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**IN THE  
COURT OF APPEALS OF INDIANA**

PROLINK, INC., PROLINK SOLUTIONS, )  
LLC and PATRICK J. PARENTI, )

Appellants, )

vs. )

THE ADE GROUP, INC., )

Appellee. )

No. 79A02-0602-CV-137

APPEAL FROM THE TIPPECANOE CIRCUIT COURT  
The Honorable Donald L. Daniel, Judge  
Cause No. 79C01-0508-PL-47

**December 8, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

ProLink, Inc., (“ProLink”) ProLink Solutions, LLC, (“ProLink Solutions”) and Patrick Parenti (collectively “the Appellants”) appeal the denial of their motion to dismiss a complaint filed by Ade Group, Inc. We affirm in part, reverse in part, and remand.

### **Issues**

The Appellants raise four issues, which we consolidate and restate as”

- I. whether the trial court properly denied the Appellants’ motion to dismiss with regard to ProLink and ProLink solutions; and
- II. whether the trial court properly granted the Appellants’ motion to dismiss with regard to Parenti.

### **Facts**

On March 23, 2001, ProLink entered into an agreement with Ade Group, the owner of a golf course in West Lafayette, to install an electronic yardage and course management system that provides distance measurements and course information to golfers via golf cart display units. On August 23, 2005, Ade Group filed a complaint against ProLink, ProLink Solutions, and Parenti seeking declaratory relief and rescission of the agreement. The complaint alleged that the Appellants:

used a ruse to place ProLink equipment at the Ravines Golf course. Parenti secured a position as a resident golf professional at the Ravines Golf Course and arranged for placement of ProLink equipment at the Ravines Golf Course without notifying Ade Group of his relationship to ProLink. By said concealment [the Appellants] fraudulently induced Ade Group.

App. p. 11. On September 9, 2005, the Appellants filed a motion to dismiss because, based on the provisions of the agreement between Ade Group and ProLink, the parties agreed to submit all disputes to binding arbitration in Arizona. The agreement also contained a forum selection clause giving exclusive jurisdiction over any arbitration or disputes to the federal and state courts in Maricopa County, Arizona. On September 13, 2005, Ade Group filed an amended complaint that contained a similar allegation of fraudulent inducement and included an allegation that Parenti breached his fiduciary duty of loyalty to Ade Group.

On October 4, 2005, the Appellants renewed their motion to dismiss, and Ade Group then filed its opposition to the Appellants' motion to dismiss. The Appellants filed a reply brief and included an affidavit in support of such. Ade Group moved to strike the affidavit. On November 1, 2005, after a hearing, the trial court granted Ade Group's motion to strike and denied the Appellants' motion to dismiss. On November 14, 2005, the Appellants filed a motion to reconsider, which the trial court denied on November 16, 2005. The trial court certified its denial for interlocutory appeal, and we accepted jurisdiction of the appeal.

### **Analysis**

The Appellants argue that the trial court improperly denied their motion to dismiss because it did not have subject matter jurisdiction "over this case" based on the arbitration and forum selection clauses of the agreement. Appellants' Br. p. 7. "In ruling on a motion to dismiss for lack of subject matter jurisdiction under Indiana Trial Rule 12(B)(1), a trial court may consider not only the original pleadings and motion to dismiss

but also any affidavits or evidence submitted by the parties.” Carter v. Estate of Davis, 813 N.E.2d 1209, 1213 (Ind. Ct. App. 2004), trans. denied. The trial court may weigh the evidence to determine the requisite jurisdictional facts. Id. On appeal, the standard of review for Indiana Trial Rule 12(B)(1) motions to dismiss is dependent upon whether the trial court resolved disputed facts and, if the trial court resolved disputed facts, whether it conducted an evidentiary hearing or ruled on a paper record. Id. “If the facts before the trial court are not in dispute, then the question of subject matter jurisdiction is purely one of law and our review is de novo.” Id. “If the facts are disputed but the trial court rules entirely based upon a paper record, the standard of review on a motion to dismiss for lack of subject matter jurisdiction is again de novo.” Id.

Here, the facts regarding the trial court’s subject matter jurisdiction do not appear to be disputed, and the trial court’s ruling is not based on an evidentiary hearing. Accordingly, our review of the denial of the Appellants’ motion to dismiss is de novo.

The Appellants’ motion to dismiss specifically provided that the trial court lacked “jurisdiction over the subject-matter of this civil action for the reasons that the parties have agreed to submit all disputes regarding their agreement to binding arbitration . . . .” App. p. 17. Ade Group argues that Indiana courts have subject matter jurisdiction over this general class of cases. The Appellants respond by arguing that their motion to dismiss was not based on the trial court’s authority to decide this general class of cases, but on the trial court’s subject matter jurisdiction over this case, or what was previously referred to as “jurisdiction over the case.” See Packard v. Shoopman, 852 N.E.2d 927, 930 (Ind. 2006) (referring to “jurisdiction over the case” as “now abolished”).

Our supreme court has recently clarified that there are only two types of jurisdiction in Indiana—subject matter jurisdiction and personal jurisdiction. K.S. v. State, 849 N.E.2d 538, 540 (Ind. 2006). Because it is not disputed that the trial court was authorized to hear this general class of cases and that the Appellants received the appropriate process, neither type of jurisdiction is at issue here. Instead, the Appellants’ claim is better characterized as one of legal error and not one of exercise of jurisdiction. See Packard, 852 N.E.2d at 930.

Nonetheless, we conclude that the Appellants did not err in raising their challenge via an Indiana Trial Rule 12(B)(1) motion to dismiss. First, at the time of the filing, Indiana law with regard to jurisdictional claims was less than clear. See, e.g., Indiana State Bd. of Health Facility Adm’rs v. Werner, 841 N.E.2d 1196, 1204 (Ind. Ct. App. 2006) (“We have noted that the confusion regarding the distinction between subject matter jurisdiction and jurisdiction over the case is understandable, given that we have often discussed whether a particular court had ‘jurisdiction’ without specifying which of the particular types of jurisdiction they were addressing.”), trans. denied. Second, in Packard, our supreme court observed that although the timing of filing the agency record implicated neither the subject matter jurisdiction nor personal jurisdiction, it was “properly raised by means of a motion under Rule 12(B)(1) for lack of jurisdiction or 12(B)(6) for failure to state a claim, depending on whether the claimed defect is apparent on the face of the petition.” Packard, 852 N.E.2d at 930-31. Thus, the propriety of filing a complaint in Indiana when the agreement called for binding arbitration in Arizona was properly raised in the Appellants’ Indiana Trial Rule 12(B)(1) motion to dismiss.

Ade Group argues that if the trial court did not have subject matter jurisdiction, it could not enforce the arbitration clause. As we have discussed, the issue raised in the Appellants' motion to dismiss is not one of the exercise of jurisdiction and is better characterized as one of legal error. Ade Group also argues that we have only agreed to review the trial court's ruling on subject matter jurisdiction and no other subsequent rulings of the trial court. More accurately stated, however, the Appellants moved to certify the trial court's denial of their motion to dismiss and the denial of their motion to reconsider and we accepted jurisdiction of the appeal on those bases. Putting all of its eggs in one basket, so to speak, Ade Group contends that "[f]or these two reasons, Appellants' arguments and authorities regarding arbitration clauses are not properly before this court on appeal. Ade Group therefore does not address them here." Appellee's Br. p. 3. Ade Group makes no substantive arguments regarding the applicability or enforceability of the agreement's arbitration or forum selection clauses. Accordingly, we review the Appellants' claims as to these issues for prima facie error. See Simon Property Group, L.P. v. Brandt Constr., Inc., 830 N.E.2d 981, 995 (Ind. Ct. App. 2005) ("[S]ince Brandt presented no arguments in its brief against these assignments of error, we will review this issue for prima facie error."), trans. denied.

In reviewing a claim of prima facie error, we do not undertake the burden of developing arguments for Ade Group, but instead, we apply a less stringent standard of review and may reverse if the Appellants establish prima facie error. Everette v. Everette, 841 N.E.2d 210, 212 (Ind. Ct. App. 2006). "In this sense, prima facie means at first sight, on first appearance, or on the face of it." Id.

The agreement between Ade Group and ProLink provides in part:

**15. DISPUTES.** All disputes under this Agreement, except as to any such dispute which may relate to ProLink's proprietary rights to manufacture and operate the System, shall be submitted to binding arbitration in accordance with the procedures of the Commercial Rules of the American Arbitration Association and judgment of the arbitrator shall be binding as a final judgment and shall be entered by a court of competent jurisdiction. Such arbitration shall be conducted in Maricopa County, Arizona. The procedures specified herein shall be the sole and exclusive procedure for resolution of disputes arising out of or relating to this Agreement, except that ProLink may seek a preliminary injunction or other preliminary judicial relief necessary to protect its rights in, and avoid irreparable damage to, the System.

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16.11. Law and Venue. This Agreement shall be considered to have been made in the State of Arizona and shall be governed by and interpreted in accordance with the laws of the State of Arizona. In any arbitration or other action between ProLink and Course Owner involving this Agreement or the System, the federal and state courts located in Maricopa County, Arizona shall have exclusive jurisdiction. ProLink and Course owner each waive any and all objections to the venue of the courts described herein and waive any claims of inconvenient forum or lack of jurisdiction.

App. pp. 63-64.

A party seeking to compel arbitration must demonstrate that an enforceable arbitration agreement exists and that the disputed matter is the type of claim that is intended to be arbitrated under the agreement. Precision Homes of Indiana, Inc. v.

Pickford, 844 N.E.2d 126, 130 (Ind. Ct. App. 2006), trans. denied.<sup>1</sup> To be enforceable, an agreement to arbitrate must be in writing and evince an intention to resolve some controversy through arbitration. Id. at 131. Whether the parties agreed to arbitration is a matter of contract interpretation, and most importantly, a matter of the parties' intent. Id. at 130-31. The Indiana Uniform Arbitration Act strongly favors enforcement of agreements to arbitrate. Id. at 131 (citing Ind. Code § 34-57-2-1). "Arbitration must be compelled unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Id.

### ***I. Claim against ProLink and ProLink Solutions***

First, we must determine whether there is an enforceable arbitration agreement between Ade Group and ProLink.<sup>2</sup> Indiana Code Section 34-57-2-1(a) provides, "A written agreement to submit to arbitration is valid, and enforceable, an existing controversy or a controversy thereafter arising is valid and enforceable, except upon such

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<sup>1</sup> The Appellants argue that we need not "dwell long on a choice of law issue because both Arizona and Indiana lead to the same result—Ade's fraudulent inducement claim should be determined by arbitration in Maricopa County, Arizona." Appellants' Br. p. 9. In their reply brief, however, the Appellants argue that that statement was "written in haste" and urge the application of Arizona law. Raising this issue for the first time in their reply brief results in waiver. See Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 977 (Ind. 2005) ("The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived."). Nevertheless, it appears that the outcome would be the same regardless of whether we apply Arizona or Indiana law.

<sup>2</sup> In support of their motion to reconsider, the Appellants included the affidavit of Steve Fisher who stated that he was the chairman of ProLink and that the agreement with Ade was sold to Textron/EzGo in 2001. Fisher also stated that in 2005, Textron was required to assign the agreement to ProLink Solutions and that ProLink Solutions was the "bona fide owner of all contract rights contained in the Agreement." App. p. 46. Thus, it appears that any rights ProLink had under the agreement have been assigned to ProLink Solutions.



grounds as exist at law or in equity for the revocation of any contract.”<sup>3</sup> We have previously observed that the reference to grounds for revocation language refers to the formation of the arbitration agreement itself and not the underlying agreement. Goebel v. Blocks & Marbles Brand Toys, Inc., 568 N.E.2d 552, 556 (Ind. Ct. App. 1991) (quoting U.S. Insulation, Inc. v. Hilro Constr. Co., 705 P.2d 490, 494 (Ariz. Ct. App. 1985) (interpreting a similar statute)). This observation was based on the Supreme Court’s interpretation of a similarly worded federal statute in which the court concluded:

Accordingly, if the claim is fraud in the inducement of the arbitration clause itself--an issue which goes to the ‘making’ of the agreement to arbitrate--the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04, 87 S. Ct. 1801, 1806 (1967). Our supreme court has also concluded that generally a receiver for a corporation should not be relieved of contractual undertakings such as an arbitration clause or a forum selection clause, unless the clause itself is fraudulently induced. ISP.COM, LLC, et al., v. Theising, 805 N.E.2d 767, 773 (Ind. 2004).<sup>4</sup>

Ade Group does not allege the arbitration clause itself was fraudulently induced.

Accordingly, ProLink and ProLink Solutions have made a prima facie showing that there

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<sup>3</sup> As written, this statute is less than clear.

<sup>4</sup> Later in that opinion our supreme court addressed an argument that the inclusion of a forum selection clause and consent to jurisdiction in Marion County demonstrated an intention not to arbitrate. Our supreme court stated, “any claim of fraud in the inducement, etc., may be presented to a court despite an arbitration clause.” Theising, 805 N.E.2d at 777. Based on our supreme court’s citation to Prima Paint, we assume that the court was explaining that any claim of fraud in the inducement of the arbitration clause itself may be presented to a court.

is an enforceable arbitration agreement with regard to the claim against them. Further, the arbitration clause provides that “[a]ll disputes under this Agreement, except as to any such dispute which may relate to ProLink’s propriety rights to manufacture and operate the System, shall be submitted to binding arbitration . . . .” App. p. 63. We see no reason why this broad language does not include Ade Group’s claim of fraudulent inducement generally. ProLink and ProLink Solutions have made a prima facie showing that that the disputed matter is the type of claim that is intended to be arbitrated under the agreement.

Ade Group argues that the forum selection clause is moot as to ProLink because of the assignment to ProLink Solutions and that ProLink Solutions does not have standing to enforce the agreement because it is unclear whether ProLink’s rights under the contract have been assigned to ProLink Solutions. These arguments, however, are disputes arising out of the contract and must be submitted to arbitration based on Ade Group’s agreement to do so. Even if such arguments are considered preliminary to a determination of the enforceability of the arbitration clause, Ade Group agreed that any action between it and ProLink involving this agreement or the system would be subject to the exclusive jurisdiction of the state and federal courts of Maricopa County. See App. p. 64. Ade Group makes no argument that this provision of the agreement was fraudulently procured. See Grott v. Jim Barna Log Systems-Midwest, Inc., 794 N.E.2d 1098, (Ind. Ct. App. 2003) (observing that before a trial court may disregard or set aside a forum-selection clause, the party opposing the enforcement must clearly show that enforcement would be unreasonable and unjust or that the clause was invalid for such reasons as

fraud), trans. denied. ProLink and ProLink Solutions have made a prima facie showing that the forum selection clause requires dismissal of Ade Group's complaint. The trial court improperly denied the motion to dismiss regarding the fraudulent inducement claims against ProLink and ProLink Solutions.

## *II. Claim against Parenti*

In its complaint, Ade Group alleges that at the time Parenti was employed with it he also had a secret business relationship with ProLink and claims that Parenti breached his fiduciary duty of loyalty to Ade Group. Parenti is now Vice-President of International Sales for ProLink Solutions. Parenti argues that even though he is not a party to the agreement, Ade Group's claim for the breach of the fiduciary duty of loyalty against Parenti must be arbitrated because he is in privity with ProLink and ProLink Solutions.<sup>5</sup>

Even if, as Parenti argues, the claim against him arises out of or relates to the agreement, we are not convinced that there is an enforceable arbitration agreement or forum selection clause between Ade Group and Parenti. Like any other agreement, an arbitration clause binds the parties to the agreement and those in privity with the parties to the agreement. Theising, 805 N.E.2d at 774. Privity exists where a non-party holds a mutual or successive relationship with a party regarding property or that their interests are so identical as to represent the same legal right. Id.

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<sup>5</sup> For the first time in their reply brief, Parenti argues that he, as a "transaction participant," may benefit from the forum selection clause. This issue is waived because Parenti did not raise it in the original brief. See Monroe Guar. Ins. Co., 829 N.E.2d at 977.

Parenti does not have a mutual or successive relationship with either ProLink or ProLink Solutions. Instead, the Appellants argue, “Both Parenti and ProLink have a common property interest in showing that the Agreement was not induced by fraud and remains enforceable against Ade.” Appellants’ Br. p. 15. Although that may be the case, Ade Group’s claim against Parenti is based on its former employment relationship with him and the fiduciary duties that arose out of that relationship. Unlike the fraudulent inducement claim against ProLink, Parenti’s alleged breach of the fiduciary duty of loyalty is not based exclusively on the agreement between Ade Group and ProLink. To fully defend against the alleged breach of his fiduciary duty to Ade Group, Parenti may be required to act in a manner that is inconsistent with the interests of ProLink or ProLink Solutions.

Although the Appellants may all have similar interests, they have not shown that Parenti’s interests are so identical as to represent the same legal rights as those available to ProLink and ProLink Solutions. In the absence of such a showing, they have not established that the arbitration and forum selection clauses of the agreement bind Ade Group with regard to its claim against Parenti. The trial court did not err in denying the motion to dismiss as to the claim against Parenti.

### **Conclusion**

The trial court erred in denying the Appellants’ motion to dismiss regarding Ade Group’s fraudulent inducement claims against ProLink and ProLink Solutions. The trial court properly denied the motion to dismiss regarding Ade Group’s breach of fiduciary duty claim against Parenti. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

ROBB, J., concurs.

SULLIVAN, J., concurs in result.