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Hentsch Henchoz & CIE v. Philippe D. Gubbay,
Capital Suisse, S.A., Capital Suisse Securities, Inc.,
Capital Suisse, Inc., Zooley Services Limited,
Zooley of Utah, Inc., Fernland Limited, Douglas P.
Hoyt, and John Does 1-10 : Reply Brief of
Appellants

Utah Supreme Court

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IN THE UTAH SUPREME COURT

HENTSCH HENCHOZ & CIE,

Plaintiff and Appellee,

vs.

PHILIPPE D. GUBBAY, CAPITAL
SUISSE, S.A., CAPITAL SUISSE
SECURITIES, INC., CAPITAL SUISSE,
INC., ZOOLEY SERVICES LIMITED,
ZOOLEY OF UTAH, INC., FERNLAND
LIMITED, DOUGLAS P. HOYT, AND
JOHN DOES 1-10,

Defendants and Appellants.

Supreme Court No. 20020683-SC

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
HONORABLE RONALD E. NEHRING

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UTAH SUPREME COURT

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PAT BARTHOLOMEW

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Appellants Philip D. Gubbay, Capital Suisse, S.A., Zooley Services Limited, Capital Suisse, Inc., Zooley of Utah, Inc., and Ferland Limited (collectively “Appellants”) through counsel respectfully submit this Appellants’ Reply Brief.

ARGUMENT

Appellee Hentsch Henchoz & Cie (“HH&C”) spends the majority of its Brief arguing the underlying facts of the case and attempting to explain how Appellants did not comply with certain orders from the trial court issued subsequent to the trial court’s denial of Appellants’ Motion to Dismiss. In large part, HH&C arguments are irrelevant to the sole issue before this Court which is the application of the forum selection clause in the parties’ agreements.

Under well-settled precedent of this Court and the United States Supreme Court, a forum selection clause contained in an agreement is prima facie valid and should be given effect unless the party opposing the clause’s enforcement meets its heavy burden of demonstrating that enforcement would be “unreasonable and unjust” or that the clause itself, as opposed to the underlying contract in which the clause was contained, was procured by fraud. HH&C did not meet this burden and the trial court did not apply the correct standard in refusing to apply the parties’ agreed upon forum selection clause.

Moreover, it is well-settled that a defendant has a substantive right to appeal the denial of a motion to dismiss for improper venue based on a forum selection clause. That right should be afforded to Appellants in the present action. Contrary to HH&C’s

allegations that Appellants willfully disobeyed the orders of the trial court, the truth is that Appellants simply declined to participate substantively in the proceedings in this case after the trial court incorrectly concluded that venue was proper in Utah despite the agreed upon forum selection clause. After the trial court failed to enforce the forum selection clause, Appellants chose to stake their entire defense on the forum selection clause and awaited their appeal that became ripe when the trial court entered an uncontested summary judgment against Appellants.

For the reasons set forth in Appellants' Opening Brief and further below, this Court should reverse the trial court's denial of Appellants' Motion to Dismiss and dismiss HH&C's Complaint.

I. THE TRIAL COURT'S CONCLUSION THAT THE PARTIES' FORUM SELECTION CLAUSE WAS "UNREASONABLE" OR "UNFAIR" WAS ERRONEOUS.

Under Utah law, a forum selection clause is unfair and unreasonable only where the party seeking to avoid the clause plainly shows that the contractual forum will be "[so] gravely difficult and inconvenient" that the party will "be deprived of his day in court." *Prows v. Pinpoint Retail Systems, Inc.*, 868 P.2d 809, 812 (Utah 1993). Consistent with *Prows*, the United States Supreme Court has held that a forum selection clause is "prima facie valid" unless the party challenging its enforcement can "clearly show that enforcement would be unreasonable and unjust." *Bremen v. Zapata Off-Shore*

Co., 407 U.S. 1, 10 (1972). The party resisting enforcement on these grounds bears a “heavy burden of proof.” *Id.* at 17.¹

In its Opposition Brief, HH&C claims that the forum selection clause at issue is unfair because HH&C agreed that it would only bring actions on the contracts in the British Virgin Islands while Appellant Capital Suisse was not limited to that jurisdiction. If HH&C thought the forum selection clause was unfair, it should not have agreed to the clause in the first place when it negotiated and signed the contracts.

It is well-settled law in Utah that when, as in this case, a contract is negotiated at arms-length by sophisticated business entities, courts will not rewrite the parties’ agreements to rectify what in hindsight one party later claims is inequitable or one-sided. As this Court recently held in *Bakowski v. Mountain States Steel, Inc.*, 52 P.3d 1179, 1185 (2002), “[w]e will not make a better contract for the parties than they have made for themselves. Nor will we avoid the contract’s plain language to achieve an ‘equitable’ result.” (Citation omitted). *See also Dalton v. Jerico Const. Co.*, 642 P.2d 748, 749 (1982) (“it is not for a court to rewrite a contract improvidently entered into at arm’s length or to change the bargain indirectly on the basis of supposed equitable principles”).

¹ HH&C, through its briefing strategy, implies that the Court should simply disregard the parties’ agreement on the proper forum and conduct an equitable after-the-fact balancing test based on the alleged behavior of the parties and the progress of the litigation. There is no support whatsoever for this position and this Court should not adopt a legal principle that would so easily vitiate contractual arrangements. The parties agreed on the proper forum and there is a significant burden on HH&C to demonstrate that the Court should disregard the parties’ agreement.

HH&C is a sophisticated investor. It is one of the oldest established private bankers in Geneva, in operation for over 200 years, and has offices across the world. HH&C makes no argument now and produced no evidence whatsoever to the trial court that HH&C's bargaining position was somehow unequal to Appellants nor did HH&C in any way present evidence or even argue that it was somehow coerced into agreeing to the forum selection clause. HH&C's claim (and the trial court's conclusion) that the forum selection clause is unenforceable based on the clause's one-sidedness is contrary to the well-reasoned precedent of this Court and simply bad law.

HH&C next claims that the forum selection clause is unenforceable because the British Virgin Islands will be an inconvenient forum. As this Court stated in *Prows*, the United States Supreme Court has held that

it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be [so] gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. ***Absent that, there is no basis for concluding that it would be unfair, unjust or unreasonable*** to hold that party to its bargain.

Id., quoting *Bremen*, 407 U.S. at 18 (emphasis added). HH&C failed to make the required evidentiary showing before the trial court and makes no compelling arguments in its Brief as to why the British Virgin Islands would be a "gravely difficult" forum in which to address the merits of this case.

Indeed, HH&C's only argument regarding inconvenience is that if this Court were to uphold the agreed upon forum selection clause, HH&C would be required to relitigate

the case. Appellee's Brief at 36. But that is wholly a problem of HH&C's creation. If HH&C had filed the case in the British Virgin Islands as it agreed it would do, it would not have wasted the resources of either party by improperly attempting to litigate the case in Utah. *See Utah Coal & Lumber Rest., Inc. v. Outdoor Endeavors Unlimited*, 40 P.3d 581, 583 (Utah 2001) (holding that "equitable relief should not be used to assist one in extricating himself from circumstances which he has created") (internal citations omitted).

Finally, HH&C argues that enforcement of the agreed upon forum selection clause would be unreasonable because there is "no connection" between the parties and the British Virgin Islands. Appellee's Brief at 35. HH&C is simple wrong. Capital Suisse is a company organized under the laws of the British Virgin Islands. It operates the investment fund which has been recognized as a Professional Fund under the Mutual Funds Act of the British Virgin Islands (the "Fund"). HH&C and Capital Suisse specifically agreed that the agreements at issue in this case would be governed and enforced under the law of the British Virgin Islands. The Fund Prospectus states that the Fund was not registered in accordance with United States securities laws, and neither the United States federal or state securities laws applied to the purchase.²

² In *Phone Directories Co., Inc. v. Henderson*, 8 P.3d 256, 261 (Utah 2000) this Court held that a forum selection clause "will be upheld as fair and reasonable so long as there is a rational nexus between the forum selected and/or consented to, and either the parties to the contract or the transactions that are the subject matter of the contract." HH&C argues that the rationale in *Phone Directories* does not apply in this case because the clause in *Phone Directories* was "consent to personal jurisdiction clause" and the

HH&C did not meet its heavy burden of demonstrating that the agreed upon forum selection clause was unreasonable or unfair, and the trial court's denial of Appellant's Motion to Dismiss should be reversed and the case should be dismissed.

II. THE TRIAL COURT'S CONCLUSION THAT THE FORUM SELECTION CLAUSE WAS VOID BECAUSE OF FRAUD WAS ERRONEOUS.

The trial court refused to enforce the agreed upon forum selection clause in the parties' agreements because it ruled that the agreements, "as a whole", were the product of fraud. The trial court misapplied the law.

In order to set aside a forum selection clause for fraud there must be a well-founded claim that the inclusion of that clause itself in the contract, standing apart from the whole agreement, was the product of fraud. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, n. 14 (1974). The Supreme Court stated in *Scherk* that a forum-selection clause in a contract is only unenforceable "***if the inclusion of that clause in the contract was the product of fraud*** or coercion. *Id.* at 519, n.14 (emphasis added). *See also Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992) (enforcing forum selection clause despite plaintiff's claims of fraud in the inducement, because plaintiff did not plead that "the ***specific*** choice of forum provisions at issue were obtained by fraud."

clause in this case was a forum selection clause. Appellee's Brief at 33 n. 8. This is a distinction without a difference. The practical application of the forum selection clause in this case and the clause at issue in *Phone Directories* is the same – both designate the acceptable and agreed upon forum. The rationale in *Phone Directories* fully applies in this case and based on that rationale, the agreed upon forum selection clause in this case is enforceable because there is a rationale nexus between the parties and the selected forum.

Id. at 960 (emphasis in original); *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1138 (6th Cir. 1991) (holding that there “must be a well-founded claim of fraud in the inducement of the clause itself, standing apart from the whole agreement, to render [a forum selection clause] unenforceable”).

Recognizing the above law, HH&C *now* claims in its Brief that the forum selection clause in the agreements was itself a product of fraud. HH&C did not make this allegation in its Verified Complaint and did not present evidence supporting this claim to the trial court.

HH&C now claims, picking up in a statement in the trial court’s ruling, that the “one-sided” nature of the forum selection agreement “implies” that fraud reached the forum selection clause itself. This implication is unsupported by law and fact and certainly is insufficient to meet HH&C’s heavy burden of demonstrating that its agreed upon contract should not be enforced. As discussed in the prior section of this Brief, HH&C is a very sophisticated international private banking operation. Prior to entering into the agreements, HH&C understood that it would be required to file any legal action relating to the agreements in the British Virgin Islands, but that Appellants would not be so limited. HH&C specifically agreed to that clause as it was written. The fact that a contract may be one-sided is certainly not sufficient evidence of fraud to support a

Court's determination to not enforce a negotiated agreement among sophisticated business entities.³

In its Brief, HH&C also now claims that the forum selection clause was the specific product of fraud because it was not a subject of negotiation. Appellants' Brief at 43. This claim is wrong for several reasons.

First, HH&C is a sophisticated international banking entity and certainly reviewed the agreements prior to signing them. HH&C has not presented any evidence indicating that it was somehow coerced into signing the agreements or that the agreements were somehow accompanied by indices of procedural unconscionability. Whether the parties specifically discussed the forum selection clause, is not evidence of fraud.

Second, HH&C has not presented any evidence that the forum selection clause was *not* a subject of negotiation. Instead, it claims that Appellants failed to present evidence of such negotiations. HH&C misunderstands the heavy burden it bears in this case. As the party attempting to evade the agreed upon forum selection clause, it must present evidence indicating that the forum selection clause itself was obtained through fraud. HH&C has not met its burden.

³ If HH&C's position were the law, forum selection clauses would routinely be disregarded in cases involving *negotiated* contracts simply because the clause appears one-sided. Even in cases with no fraud, a party would disregard the clause, file in its chosen jurisdiction, and allege that the contract was one-sided and induced by fraud to avoid the clause. If the Court determined that the contract was one-sided, it would accept the allegations of fraud as true and rule that the clause was unenforceable. That is not the law. A one-sided clause in a contract is not evidence of fraud.

Third, whether or not the forum selection clause itself was negotiated is irrelevant to the issue of enforceability and is certainly not evidence of fraud. Courts routinely uphold forum selection clauses that were not themselves products of active negotiations. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum selection clause contained in form passenger ticket even though it was not the product of negotiation); *Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763, 768 (D.C. Cir. 1992) (same); *Vitricon, Inc. v. Midwest Elastomers, Inc.*, 148 F.Supp.2d 245 (E.D.N.Y. 2001) (enforcing forum selection clause contained on back of pre-printed invoice, despite use of “boilerplate” language which was not subject to negotiation).

There is no evidence in this case that the inclusion of the agreed upon forum selection clause in the parties’ agreements was the product of fraud or coercion. The trial court’s denial of Appellant’s Motion to Dismiss should be reversed and the case should be dismissed.

III. APPELLANTS HAVE A SUBSTANTIVE RIGHT TO APPEAL THE TRIAL COURT’S DENIAL OF APPELLANTS MOTION TO DISMISS FOR IMPROPER VENUE BASED UPON THE AGREED UPON FORUM SELECTION CLAUSE.

HH&C argues that the Court should dismiss Appellants’ appeal without considering the merits based on HH&C’s allegation that Appellants have, among other things, repeatedly disobeyed the trial court orders and refused to recognize the jurisdiction of the Utah courts. In particular, HH&C argues that under Utah law, an appellate court has the authority and discretion to stay or dismiss an appeal taken from an

appellant who is in contempt by failing to obey the trial court's orders. HH&C's argument is misplaced.

First, courts routinely hold that a party has a right to appeal the trial court's denial of its motion to dismiss for improper venue based upon a jurisdiction or venue selection clause in a contract. For example, in *Cable Tel Services, Inc. v. Overland Contracting, Inc.*, 574 S.E.2d 31 (N.C. Ct. App. 2002), the court held that "case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantive right that would be lost." *Id.* at 33; *see also L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 502 S.E.2d 415, 417 (N.C. Ct. App. 1998) (courts have held "the denial of a motion to dismiss for improper venue based upon a forum selection clause to be properly appealable"); *Triple Quest, Inc. v. Cleveland Gear Company, Inc.*, 627 N.W.2d 379, 381 (N.D. 2001) ("Courts have held . . . that dismissal of an action to enforce a forum selection clause directing litigation to be conducted in another jurisdiction is an appealable order . . .") (citing numerous cases).

This Court has similarly held that "the parties have a legal right to insist that the action proceed in the proper venue . . . It is a right personal to the defendant to have his cause tried in the court of proper venue. . ." *State v. Sosa*, 598 P.2d 342, 344 (Utah 1979). This substantive right that preexists any alleged disobedience to court orders in the present action should not lightly be ignored by the Court. In fact, Appellants sought

dismissal of the action for lack of jurisdiction and improper venue on August 15, 2001, only thirteen days after HH&C filed their Complaint on August 2, 2001. Appellants has consistently fought to have this case removed to its proper and agreed upon venue in the British Virgin Islands.

Second, HH&C attempts to characterize Appellants' failure to adhere to the trial court's orders as willful disobedience to those orders. The trial court's orders were made after the court had denied Appellants' Motion to Dismiss for lack of venue. At that point, Appellants were convinced that the trial court had abused its discretion by wrongly concluding that venue was proper in Utah. Instead of actively participating in an action that they were convinced was improperly before the Utah trial court, Appellants were willing to stake their defense on the agreed upon forum selection clause and did not participate substantively in any further proceedings in the case. The result was the court's entry of an uncontested summary judgment against Appellants. HH&C has pointed to no case law that demonstrates under the facts of this case that Appellants have now somehow lost their right to appeal. Appellants should be allowed to maintain this appeal in order for this Court to determine whether the trial court improperly held that venue is proper in this jurisdiction.

CONCLUSION


For the reasons set forth above and in Appellants' Opening Brief, the trial court erred in refusing to enforce the agreed upon forum selection clause contained in the

parties' agreements. The trial court's denial of Appellants' Motion to Dismiss should be reversed.

RESPECTFULLY SUBMITTED this 15th day of August, 2003.

HATCH, JAMES & DODGE

By:

A handwritten signature in black ink, appearing to read "Mark H. Richards", written over a horizontal line.

Brent O. Hatch
Mark H. Richards

Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS to be placed in the United States Mail first class postage pre-paid on the

15 day of August, 2003 addressed to the following:

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