal. We will therefore refrain from opining on the subject. Out of caution, we have

439 (Fla. 1986), the Florida Supreme Court held that forum selection clauses are enforceable but made clear that their enforceability is a function of contract law, not subject matter jurisdiction. "Forum selection clauses, however, do not 'oust' courts of their jurisdiction. They merely present the court with a legitimate reason to refrain from exercising that jurisdiction." *Id.* at 439-40. Illinois courts have held similarly. *See Putnam Energy, LLC v. Superior Well Servs., Inc.*, No. 5-12-0422, 2013 WL 3487386, at *4 (Ill. App. Ct. July 9, 2013) ("A valid forum-selection clause does not 'oust' a court of its inherent jurisdiction to review a given case but rather presents 'a legitimate reason to refrain from exercising that jurisdiction.' " (quoting *Manrique*, 493 So. 2d at 439-40)); *Horgan v. Romans*, 851 N.E.2d 209, 213 (Ill. App. Ct. 2006) (holding that an agreed removal order's forum selection provision did not deprive Illinois court's jurisdiction to consider custody dispute).

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considered the arguments under both Florida and Illinois jurisprudence, which, fortunately, appear to align on this issue.

As such, a contracting party can waive the ability to enforce a forum selection provision. *See Carnival Corp. v. Booth*, 946 So. 2d 1112, 1114 (Fla. 3d DCA 2006) ("Contractual forum selection clauses can be waived." (citing *Three Seas Corp. v. FFE Transp. Servs., Inc.*, 913 So. 2d 72, 74-75 (Fla. 3d DCA 2005))); *Putnam Energy, LLC*, 2013 WL 3487386, at *5 (recognizing that "[p]arties to a contract have the power to waive provisions placed in the contract for their benefit and such a waiver may be established by conduct indicating that strict compliance with the contractual provisions will not be required" but holding that waiver of enforcement of a forum-selection clause had not occurred in this case (quoting *In re Liquidation of Inter-Am. Ins. Co. of Ill.*, 768 N.E.2d 182, 193 (Ill. App. Ct. 2002))). Forum selection clauses are analogous in this regard to arbitration provisions. *See Carnival Corp.*, 946 So. 2d at 1115 ("Courts have often compared forum selection clauses to arbitration clauses and have applied a similar enforceability analysis to both." (quoting *Thunder Marine, Inc. v. Brunswick Corp.*, No. 8:06-CV-384-T17, 2006 WL 1877093, at *8 (M.D. Fla. July 6, 2006))); *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1342 n.7 (11th Cir. 2012) ("Although all of the cases we cite concern the application of

equitable estoppel to contracts with arbitration clauses rather than forum-selection clauses, the equitable estoppel analysis is the same. Arbitration clauses are similar to forum-selection clauses." (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974))); *cf. Applicolor, Inc. v. Surface Combustion Corp.*, 222 N.E.2d 168, 171 (Ill. App. Ct. 1966) ("Reviewing, then, the history of this litigation, we have no doubt that defendants did submit to both federal and state courts the 'controversy' between the parties in the light in which they saw it—as an issue of law. And in so doing, they did, in our opinion, waive their right to have that controversy decided pursuant to the arbitration provisions of the contract."); *Auto. Mechs. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 743 (7th Cir. 2007) ("Enforcement of a forum selection clause (including an arbitration clause) is not jurisdictional; it is a waivable defense that Vanguard, in fact, waived."); *Omron Healthcare, Inc. v. Maclaren Exps. Ltd.*, 28 F.3d 600, 603 (7th Cir. 1994) ("We concluded in *Sweet Dreams Unlimited, Inc. v. Dial–A–Mattress International, Ltd.*, 1 F.3d 639, 642-43 (7th Cir. 1993), that all disputes the resolution of which arguably depend on the construction of an agreement 'arise out of' that

agreement for purposes of an arbitration clause. We cannot imagine why the scope of that phrase would differ for purposes of a forum-selection clause." (citations omitted)). And it is well settled that a party who files a lawsuit based on a contract waives the right to enforce an arbitration provision in that contract. *See, e.g.*, *Wilson v. AmeriLife of E. Pasco, LLC*, 270 So. 3d 542, 545 (Fla. 2d DCA 2019) ("A party which seeks to rely on its right to arbitration must safeguard the right and not act inconsistently with it. However, actively participating in a lawsuit is inconsistent with arbitration. Thus, 'a party may waive [its] right to arbitration by filing a lawsuit without seeking arbitration.' " (alteration in original) (citations omitted) (citing and quoting *Green Tree Serv., LLC v. McLeod*, 15 So. 3d 682, 687 (Fla. 2d DCA 2009))).

The same rule applies here. Initiating a lawsuit based on a contract in a jurisdiction other than the one provided under a forum selection clause under the contract would constitute a waiver of that party's right to enforce that clause.[4]

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[4] To its counsel's credit, DMI candidly conceded as much at oral argument. If DMI's claims indeed arose under the Services Agreement, its filing of a Florida lawsuit on those claims would have waived DMI's right to enforce its Illinois forum selection provision.

The question, then, is whether the tort claims DMI brought in its Florida complaint—professional negligence and breach of fiduciary duty—arose out of the Services Agreement. Simply put, they did. *See Johnson v. Allen, Knudsen, DeBoest, Edwards & Rhodes, P.A.*, 621 So. 2d 507, 508 (Fla. 2d DCA 1993) ("Since the Johnsons' counterclaim [for legal malpractice] was based on the same representation for which Allen, Knudsen sought to recover fees, we must find that it arose out of the same transaction or occurrence as Allen, Knudsen's original action."); *Libman v. Fla. Wellness & Rehab. Ctr., Inc.*, 260 So. 3d 515, 518 (Fla. 3d DCA 2018) (holding that trial court's order dismissing an attorney's breach of contract claim against former client who had pending counterclaims for breach of fiduciary duty and legal malpractice was not an appealable order because "Libman's breach of contract claim is inextricably intertwined with Appellees' still-pending counterclaims"); *Oak Brook Bank v. Cowley, Barrett & Karaba, Ltd.*, No. 1-10-3560, 2012 WL 6951938, *11 (Ill. App. Ct. Oct. 26, 2012) ("[E]ven when grounded in tort, an action for legal malpractice rises out of an express or implied contract for legal services." (citing *Majumdar v. Lurie*, 653 N.E.2d 915 (Ill. App. Ct. 2012))). The circuit

court was quite correct when it observed that Solomon's counterclaim for breach of the Services Agreement was a compulsory counterclaim to DMI's claims of professional negligence and breach of fiduciary duty, which were based on that very agreement. All the claims and counterclaims arose "out of the same transaction or occurrence." Fla. R. Civ. P. 1.170(a). It follows that when DMI filed its claims in Hillsborough County, it waived its right to have the inextricably related counterclaims litigated in Cook County under the forum selection provision. The circuit court erred when it ruled to the contrary and applied the forum selection provision as if it were jurisdictional.

Accordingly, we reverse the order dismissing Solomon's counterclaim and remand with instructions to the circuit court to reinstate the counterclaim.

Reversed and remanded with instructions.

VILLANTI and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.