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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PAUL RYAN ASSOCIATES,

**Cross-Complainant and
Appellant,**

v.

WELCH MARBLE & TILE, INC.,

Cross-Defendant and Respondent.

A137177

**(San Francisco County
Super. Ct. No. CGC-10-504430)**

Paul Ryan Associates (Ryan Associates) appeals from an order quashing service of its cross-complaint against respondent Welch Marble & Tile, Inc. (Welch) in this construction defect action. Ryan Associates contends the court erred because Welch had consented to personal jurisdiction in California when it entered into a subcontract that purportedly incorporated a term from another contract – between Ryan Associates and the owner of the construction project – which stated that those parties would litigate in San Francisco.

We will affirm the judgment. The forum selection clause, even if it were incorporated into the subcontract, did not subject Welch to personal jurisdiction in California since, among other things, it did not refer to litigation with subcontractors or even mention personal jurisdiction. Furthermore, the forum selection clause was unreasonable as applied to Welch under the circumstances presented to the court.

I. FACTS AND PROCEDURAL HISTORY

This litigation arises from a project to build a residence in Hawaii. The owner of the project is Thomas Weisel, a California resident, who hired Ryan Associates, a California corporation, to be the general contractor. Ryan Associates thereafter subcontracted work to multiple subcontractors in Hawaii, including respondent Welch, a Hawaii corporation. The issue of personal jurisdiction turns on the language in the General Contract between Weisel and Ryan Associates, and the subcontract between Ryan Associates and Welch.

A. *General Contract Between Weisel and Ryan Associates*

In August 1999, Weisel and Ryan Associates entered into a contract entitled “Standard Form of Agreement Between Owner and Contractor” for construction of the project (General Contract). The contract, based on a standard industry form (“AIA Document A111”), consisted of 14 pages. Attached to this contract and made a part thereof is a document entitled “General Conditions of the Contract for Construction.” This document is also on an industry form (“AIA Document A201”) and consists of many pages of provisions, mostly in a two-column format with small print.

Included in the General Contract is “Attachment No. 4,” which purports to insert provisions into “AIA Document A111.” On the last page of this attachment, nearly at the end of the General Contract, is Paragraph 24.3.3.

Paragraph 24.3.3 of the General Contract is entitled “Attorney’s Fees and Costs.” But it also contains some language pertaining to the location of prospective lawsuits between Weisel and Ryan Associates. Paragraph 24.3.3 reads: “If either Owner [Weisel] or Contractor [Ryan Associates] brings any suit or other proceeding with respect to the subject matter or the enforcement of this Agreement, the prevailing party (as determined by the court, agency, or other authority before which such suit or proceeding is commenced), in addition to such other relief as may be awarded, shall be entitled to recover reasonable attorneys’ fees, expenses, and costs of investigation actually incurred. The foregoing includes, without limitations, attorney’s fees, expenses, and costs of investigation incurred in appellate proceedings, costs incurred in

establishing the right to indemnification, or in any action or participation in, or in connection with, any case or proceeding under Chapter 7, 11, or 13 of the Bankruptcy Code, 11 United States Code Section 101 et seq., or any successor statutes. [¶] Owner [Weisel] and Contractor [Ryan Associates] agree that any dispute which may arise from the performance of this contract shall be subject to resolution pursuant to California law. *Furthermore, should any dispute arise resulting in arbitration or litigation, the proceeding will take place in San Francisco, California.*” (Italics added.)

B. *Ryan Associates’ Subcontract with Welch*

In 2000, Welch entered into a subcontract with Ryan Associates to supply labor and materials in regard to specified work for the Hawaii project.

As mentioned, Welch is a Hawaii corporation. It is not registered to do business in California, has no offices or employees in California, and does not perform contracting work in California. There is no contention in this appeal that Welch had contacts with California sufficient for the exercise of personal jurisdiction.

The subcontract between Welch and Ryan Associates does not contain any provision by which the parties explicitly consent to, or agree upon, jurisdiction, venue, or any particular “forum” in the case of litigation. Nor does the subcontract contain anything like Paragraph 24.3.3 of the General Contract. The only reference to a location for litigation appears in Paragraph 17 of the subcontract, which is actually entitled “ARBITRATION.” Paragraph 17 provides that Ryan Associates may demand that subcontractors become a party to an arbitration between Ryan Associates and Weisel, that certain disputes arising out of the subcontracts may be subject to arbitration, but that Ryan Associates may elect to have certain disputes *litigated* only “in a Court of Law where all parties can be joined.”¹

¹ Paragraph 17 reads: “ARBITRATION: If the *Prime* Contract calls for arbitration, and an arbitration concerning or relating to Subcontractor’s work and/or materials is commenced between Owner and Contractor, Subcontractor will, on demand of Contractor, become a party to such arbitration proceedings and shall submit to any award that may be rendered therein. Subject to the foregoing, if any questions arise regarding the work required and/or materials supplied under this subcontract, or

Paragraph 2 of the subcontract purports to incorporate by reference the terms of the General Contract. Paragraph 2 provides: “Subcontractor [Welch] agrees that he has read or is familiar with the General Contract and all the terms, conditions, modifications, plans and specifications thereof, and that he will abide by and comply with, each and all of the same, and agrees that all are included as a part of this subcontract.” In addition, Paragraph 15 of the subcontract provides in part that the “entire contract between Subcontractor [Welch] and Contractor [Ryan Associates] is embodied in the terms and conditions of this contract together with any supplemental document, specifications, drawings, notes, instruction, engineer’s notices or technical data referred to herein.”

C. The Litigation

In October 2010, Weisel filed this litigation in San Francisco Superior Court, seeking damages from Ryan Associates and others for alleged defects in the design and construction of the project. Weisel did not name Welch as a defendant.

In June 2011, Ryan Associates filed a cross-complaint against nine subcontractors, eight of whom were from Hawaii. Ryan Associates later added Welch as Roe 1. In essence, Ryan Associates alleged that Welch and others breached contractual duties to defend and to obtain insurance, and that Ryan Associates was entitled to equitable contribution and indemnity.

Welch filed a motion to quash the service of the cross-complaint, contending it was not subject to jurisdiction in California and no forum selection clause was enforceable against it. Ryan Associates opposed the motion, contending that the purported forum selection clause in the General Contract (Paragraph 24.3.3) was

regarding the rights and obligations of Contractor and Subcontractor, under the terms of this subcontract or the *General Contract Documents*, such question shall be subject to arbitration, provided however, if the work involves the Owner to participate in such arbitration, then Contractor may elect to have the dispute litigated in a Court of Law where all parties can be joined. . . .” (Italics added.) It is not explained why Paragraph 2 of the subcontracts refers to the “General Contract,” and Paragraph 17 refers to the “Prime Contract” as well as the “General Contract.”

incorporated into Welch's subcontract and binding on Welch as a reasonable consent to jurisdiction.

In September 2012, the court granted Welch's motion to quash by written order. The court concluded: "Cross-Complainant fails to establish that Cross-Defendant has minimum contacts with California to warrant personal jurisdiction or that Cross-Defendant consented to California jurisdiction through the subcontract, which incorporated the prime contract. There is nothing in the prime contract to indicate that the forum selection clause applies to subcontractors."

This appeal followed.² (See Code Civ. Proc., § 904.1, subd. (a)(3) [order granting motion to quash is appealable order].)

II. DISCUSSION

Ryan Associates argues that Welch consented to personal jurisdiction in California by signing a subcontract that incorporated the terms of the General Contract, which included Paragraph 24.3.3, by which Ryan Associates and Weisel agreed that California law would apply to their disputes and a lawsuit between them would be held in San Francisco. We have addressed Ryan Associates' contentions twice in this litigation as to other subcontractors, both times finding the contentions unpersuasive. Consistent with our rulings in those cases, we conclude here that the provisions of the subcontract and General Contract did not constitute a consent by Welch to personal jurisdiction in California, and enforcement of the purported forum selection clause against Welch would be unreasonable under the facts of the case. Because of our extensive discussion in our opinions in appeal numbers A134235 and A136052, our discussion in this opinion is abbreviated.

² Ryan Associates cross-complained against other subcontractors, including Dorvin D. Leis Company, Inc., and Hawaiiana Painting & Maintenance, Inc., both of whom also filed motions to quash. The trial court granted these motions, and we affirmed the rulings in appeal numbers A134235 and A136052, respectively.

A. *Contract Interpretation: Welch Did Not Consent to Personal Jurisdiction*

For purposes of this appeal, we will assume that Welch’s subcontract, by its Paragraph 2, incorporates by reference the terms of the General Contract, including Paragraph 24.3.3. Paragraph 24.3.3, however, does not constitute a consent by Welch to personal jurisdiction in California for two reasons: (1) the paragraph does not expressly apply to subcontractors like Welch; and (2) the paragraph does not expressly discuss personal jurisdiction.

1. *Paragraph 24.3.3 Does Not Refer to Subcontractors*

In Paragraph 2 of the subcontract, Welch agreed that it would “abide by and comply with” the terms of the General Contract, and those terms were “included as a part of this subcontract.” One such term – Paragraph 24.3.3 – reads: “Owner [Weisel] and Contractor [Ryan Associates] agree that any dispute which may arise from the performance of this contract shall be subject to resolution pursuant to California law. *Furthermore, should any dispute arise resulting in arbitration or litigation, the proceeding will take place in San Francisco, California.*” (Italics added.)

The effect of the incorporation of Paragraph 24.3.3 into Welch’s subcontract is subject to two interpretations. On the one hand, Welch agreed it would “abide by and comply with” the term that, as to “any dispute which may arise from the performance of this [General Contract],” arbitration or litigation “will take place in San Francisco, California.” This could be interpreted to mean that Welch agreed that *any* litigation between Weisel and Ryan Associates – even if Welch became a part of it – would take place in California, and Welch therefore submitted to the California forum too.

On the other hand, it could be also concluded from the contractual language that Welch acquiesced in the agreement between Weisel and Ryan Associates that any litigation *between Weisel and Ryan Associates* would take place in California, but because Paragraph 24.3.3 nowhere mentioned a venue or forum for *subcontractors*, Welch did not consent that it too would be bound to litigate in California.

Since the language of the contractual provisions is reasonably susceptible of both of these interpretations, the language is ambiguous. Contrary to Ryan Associates’

argument, the ambiguity is not resolved by Paragraph 5.3.1 of the General Contract, since the vitality of Paragraph 5.3.1 is expressly conditioned on there being a separate “agreement,” which never came into existence.³ Nor is the ambiguity resolved by any tenet of contractual interpretation raised by the parties, and no extrinsic evidence on the issue was presented in the trial court. We must therefore resolve the ambiguity pursuant to Civil Code section 1654, interpreting the language most strongly against the party who caused it to exist. That party was Ryan Associates, since it was Ryan Associates – not Welch – that drafted Paragraph 24.3.3. Resolving the ambiguity in Welch’s favor, Paragraph 24.3.3 does not apply to Welch, and it therefore does not constitute any consent by Welch to the litigation proceeding in San Francisco. On this basis, the court did not err in granting Welch’s motion to quash.

2. *Paragraph 24.3.3 Does Not Refer to Personal Jurisdiction*

Even if Paragraph 24.3.3 did apply to Welch, it still would not subject Welch to the personal jurisdiction of California courts for another reason: the paragraph does not mention anything about personal jurisdiction. To the contrary, it merely specifies that arbitration or litigation will take place in San Francisco, California. A forum selection clause alone, however, is generally insufficient to confer personal jurisdiction over a defendant. (*Global Packaging, Inc. v. Superior Court* (2011) 196 Cal.App.4th 1623, 1632-1633 (*Global Packaging*).

Ryan Associates’ attempts to distinguish *Global Packaging* are unavailing. First, it asserts that *Global Packaging* involved an adhesion contract; but the adhesive

³ Paragraph 5.3.1 states: “*By appropriate agreement*, written where legally required for validity, the Contractor [Ryan Associates] shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and Architect. . . . The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Contractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract.”

nature of the contract was barely mentioned in *Golden Packaging*, and it was *not* the basis of the court’s distinction between personal jurisdiction clauses and forum selection clauses. (*Golden Packaging, supra*, 196 Cal.App.4th at p. 1632.) Second, Ryan Associates argues, the agreement in *Global Packaging* specifically restricted itself to venue, while Paragraph 24.3.3 states that disputes “shall be subject to resolution pursuant to California law” and “the proceeding will take place in San Francisco, California.” The fact that Paragraph 24.3.3 provides for California law is not a distinction, however, since the clause in *Global Packaging* did too. (*Golden Packaging, supra*, 196 Cal.App.4th at p. 1627, fn. 3.) And while Paragraph 24.3.3 does not expressly limit itself to venue, the point is that it does not say anything about personal jurisdiction.

Ryan Associates’ reliance on *Berard Construction Company, Inc. v. Municipal Court* (1975) 49 Cal.App.3d 710 (*Berard*) is misplaced. *Berard* is distinguishable, since it did not address the question before us – whether a forum provision in a contract would subject a *third* party to personal jurisdiction in California simply because the third party signed a separate contract purporting to incorporate the terms of the primary contract. In addition, as explained in our opinions in appeal numbers A134235 and A136052, *Global Packaging* is more recent than *Berard* and, in our view, more thorough and persuasive.

In sum, whether or not Paragraph 24.3.3 applied to Welch, it did not constitute a consent by Welch to personal jurisdiction in California. The court did not err in granting Welch’s motion to quash.

B. Enforcing Paragraph 24.3.3 To Establish Jurisdiction Would Be Unreasonable

The trial court did not err in granting Welch’s motion to quash for another reason: it would be unreasonable to enforce Paragraph 24.3.3 against Welch under the circumstances of this case. (See *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19 [appellate court will uphold trial court order on any lawful ground].)

A forum selection clause will not be enforced if it is unreasonable under the facts of the case. (E.g., *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17

Cal.3d 491, 496; *Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 908.) Here, enforcement of Paragraph 24.3.3 as a forum selection clause against Welch, so as to subject Welch to personal jurisdiction where it otherwise would not exist, would be unreasonable. Although Paragraph 24.3.3 had some nexus to Weisel and Ryan Associates (since they are both from California), it had little if any nexus to Welch (a Hawaii company, with no business or office in California, working on a project in Hawaii). Nor did it give Welch adequate notice that Welch was submitting itself to the personal jurisdiction of the California courts. Certainly there was no express warning of such a consent, and while the subcontract stated that Welch knew or was familiar with the General Contract's terms, it would be unreasonable to expect Welch to infer a jurisdictional consent from Paragraph 24.3.3 under the circumstances. Welch would have to figure out that Paragraph 24.3.3 – placed near the end of a contract spanning roughly 50 pages, and entitled “Attorney’s Fees and Costs” – not only existed, but actually contained a provision regarding the location of litigation that might result from disputes. Then Welch would have to recognize that Paragraph 24.3.3, which addresses where Weisel and Ryan Associates will litigate their disputes but does not mention Welch, any other subcontractor, or even the word “subcontractor,” nonetheless applies to disputes with Welch too. Then Welch would have to discern that the provision, which does not state that anyone is submitting to personal jurisdiction, was subjecting Welch to personal jurisdiction in California. And this deduction might be quite elusive, for two reasons: Article 5 of the General Contract, entitled “Subcontractors,” does not mention anything about subcontractors submitting to personal jurisdiction in California or even litigating in California; and Paragraph 17 of the subcontract promises that Ryan Associates would bring litigation only in a court in which all parties can be joined, without any mention of California.

The court did not err in granting the motion to quash.

C. Ryan Associates’ Other Arguments

We have considered all of the other arguments presented in Ryan Associates’ appellate brief and find them all unconvincing.

Ryan Associates fails to establish error.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.