[Cite as *Conway Revocable Trust-1998 v. Huntington Natl. Bank*, 2013-Ohio-1201.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

James R. Conway, Revocable Trust-1998, as amended by James R. Conway, Trustee et al.,	:	
Plaintiffs-Appellants,	:	No. 11AP-1105 (C.P.C. No. 10 CVH7 11112)
v.	:	(REGULAR CALENDAR)
The Huntington National Bank et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 28, 2013

Roetzel & Andress, LPA, Stephen D. Jones, and *Jeremy S. Young; Emens & Wolper Law Firm, LPA*, and *J. Richard Emens*, for appellants.

Hahn Loeser & Parks LLP, Marc J. Kessler, and *Jeffrey A. Yeager*, for appellee Nucor Steel Marion, Inc.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} This is an appeal by plaintiffs-appellants, James R. Conway, Revocable Trust-1998 ("the Conway Trust"), Kathleen A. Ament, Steven J. Conway, Scott D. Conway, Gerald C. Lehrke, and James R. Conway (collectively "appellants"), from a judgment of the Franklin County Court of Common Pleas granting a motion to dismiss filed by defendant-appellee, Nucor Steel Marion, Inc. ("Nucor") pursuant to Civ.R. 12(B)(3) and (6).

{¶ 2} On April 15, 2005, the Marion Steel Company ("Marion Steel") entered into an asset purchase agreement ("APA") with JAR Acquisition Corporation ("JAR") and Nucor, whereby Nucor purchased the assets of Marion Steel. Section 9.2 of the APA included a choice of law and forum selection clause, providing in part that the agreement shall be governed by the laws of Delaware, and that each of the parties "submits to the exclusive jurisdiction" of the state and federal courts of Delaware.

{¶ 3} On May 31, 2005, an indemnification escrow agreement ("IEA") was entered into by Nucor (as buyer) and the shareholders of Marion Steel (as seller), as well as James R. Conway, trustee, and Kathy A. Ament (as representatives of the shareholders), and the Huntington National Bank ("Huntington") as escrow agent. The "Recitals" section of the IEA sets forth that, "pursuant to Section 7.7(d) of the APA, the Parties and the Trust have agreed that on the date hereof, $9,000,000 will be placed in an escrow" to secure indemnification obligations under the APA. In accordance, the seller placed $9 million into an escrow account, arising out of the sale proceeds, in order to address potential liabilities occurring after the sale.

{¶ 4} On May 28, 2009, Nucor submitted a claim notice seeking indemnification from the seller for alleged remediation costs. On July 29, 2010, a complaint was filed by the Conway Trust, James R. Conway "individually," Kathleen A. Ament, Steven J. Conway, Scott D. Conway, and Gerald C. Lehrke, naming as defendants Nucor and Huntington. The complaint requested declaratory relief as to the IEA, and asserted causes of action against Nucor for tortious interference with contractual relations and failure to deal in good faith. Attached to the complaint were various documents, including copies of the APA and IEA.

{¶ 5} On September 30, 2010, Nucor filed a motion to dismiss or, alternatively, a motion for summary judgment, asserting that the forum selection clause of the APA required any legal action under the APA or IEA to be litigated in the state of Delaware. On October 18, 2010, appellants filed a memorandum in opposition to Nucor's motion, as well as a cross-motion for summary judgment against Nucor.

{¶ 6} By decision rendered November 4, 2011, the trial court granted Nucor's motion to dismiss on venue/jurisdiction grounds, holding that appellants were bound to the forum selection clause of the APA and, thus, Delaware was the proper forum for

disputes. In its decision, the trial court noted that, under Delaware law, multiple documents executed as part of one transaction are interpreted together; the court found that the APA and the IEA "are sufficiently integrated agreements that must be interpreted together." The court further determined that, even if the APA and the IEA were not integrated documents and part of the same transaction, the doctrine of equitable estoppel was applicable to bind appellants to the forum selection clause of the APA.

{¶ 7} On appeal, appellants set forth the following assignment of error for this court's review:

> The Common Pleas Court erred by granting the Motion to Dismiss filed by Defendant-Appellee Nucor Steel Marion, Inc.

{¶ 8} Appellants assert the trial court erred by dismissing their claims, pursuant to Civ.R. 12(B)(3) and (6), based upon the forum selection clause contained in the APA. More specifically, appellants argue that the trial court erred by applying the single agreement theory to dismiss their claims.

{¶ 9} A motion under Civ.R. 12(B)(3) addresses the issue of improper venue, while a Civ.R. 12(B)(6) motion is based on the failure to state a claim upon which relief can be granted, and this court's "standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo." *Natl. Union Fire Ins. Co. of Pittsburgh v. Hartford Ins. Co.*, 5th Dist. No. 06CA32, 2007-Ohio-2615, ¶ 10, citing *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228 (1990). Similarly, "[t]he enforceability of a forum-selection clause is a question of law that we review de novo." *Original Pizza Pan v. CWC Sports Group, Inc.*, 194 Ohio App.3d 50, 2011-Ohio-1684, ¶ 10 (8th Dist.). A party challenging a forum selection clause "bears a heavy burden of establishing that it should not be enforced." *Id.*, citing *Discount Bridal Servs. v. Kovacs*, 127 Ohio App.3d 373, 376-77 (8th Dist.1998).

{¶ 10} Section 9.2 of the APA provides:

> This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without regard to such state's conflicts of laws rules. Each of the Parties hereby submits to the exclusive jurisdictions of the State and Federal Courts located in Delaware and irrevocably waives, to the fullest extent permitted by law, any objection to such action based on venue or *forum non conveniens.*

(Emphasis sic.)

{¶ 11} Section 9.5 of the APA states in relevant part:

> (a) This Agreement, including the Recitals, Schedules and Exhibits referred to and incorporated herein, contain the entire understanding of the parties hereto with respect to the subject matter contained herein and therein.
>
> (b) The Schedules and all Exhibits and documents referred to in or attached to this Agreement are integral parts of this Agreement as if fully set forth herein, and all statements appearing therein shall be deemed to be representations.

{¶ 12} Section 7.7(d) of the APA states in part as follows:

> The Trust, as principal shareholder of Seller, shall unconditionally and irrevocably guarantee to Buyer the timely payment and performance of Seller's obligations under Sections 7.4, 7.5, 7.6, 7.7 and 7.8 (together, the "**Indemnity Covenants**"). Prior to or at Closing, the Trust shall secure its obligations under the foregoing guaranty of the Indemnity Covenants by:
>
> (i) Entering into an escrow agreement ("**Escrow Agreement**") with Buyer and a national financial institution reasonably acceptable to Buyer and the Trust (the "**Escrow Agent**"), pursuant to which the Trust would deposit into an interest-bearing escrow account Nine Million Dollars ($9,000,000) (the "**Trust Cap**"), which would be held by the Escrow Agent for four (4) years after Closing, subject to the exception in Section 7.6(c) hereof (the "**Indemnity Term**"), and against which Buyer may make claims under the Indemnity Covenants; any interest earned on the escrowed funds, and any funds remaining in the escrow account at the end of the Indemnity Term, would be for the benefit of and disbursed by the Escrow Agent to the Trust, its successors and assigns; or
>
> (ii) Procuring from a reputable insurance company reasonably acceptable to Buyer insurance coverage ("**Indemnity Insurance**") in the amount of the Trust Cap to cover Seller's obligations under the Indemnity Covenants for the Indemnity Term; or
>
> (iii) Performing under both (i) and (ii) in amounts less than the Trust Cap, provided that the aggregate of the amount

> subject to the Escrow Agreement and the amount of the Indemnity Insurance coverage shall be equal to the Trust Cap.

(Emphasis sic.)

{¶ 13} Appellants contend the trial court erroneously construed the IEA and the APA as a single document under the "single agreement" theory (as recognized by Delaware law). Appellants argue that the trial court failed to appreciate the significance of the separate identities of the parties to the two agreements, as well as the fact that the IEA was executed a number of weeks after execution of the APA. Appellants further argue that the trial court's decision with respect to the issue of equitable estoppel constitutes dicta. Specifically, appellants challenge the trial court's holding that, "even if the APA and the IEA were not integrated documents and part of the same transaction, the doctrine of equitable estoppel would bind Plaintiffs to the forum selection clause of the APA."

{¶ 14} Contrary to appellants' assertion, we do not construe the trial court's discussion of equitable estoppel as merely dicta. In its briefing in support of its motion to dismiss, Nucor relied upon *Weygandt v. Weco, LLC*, Del.Ch. No. 4056-VCS (May 14, 2009), in which that court discussed a three-part test, utilized by Delaware courts for determining whether a non-signatory to an agreement may be bound by the agreement's forum selection clause. Appellants also cited and discussed the decision in *Weygandt* in the trial court proceedings, and the trial court utilized the analysis in *Weygandt* (and other Delaware authority) in determining that appellants were bound by the forum selection clause under the doctrine of equitable estoppel. Specifically, the trial court found (1) the forum selection clause was valid, (2) that appellants, as shareholders and beneficiaries of the trust, were "closely related" to the contract (and beneficiaries of the APA), and (3) that the substance of appellants' claims in their complaint arose from Nucor's attempted notice of an environmental claim subject to indemnification under Section 7.6 of the APA. Thus, the question as to the applicability of the doctrine of collateral estoppel was presented to the trial court, and the court's determination of this issue constituted an alternative basis for enforcing the forum selection clause. *See Dunn v. Ransom,* 4th Dist. No. 10CA806, 2011-Ohio-4253, ¶ 50, quoting 22 Ohio Jurisprudence 3d, Courts and Judges, Section 381 (" '[t]he fact that a decision is based on two grounds does not render it obiter dictum as to one of those grounds. If the question is fairly

presented by the record, the decision thereon does not become mere dicta by reason of the fact that there is another proposition on which the decision might have been based.' ").

{¶ 15} As noted, appellants maintain that a "single agreement theory" has no application to this case. Section 7.7(d) of the APA, cited above, sets forth a provision whereby the trust shall unconditionally guarantee to buyer the payment and performance of seller's obligations under Sections 7.4, 7.5, 7.6, 7.7, and 7.8 (the indemnity covenants). Section 7.7(d) of the APA further provides that, prior to or at closing, the trust shall secure its obligations under the indemnity covenants in one of three ways, including, as pertinent to the instant action, entering into an escrow agreement with buyer and a national financial institution, whereby the trust would deposit $9 million (the "Trust Cap") to be held by the escrow agent for four years after closing.

{¶ 16} Pursuant to the terms of Section 7.7(d)(1) of the APA, the parties executed the IEA at the time of closing, whereby Huntington became the escrow agent of the $9 million Trust Cap. In its motion to dismiss, Nucor argued that the parties agreed, under Section 9.2 of the APA, that Delaware would be the exclusive jurisdiction for claims arising out of the parties' contractual relationship. In response, appellants argued that the IEA was separate from the APA and, therefore, the forum selection clause of the APA was not applicable to appellants' action.

{¶ 17} The trial court, in considering the terms of both the APA and IEA, cited Delaware case law holding that multiple documents executed as part of a single transaction are interpreted together. *See Ashall Homes Ltd. v. ROK Entertainment Group, Inc.,* 992 A.2d 1239, 1251 (2010), fn. 56, quoting Restatement of the Law 2d, Contracts, Section 202(2) (1981) (" 'A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.' ").

{¶ 18} The trial court further held in part:

> §7.7(d) of the APA states that the Trust, as Marion Steel's primary shareholder, must enter into an escrow agreement for the purposes of indemnification, and then proceeds to give the general, necessary terms of the IEA. Further, the IEA, in its Recitals, states "pursuant to Section 7.7(d) of the APA, the Parties and the Trust have agreed" to secure the various indemnity obligations expressly set out in the APA. In addition, section 2.1 of the IEA provides that the $9 million

> escrow amount will be delivered "simultaneously with the payment by the Buyer of the Purchase Price under the APA." Moreover, Section 3 of the IEA, which governs the relevant Notice Claim requirements that form the substance of Plaintiffs' claims, consistently refers back to the APA. Such evidence clearly demonstrates that the APA and the IEA are sufficiently integrated agreements that must be interpreted together.

{¶ 19} Appellants raise several arguments as to why the trial court should not have construed the agreements together, including the assertion that the court failed to appreciate the significance of the separate identities/capacities of the parties to the two agreements. Appellants maintain the trial court glossed over the requirement of an identity of parties; according to appellants, the trial court ignored the fact that the individual appellants, as members of the senior management group of Marion Steel, were APA signatories for only limited purposes and were not, it is contended, parties to the APA for purposes of the APA's forum selection clause.

{¶ 20} On this point, the APA contains the signatures of appellants James R. Conway, Steven J. Conway, Scott D. Conway, Kathleen A. Ament, and Gerald C. Lehrke under the heading: "SENIOR MANAGEMENT GROUP, For Purposes of Sections 4.16, 4.22(b), 7.14 and 7.15." The APA also contains the signature of James R. Conway, as trustee on behalf of the Conway Trust, "For Purposes of Sections 7.2(b), 7.7(d) and 7.15." With respect to the IEA, the signatures of appellants Steven J. Conway, Scott D. Conway, Kathleen A. Ament, and Gerald C. Lehrke, as well as the signature of James R. Conway on behalf of the Conway Trust, appear under the heading "SHAREHOLDERS."

{¶ 21} Nucor argues that appellants cite no case law for the proposition that a contract signatory can be a party to a portion of a contract (i.e., in the instant case signatories to the APA), but not be bound by the contractual forum selection clause. Nucor notes that each of the appellants signed the APA, and that each of the appellants (with the exception of James Conway), are shareholders of Marion Steel and a party to the IEA.

{¶ 22} We need not reach appellants' argument that the trial court, in finding the APA and IEA to be integrated documents, erred in failing to recognize that appellants are not "parties" to the APA's forum selection clause, as we agree with the trial court that

appellants are subject to the forum selection clause under the doctrine of equitable estoppel. Under Delaware law, "[i]n order to find that [an individual] is bound by [a] forum selection clause, it is not necessary to find that [the individual] was a party to the [agreement]." *Capital Group Cos., Inc. v. Armour,* Del.Ch. No. 422-N (Oct. 29, 2004).

{¶ 23} As previously alluded to, Delaware courts utilize "a three-part inquiry to determine whether a nonsignatory to an agreement is bound by a forum selection clause in that agreement: 'First, is the forum selection clause valid? Second, are the [non-signatories] third-party beneficiaries, or closely related to, the contract? Third, does the claim arise from their standing relating to the * * * agreement?' " *Baker v. Impact Holding, Inc.,* Del.Ch. No. 4960-VCP (May 13, 2010), quoting *Capital Group Cos.*

{¶ 24} With respect to the first question, "forum selection clauses are 'presumptively valid' and have generally been enforced." *Capital Group Cos.,* quoting *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.,* 709 F.2d 190, 202 (3d Cir.1983). A forum selection clause will be enforced unless the party opposed to its enforcement establishes: "(i) it is a result of fraud or overreaching; (ii) enforcement would violate a strong public policy of the forum; or (iii) enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable." *Hadley v. Shaffer,* D.C.Del. No. 99-144-JJF (Aug. 12, 2003). In the present case, the trial court found, and we agree, there is no dispute that the forum selection clause of the APA is valid.

{¶ 25} As to the second part of the test, Delaware case law "suggests two ways a party can be closely related to an agreement: 1) the party receives a direct benefit from the agreement or 2) it was foreseeable that the party would be bound by the agreement." *Baker,* citing *Weygandt.* Federal courts similarly hold that " '[f]orum selection clauses bind nonsignatories that are closely related to the contractual relation or that should have foreseen governance by the clause.' " *Hadley,* quoting *Jordan v. SEI Corp.*, No. 96-1616 (E.D.Pa. June 4, 1996).

{¶ 26} Appellants challenge the trial court's finding that they were closely related to the contract, maintaining it was not foreseeable they would be required to litigate a dispute in Delaware based upon the IEA. In response, Nucor argues that the trial court properly held it was foreseeable appellants would be bound by the forum selection clause,

noting that appellants are signatories and/or parties to both the APA and IEA. Nucor further argues that appellants, as managers and shareholders of Marion Steel, were decision makers for the seller side of the APA, and that they (1) controlled the corporation that was the main party to the APA, (2) were signatories to the APA, (3) secured the APA indemnification obligations, and (4) stand to benefit from any remaining escrow funds.

{¶ 27} We agree with the trial court that the second prong is satisfied as appellants, as shareholders and senior management of Marion Steel, were closely related to the contract and signatory such that it was reasonably foreseeable they would be bound by the forum selection clause. Pursuant to Section 1.26 of the APA, the "Senior Management Group" for Marion Steel is defined as the following individuals: "James R. Conway (President), Steven J. Conway (Executive Vice President), Scott D. Conway (Executive Vice President), Kathleen A. Ament (Executive Vice President & CFO), and Gerald C. Lehrke (Vice President-Sales)." Appellants' complaint avers that, as shareholders of Marion Steel, the Conway Trust, and "Plaintiffs Kathleen A. Ament, Steven J. Conway, Scott D. Conway, and Gerald C. Lehrke * * * are parties in interest to the IEA." In holding that appellants were closely related to the contract, the trial court noted that "each of the [appellants] was a signatory to the IEA as well as a signatory to the APA under the category of the 'Senior Management Group,' [and] as the shareholders of Marion Steel, [appellants] were the primary beneficiaries of the APA."

{¶ 28} Courts have held that a close business relationship between a non-party and a party to an agreement is an important consideration in determining whether a forum selection clause is enforceable against the non-party. *Universal Grading Serv. v. eBay, Inc.*, No. 08-CV-3557 (E.D.N.Y. June 10, 2009). In this respect, courts have enforced forum selection clauses against non-signatory officers and directors found to be closely related to a corporation. *See, e.g.*, *Cinema Laser Technology, Inc. v. Hampson,* No. 91-1018 (D.N.J. May 30, 1991) (rejecting argument that it would be unfair to apply forum selection clause to corporate directors who were not parties to joint venture agreement; non-signatory directors were subject to forum selection clause because their relationship to signatory company made it foreseeable they might be compelled to litigate in another forum). *See also Firefly Equities, LLC v. Ultimate Combustion Co., Inc.,* 736 F.Supp.2d 797, 800 (S.D.N.Y. 2010) (company president, even though he signed contract in his

representative rather than individual capacity, was closely related to company that it should have been foreseeable to him that forum selection clause might have application to disputes arising under contract that also involved him); *Marano Ents. of Kansas v. Z-Teca Restaurants, L.P.*, 254 F.3d 753, 757 (8th Cir.2001) (non-signatory to contract was "closely related" to disputes arising out of agreements based upon his status as "shareholder, officer, and director" of company that was a party to agreements); *Beck v. CIT Group/Credit Fin., Inc.*, No. 94-5513 (E.D.Pa. June 29, 1995) ("That Mr. Beck signed the Security Agreement as president of Beck Co. is of little consequence given his intimate relationship to Beck Co., the benefit to him from the funding provided, the circumstances giving rise to his claims that he was personally injured by the manner in which defendant performed under the agreement and his request to be credited personally for amounts allegedly overcharged.").

{¶ 29} Here, appellants' involvement in the APA was not tangential. As noted by Nucor, appellants served as the decision makers for the seller side of the APA, and were involved in securing the indemnification obligations. While appellants seek to distance the IEA from the APA, the IEA derives its existence "pursuant to" the APA, and the language of the APA evinces that the indemnity guaranty was an integral part of the sale agreement. Cases considering whether enforcement of a forum selection clause is foreseeable "focus on whether the same people were involved in all of the agreements, even if they were acting on behalf of different entities." *Weygandt.* Further, "when a control person agrees to a forum, it is foreseeable that the entities controlled by that person which are involved in the deal will also be bound to that forum." *Id.* In light of their close relationship to the agreement and APA signatory, appellants should have reasonably foreseen they would be bound by the forum selection clause. *See Hadley* (applying Delaware law to find that plaintiff-shareholders were closely related to merger agreement and should have foreseen being bound by forum selection clause).

{¶ 30} That appellants should have foreseen governance by the forum selection clause is also reflected in the language of the APA and IEA, as well as appellants' own complaint. As noted, the APA contemplated the creation of an escrow fund to secure the seller's indemnification obligations to be executed prior to the closing of the purchase and sale of the assets and plant. Under Section 2.1 of the IEA, the trust was required to deliver

to the escrow agent, "simultaneously with the payment by Buyer of the Purchase Price under the APA, Nine Million Dollars." Appellants' complaint for declaratory relief avers that the IEA was "effectuated as mandated by" the APA, and further alleges that "the full amount" of the $9 million escrow "should have been released to James R. Conway, trustee of Conway Trust, and Plaintiff Kathleen A. Ament, as 'Representatives' of the shareholders of Marion Steel Company and for the benefit of Trust Plaintiffs" (i.e., plaintiffs Kathleen A. Ament, Steven J. Conway, Scott D. Conway, and Gerald C. Lehrke). In asserting entitlement to the escrow funds, appellants' complaint seeks enforcement based upon specific terms of the APA, including allegations that: (1) Nucor failed to comply with Section 7.7(b) of the APA, (2) Nucor's claims for indemnification were not preserved because it failed to act as required by Section 7.4 of the APA, (3) "Nucor had a duty to deal in good faith with Trust Plaintiffs under the APA and under the IEA", and (4) "Under Section 7.6(d) of the APA, Nucor has a contractual duty to deal in good faith under the terms of the APA." Thus, appellants' claims against Nucor, as set forth in their pleadings, are dependent upon the underlying APA agreement. It has been held that "[t]he doctrine of equitable estoppel prevents a non-signatory to a contract from embracing the contract, and then turning her back on the portions of the contract, such as a forum selection clause, that she finds distasteful." *Capital Group Cos.*

{¶ 31} We also conclude that the third prong is satisfied, i.e., that the claims relate to the contract containing the forum selection clause. As found by the trial court, the substance of appellants' claims arise from Nucor's "attempted notice of an 'Environment Claim' subject to indemnification under § 7.6 of the APA, for which Nucor sought indemnification pursuant to § 7.5 of the APA" and that, "[a]s part of their allegations, [appellants] assert that Nucor has provided no proof of loss as is required by §§ 7.4 and 7.7 of the APA." As also noted above, appellants' complaint alleged that Nucor had a duty to deal in good faith under both the APA and IEA, and that Nucor had a contractual duty to deal in good faith under Section 7.6(d) of the APA.

{¶ 32} Upon review, the trial court did not err in holding that appellants were bound to the forum selection clause of the APA based upon the doctrine of equitable estoppel. Accordingly, the trial court did not err in granting Nucor's motion to dismiss.

{¶ 33} Based upon the foregoing, appellants' single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BRYANT and DORRIAN, JJ., concur.