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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MAPLEHURST BAKERIES, LLC, an Indiana limited liability company, Appellant, v. JOHN BEAN TECHNOLOGIES CORPORATION, a Delaware corporation; and PRECISION INDUSTRIAL CONTRACTORS, INC., a Washington corporation, Respondents.	No. 81169-0-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — Maplehurst Bakeries, LLC (Maplehurst) sued John Bean Technologies Corporation (JBT) and Precision Industrial Contractors, Inc. (Precision) in Washington. The trial court dismissed the action as to JBT for improper venue. Maplehurst appeals. We affirm.

I. BACKGROUND

Maplehurst, an Indiana limited liability company headquartered in Indiana, produces and sells baked goods. JBT, a Delaware corporation with its principal place of business in Illinois, manufactures and services commercial food processing equipment.

JBT became a preferred service vendor for Maplehurst. Maplehurst's preferred vendor agreement states any "legal action or proceeding" relating "to these Terms and Conditions may be brought only in the Courts of the State of

Indiana, sitting in the County of Hendricks or in the United States District Court for the Southern District of Indiana."[1]

Maplehurst accepted JBT's proposal to refurbish a spiral freezer in Kent, Washington. JBT's purchase order for this project designates "the State or Federal courts sitting, respectively, in Cook County Illinois or the federal district of which that county is a part" for any disputes between the parties. JBT subcontracted the refurbish work to Precision, but provided supervision, direction, and expertise.

After determining that the freezer was improperly serviced and led to damages to its food product, Maplehurst sued JBT and Precision in Washington, alleging negligence and strict product liability. Based on improper venue, the trial court dismissed Maplehurst's claims against JBT without prejudice. The court also denied Maplehurst's motion for reconsideration.

The trial court granted Maplehurst's CR 54(b) motion to certify the dismissal order as final as to JBT. A commissioner of this court granted discretionary review of the order.

II. ANALYSIS

Maplehurst says the trial court erred in dismissing its complaint against JBT because (1) personal jurisdiction exists in Washington as to all the parties, (2) enforcement of the forum selection provisions would be unjust, leading to litigation in multiple fora, (3) enforcement would be unreasonable, and (4) issues

[1] The copy of Maplehurst's terms and conditions in the record does not include JBT's signature. But the parties do not dispute that JBT executed this agreement.

of fact remain on whether Indiana or Illinois was the proper forum. We disagree with these arguments.

A. Standard of Review

We review a trial court's decision on the enforceability of a forum selection clause for an abuse of discretion. Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). A trial court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, based on an erroneous view of the law, or involves application of an incorrect legal analysis. Id. Thus, "the abuse of discretion standard gives deference to a trial court's fact-specific determination on enforceability of a forum selection clause, while permitting reversal where an incorrect legal standard is applied." Id. But we review de novo pure questions of law. See id. at 833-34 (whether public policy precludes giving effect to a forum selection clause in particular circumstances presents a question of law).

Washington courts enforce forum selection clauses unless they are unreasonable and unjust. Voicelink Data Servs., Inc. v. Datapulse, Inc., 86 Wn. App. 613, 617, 937 P.2d 1158 (1997). "A 'party arguing that the forum selection clause is unfair or unreasonable bears a heavy burden of showing that trial in the chosen forum would be so seriously inconvenient as to deprive the party of a meaningful day in court.'" Dix, 160 Wn.2d at 835 (quoting Bank of Am., N.A. v. Miller, 108 Wn. App. 745, 748, 33 P.3d 91 (2001)). "'[A]bsent evidence of fraud, undue influence, or unfair bargaining power, courts are reluctant to invalidate forum selection clauses as they increase contractual predictability.'" Id. (quoting Bank of Am., 108 Wn. App. at 748).

When evaluating the enforceability of a forum selection clause, we do "not accept the pleadings as true[;]" rather, "the challenging party must present evidence to justify nonenforcement." Id. (citing Bank of Am., 108 Wn. App. at 748; Voicelink, 86 Wn. App. at 618).

B. Washington Jurisdiction

Maplehurst seeks reversal on the ground that Washington courts have personal jurisdiction over all the parties, including Precision. This argument misses the mark. That such jurisdiction may exist does not weaken the right to enforce a forum selection clause requiring suit in another venue. Chew v. Lord, 143 Wn. App. 807, 818, 181 P.3d 25 (2008) ("Consenting to personal jurisdiction in Washington courts is not the same as agreeing that Washington courts are the only venue in which a claim may be brought."); Voicelink, 86 Wn. App. at 626.

C. Unfair Application to Precision

Maplehurst says that a forum selection clause should not be enforced against Precision because that party did not agree to the provisions.[2] Maplehurst presents no authority to support its argument.

Maplehurst relies on the Utah case of Prows v. Pinpoint Retail Sys., Inc., 868 P.2d 809 (Utah 1993). It appears to say that the Washington case of Voicelink cites Prows with approval for the proposition that a forum selection

[2] While neither party on appeal discusses it, we question whether Maplehurst has standing to assert Precision's interests here. "The doctrine of standing prohibits a litigant from raising another's legal rights." Haberman v. Washington Pub. Power Supply Sys., 109 Wn.2d 107, 138, 744 P.2d 1032 (1987) (citing Allen v. Wright, 468 U.S. 737, 750-51, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)). But we need not address this issue because we reject Maplehurst's argument on other grounds.

clause forcing a party to litigate in two venues is unjust. See Voicelink, 86 Wn. App. at 619 n. 3. But Voicelink does not purport to approve of Prows. Rather, the case deems Prows as "readily distinguishable" and "inapposite to the case at hand." Id.

Nor does Prows support Maplehurst's argument. In Prows, a Utah-based plaintiff sued two companies in Utah, a Utah corporation and a Canadian company. 868 P.2d at 812. The Canadian company moved to dismiss, arguing that a forum selection clause required all claims between it and plaintiff be litigated in New York. Id. The plaintiff argued that if the forum selection clause were enforced, litigation would be required in Utah against one defendant and in New York against the other. Id. at 812. The Prows court reasoned, "[r]equiring a bifurcated trial on the same issues contravenes the 'objective of modern procedure,' which is to 'litigate all claims in one action if that is possible'" and held requiring the plaintiff to litigate in two states would essentially deny the plaintiff's day in court. Id. at 813 (quoting Dyersburg Machine Works, Inc. v. Rentenbach Eng'g Co., 650 S.W.2d 378, 380–81 (Tenn.1983)). Prows says nothing about forcing the Utah company, a nonparty to the forum-selection agreement—like Precision here—to litigate in multiple fora.

D. Unjust Litigation in Multiple States

Maplehurst also says that enforcement of a forum selection clause would force it to potentially litigate in multiple states and thus be unjust. To support this assertion, it contends the trial court failed to evaluate the potential of it having to litigate against JBT and Precision in separate states. The record does not

support this contention. At the hearing, this exchange took place between the court and counsel:

> [COUNSEL]: Illinois or Indiana. And we'd be suing [Precision] here in Washington. And we would have two separate actions with the possibility of two separate verdicts. Because I can guarantee you that J—
>
> THE COURT: But wouldn't you – you would try to sue [Precision] in Illinois or Indiana? I mean, again, maybe you strategically decide it's not worth it, but potentially you could still do it, and then [Precision] will then come in and argue presumably that we shouldn't be here, we should be in Washington because of X, Y, Z.

Maplehurst fails to meet its burden of proving enforcement of a forum selection clause would be unjust.[3]

E. Unreasonableness of Enforcement

Maplehurst alleges enforcement would be unreasonable because Washington is where the witnesses are located, the refurbishment service was performed, and the damages occurred. But that is not the test for determining unreasonableness. To prove unreasonableness here, Maplehurst had to prove that it would be so seriously inconvenienced by litigation in another state that Maplehurst would be denied its day in court. Dix, 160 Wn.2d at 835. But the record does not contain any evidence of serious inconvenience to Maplehurst.

[3] Maplehurst asks us to take judicial notice of an order dismissing Precision from a concurrent suit pending before the Cook County Circuit Court in Illinois, as evidence that it is litigating the same issues in two fora. We decline Maplehurst's invitation for two reasons. First, we do not need the Illinois order "to fairly resolve the issues on review." RAP 9.11(a). Second, "we cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties." In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (citations omitted); King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 142 Wn.2d 543, 549 n. 6, 14 P.3d 133 (2000) ("Even though ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review.").

In opposition to JBT's motion to dismiss below, Maplehurst filed three declarations: one from its counsel, another from Tim Richardson (its plant manager in Kent), and the last from Greg Taylor (its vendor manager in Brownsburg, Indiana). Neither the Richardson nor Taylor declarations (1) say where the pertinent witnesses are located, (2) indicate all of Maplehurst's damages occurred in Washington, (3) complain about the costs of litigating in multiple states being burdensome, (4) express any inconvenience of trial in other states, or (5) detail how Maplehurst would not receive its day in court if trial occurred outside Washington. Maplehurst's counsel asserts the fact witnesses, damages giving rise to this lawsuit, and evidence are all in Washington, but "[a]ssertions by counsel are not evidence." Voicelink, 86 Wn. App. at 619 n.2 (citing Bravo v. Dolsen Cos., 71 Wn. App. 769, 777, 862 P.2d 623 (1993)). Maplehurst fails to establish facts to show a serious inconvenience in litigating outside of Washington and because "[w]e will not consider allegations of fact without support in the record." Id. at 619. Maplehurst has not carried its burden of proving unreasonableness.

F. Which Forum Selection Clause Applies

Maplehurst maintains the trial court abused its discretion by failing to make findings on which party's forum selection clause applied. We disagree. In its oral ruling, the court correctly informed the parties it was "not making a decision whether Illinois or Indiana or Ohio apply" and whether venue is in Ohio or Illinois or Indiana, that determination is "for another hearing" and "not for the Court to decide."

To the extent Maplehurst claims the trial court did not enter detailed findings on this issue, we reject the argument. First, findings "are not necessary" when granting a CR 12(b) motion. CR 52(a)(5)(B). Second, after having a chance to review and revise the written order just before it was entered, Maplehurst's counsel agreed with the court's written language. We conclude any error was invited. Under the invited error doctrine, "a party may not set up an error at trial and then complain of it on appeal." Grange Ins. Ass'n v. Roberts, 179 Wn. App. 739, 774, 320 P.3d 77 (2013). The doctrine applies when a party "takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal." Lavigne v. Chase, Haskell, Hayes & Kalamon, PS, 112 Wn. App. 677, 681, 50 P.3d 306 (2002).

G. Motion to Strike

Finally, JBT moves to strike portions of Maplehurst's opening brief, arguing that it refers to evidence not contained in the record. We decline to reach this issue, as we reject Maplehurst's arguments on unrelated grounds.

We affirm.

Chun, J.

WE CONCUR:

Brennan, J.

Mann, C.J.