IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-264

Filed: 4 February 2020

New Hanover County, No. 18-CVS-1707

S&S FAMILY BUSINESS CORP., MARK STEELE, THERESA STEELE, KELSEY SCHULER, and MICHAEL SCHULER, Plaintiffs,

v.

CLEAN JUICE FRANCHISING, LLC, Defendant.

Appeal by Defendant from order entered 13 November 2018 by Judge Imelda Pate in Superior Court, New Hanover County. Heard in the Court of Appeals 1 October 2019.

Chleborowicz Law Firm, PLLC, by Christopher A. Chleborowicz and Elijah A.T. Huston, for Plaintiffs-Appellees.

Barber Power Law Group, PLLC, by Jonathan N. Barber, for Defendant-Appellant.

McGEE, Chief Judge.

Clean Juice Franchising, LLC ("Defendant") appeals from an order denying its motion to dismiss or, in the alternative, for change of venue. Defendant contends the trial court erred by not dismissing the declaratory judgment action filed by S&S Family Business Corporation, Mark Steele, Theresa Steele, Kelsey Schuler, and

Michael Schuler ("Plaintiffs") or, in the alternative, transferring the case to Mecklenburg County because the Multi-Unit Agreement contains a mandatory forum selection clause. We agree and, as a result, reverse and remand.

I. Factual and Procedural History

Defendant is a franchisor of stores selling smoothies, juices, cleanses, and other related products. S&S Family Business Corporation ("S&S") is a business entity that "develop[s], own[s], and operat[es] food service businesses that provide customers with healthy, organic, and fresh food and drink options in a fast [and] casual setting." S&S was formed by Mark Steele and his wife, Theresa Steele, their daughter, Kelsey Schuler, and their son-in-law, Michael Schuler (collectively, the "Individual Plaintiffs").

S&S entered into the "Multi-Unit Agreement" with Defendant on 20 March 2017 and agreed to "develop, equip, open and thereafter continue to operate at least three" Clean Juice stores in accordance with a specified development schedule. Approximately four months after entering into the Multi-Unit Agreement, S&S and Defendant decided to dissolve their contractual agreement. S&S, the Individual Plaintiffs, and Defendant executed a "Conditional Consent to Assignment of Multi-Unit Agreement" (the "Assignment Agreement") between S&S, Defendant, and a third-party assignee on 21 August 2017. Under the Assignment Agreement, S&S was released from liability under the Multi-Unit Agreement, the third party was assigned

"all of [S&S's] right, title and interest in the Multi-Unit Agreement[,]" and the third party "assume[d] all of [S&S]'s duties and obligations under the Multi-Unit Agreement."

Subsequently, S&S and the Individual Plaintiffs entered into a business agreement with Kale Me Crazy Franchising, Inc. and agreed to open a Kale Me Crazy restaurant in Wilmington, North Carolina. As a result, Defendant sent S&S, Mark Steele, and Kelsey Schuler a letter on 12 April 2018 "alleging that Kale Me Crazy was a competitor and that such activities were in breach of the restrictive covenant found in the" Multi-Unit Agreement. S&S responded and explained that "any liability under [the] restrictive covenant had been released pursuant to the Assignment Agreement[.]" At that time, Defendant informed S&S "that it intended to file suit against S&S and the Individual Plaintiffs under the assigned" Multi-Unit Agreement.

Plaintiffs filed a complaint on 10 May 2018 seeking a declaratory judgment that: (1) Plaintiffs are not in breach of the Multi-Unit Agreement or the Assignment Agreement; (2) the restrictive covenant contained in the Multi-Unit Agreement is not enforceable against Plaintiffs; (3) Plaintiffs are released, under the Assignment Agreement, from any and all liability under the restrictive covenant in the Multi-Unit Agreement; (4) under North Carolina law, the restrictive covenant in the Multi-Unit Agreement cannot be enforced against Plaintiffs; and (5) venue is not exclusive in

Mecklenburg County, North Carolina. Defendant's counsel sent Plaintiffs' counsel a letter on 25 May 2018 requesting that Plaintiffs "either voluntarily dismiss [their] action or consent to transfer the case to Mecklenburg County where the proper venue lies." Plaintiffs' counsel informed Defendant's counsel during a phone call on 30 May 2018 that Plaintiffs did not consent to transferring venue to Mecklenburg County. Defendant filed a motion to dismiss or, in the alternative, for change of venue (the "motion to dismiss") on 11 June 2018. A hearing was held on the motion on 4 October 2018 in Superior Court, New Hanover County. The trial court entered an order denying the motion to dismiss on 13 November 2018. Defendant appeals.

II. Analysis

Defendant contends the trial court erred in denying its motion to dismiss because the forum selection clause in the Multi-Unit Agreement applies to its action and the Multi-Unit Agreement and the Assignment Agreement both contain mandatory forum selection clauses.

Initially, we note that "[a]lthough a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive [it] of a substantial right." *Hickox v. R&G Grp. Int'l, Inc.*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003) (citation omitted). Thus, this issue is properly before this Court. *Id.* at 511, 588 S.E.2d at 567.

This Court reviews a trial court's decision regarding a venue selection clause for abuse of discretion. *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002) (citation omitted). "Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 566, 566 S.E.2d at 161 (citation omitted).

A.

Defendant asserts that the forum selection clause in the Multi-Unit Agreement is controlling in this action. A forum selection clause "designates a particular state or court jurisdiction as the one in which the parties will litigate any disputes arising out of their contract or contractual relationship." *Cable Tel Serv., Inc. v. Overland Contr'g, Inc.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002) (citations omitted). In order to address this contention, we review the language of the forum selection clauses in both the Multi-Unit Agreement and the Assignment Agreement.

The Assignment Agreement contains the following:

> Choice of Law; Jurisdiction and Venue: This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina. The parties hereto acknowledge and agree that the venue and exclusive proper forum in which to adjudicate any case or controversy arising, either directly or indirectly, under or in connection with this Agreement, the Multi-Unit Agreement, related documentation, or any other agreement with Franchisor shall be as provided in Section 23 of the Multi-Unit Agreement.

Notably, Plaintiffs' complaint seeks a declaration that, *inter alia*, Plaintiffs are not in breach of the Multi-Unit Agreement and the restrictive covenant in the Multi-Unit Agreement cannot be enforced against Plaintiffs. Thus, as these claims arise "under or in connection with" the Multi-Unit Agreement, "the venue and exclusive proper forum . . . shall be as provided in Section 23 of the Multi-Unit Agreement." Section 23 of the Multi-Unit Agreement provides:

> Venue: Subject to Section 17, the proper, sole and exclusive venue and forum for any action arising out of or in any way related to this Agreement shall be the federal and state courts where our principal place of business is located at the time of filing. As of the Effective Date, venue shall be exclusive in the federal or state courts sitting in Mecklenburg County, North Carolina.

The forum selection clause contained in the Multi-Unit Agreement, therefore, mandates that "venue shall be exclusive in . . . Mecklenburg County[.]" Thus, pursuant to the forum selection clauses provided in the Multi-Unit Agreement and the Assignment Agreement, because Plaintiffs' claims fall "under or in connection with" the Multi-Unit Agreement, the forum selection clause of the Multi-Unit Agreement applies.

B.

We now determine whether the forum selection clauses in the Multi-Unit Agreement and the Assignment Agreement constitute *mandatory* forum selection clauses. A mandatory forum selection clause vests exclusive jurisdiction in a

particular state or court. *See US Chem. Storage, LLC v. Berto Constr., Inc.*, 253 N.C. App. 378, 383, 800 S.E.2d 716, 720 (2017). Defendant asserts that the clauses in question are mandatory forum selection clauses and, as a result, the trial court was required to dismiss Plaintiffs' action or transfer it to Mecklenburg County. Plaintiffs argue that the forum selection clause in the Assignment Agreement is a permissive, not mandatory, venue provision because "exclusive" modifies the parties' agreement to jurisdiction, not venue. As a result, Plaintiffs contend the Assignment Agreement "contains a permissive venue provision and a mandatory jurisdiction provision." Additionally, Plaintiffs assert that S&S is not bound to the Multi-Unit Agreement and, as a result, the forum selection clauses in both agreements are inapplicable to S&S.

N.C.G.S. § 1-82 provides, in pertinent part, that any "action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement[.]" N.C.G.S. § 1-82 (2017). N.C.G.S. § 1-82 "is a default provision which is applied when the parties have provided no pre-dispute agreement for the place of a trial." *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 408, 747 S.E.2d 292, 297 (2013) (citation omitted). However, the default rule can be modified by a contractual forum selection clause. *Id.* at 408, 747 S.E.2d at 297. "As a result, our courts generally enforce mandatory forum selection clauses." *Id.* at 408, 747 S.E.2d

at 297 (citation omitted). Regarding mandatory forum selection clauses, this Court has explained

> the general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive. Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive.

Mark Grp. Int'l, 151 N.C. App. at 568, 566 S.E.2d at 162 (internal citations omitted).

Notably, "[w]hen demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. The provision in N.C. Gen. Stat. § 1-83 that the court 'may change' the place of trial when the county designated is not the proper one has been interpreted to mean 'must change.'" *LendingTree*, 228 at 409, 747 S.E.2d at 297 (internal quotation marks, citation, and brackets omitted). "Defendant[] can assert a venue objection in either: (i) a responsive pleading; or (ii) a motion to dismiss under N.C. R. Civ. P. 12(b)(3)." *Id.* at 409, 747 S.E.2d at 297. In the present case, Defendant objected to venue in its motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(3).

The present case compels us to interpret two distinct forum selection clauses. It is well established that "each and every part of the contract must be given effect if this can be done by any fair or reasonable interpretation; and it is only after

subjecting the instrument to this controlling principle of construction that a subsequent clause may be rejected as repugnant and irreconcilable." *Davis v. Frazier*, 150 N.C. 447, 64 S.E. 200, 202 (1909). As such, "'contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible.'" *Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 407, 553 S.E.2d 84, 88 (2001) (quoting *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 639, 217 S.E.2d 682, 693 (1975)). Thus, the forum selection clause in the Assignment Agreement and the forum selection clause in the Multi-Unit Agreement "must be given effect if this can be done by a fair or reasonable interpretation." *Id.* at 407, 553 S.E.2d at 88 (citation omitted).

In the present case, both forum selection clauses can be given effect without conflict. The forum selection clause in the Assignment Agreement decrees that "venue and exclusive proper forum . . . shall be as provided in Section 23 of the Multi-Unit Agreement." Section 23 of the Multi-Unit Agreement, in turn, provides "venue shall be exclusive in the federal or state courts sitting in Mecklenburg County, North Carolina." In order to give each forum selection clause effect without conflict, we construe the forum selection clause in the Assignment Agreement as a designation of venue to *wherever venue is designated in the forum selection clause in the Multi-Unit Agreement*. And, because the forum selection clause of the Multi-Unit Agreement designates *exclusive* venue in Mecklenburg County, there is an "indicat[ion] that the

contracting parties intended to make jurisdiction exclusive." *Mark Grp. Int'l,* 151 N.C. App. at 568, 566 S.E.2d at 162 (citation omitted).

Plaintiffs also argue that S&S was not bound by any mandatory forum selection clause because it was not bound to the Multi-Unit Agreement. Specifically, Plaintiffs assert that because the forum selection clause in the Multi-Unit Agreement is applicable exclusively to an "action arising out of or in any way related to [the Multi-Unit] Agreement[,]" in drafting the Assignment Agreement, the parties intended that "that the venue provision the Multi-Unit Agreement apply *only* to the parties to the Multi-Unit Agreement." However, the language of the forum selection clause in the Multi-Unit Agreement does not limit its venue provision to parties to the Multi-Unit Agreement. Indeed, by signing the Assignment Agreement, all parties agreed to the designation of venue to wherever venue was designated in the Multi-Unit Agreement.

Moreover, the forum selection clause in the Multi-Unit Agreement applies to "any action arising out of or in any way related to" the Multi-Unit Agreement. Even assuming S&S is no longer a party to the Multi-Unit Agreement, Plaintiffs' complaint specifically seeks a declaration that Plaintiffs are not in breach of the Multi-Unit Agreement and the restrictive covenant in the Multi-Unit Agreement cannot be enforced against Plaintiffs. Thus, Plaintiffs' action is undeniably "related to" the Multi-Unit Agreement.

C.

Finally, having concluded that both the Multi-Unit Agreement and the Assignment Agreement contain mandatory forum selection clauses, we must determine if both S&S and the Individual Plaintiffs are bound by said clauses. At the hearing before the trial court, Plaintiffs argued that the Individual Plaintiffs were not bound by any mandatory forum selection clause because they were not a party to the Multi-Unit Agreement or the Assignment Agreement. Plaintiffs make the same argument in their brief to this Court. Defendant made no argument to the trial court, and makes no assertion on appeal, that the Individual Plaintiffs were bound by the forum selection clauses in either agreement. *See* N.C. R. App. P. 10 (2019) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Thus, we hold that only S&S, not the Individual Plaintiffs, are bound by the mandatory forum selection clauses in the Multi-Unit Agreement and the Assignment Agreement. Thus, we reverse and remand the trial court's order denying Defendant's motion to dismiss as to S&S. On remand, the trial court may determine, in its discretion, whether to transfer venue as to the Individual Plaintiffs.

III. Conclusion

In sum, we hold the trial court erred in denying Defendant's motion to dismiss as to S&S because the Multi-Unit Agreement and the Assignment Agreement contain mandatory forum selection clauses.

REVERSED AND REMANDED.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).