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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**GREEN HORIZON MANUFACTURING
LLC,**

Plaintiff and Appellant,

v.

MERIDIAN WORKING CAPITAL et al.,

Defendants and Respondents.

A138781

**(San Francisco County
Super. Ct. No. CGC 12-520787)**

Plaintiff Green Horizon Manufacturing, LLC (Green Horizon) appeals from an order staying its action against defendants Meridian Working Capital, LLC (MWC), Meridian PO Finance, LLC (MPOF) and Tim Irish (Irish) (collectively, defendants), based on a forum selection clause requiring the claims to be brought in Arizona. (Code Civ. Proc., § 904.1, subd. (a)(3).)¹ We affirm.

I. FACTS AND PROCEDURAL HISTORY

Green Horizon is a California limited liability company that designs and manufactures portable disaster relief housing and has its principal place of business in San Francisco, California. MWC is an Arizona limited liability company that provides other companies with capital needed to fulfill current or future purchase orders, primarily through short-term financing. MPOF is also an Arizona limited liability company. Tim

¹ Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Irish is the chief executive officer of both MWC and MPOF. Irish has a home in Chula Vista, California, and MWC has an office there.²

On May 14, 2010, Green Horizon signed a “Purchase Order Financing Loan and Security Agreement” with MWC (Agreement), under which MWC would provide financing to enable Green Horizon to obtain inventory from its suppliers. Under the terms of the Agreement, MWC would make advances to Green Horizon or its suppliers for products being sold to Green Horizon’s customers; when the customers received the products, they would be provided with an invoice directing payment to MWC. MWC would apply payments made by the buyer to the advance and any accrued interest and fees, and would remit the balance to Green Horizon. The interest rate specified in the agreement was .225 percent per day, to be increased to 200 percent of this rate after a default.

The recitals at the beginning of the Agreement include the following statement: “C. This Agreement is entered into and will be performed in the Controlling State.” Paragraph 1.6 of the Agreement defined the “Controlling State” as Arizona. Notices required under the Agreement were to be given to MWC at an address in Gilbert, Arizona.

A choice of law provision in paragraph 21.5 of the Agreement stated, “This agreement and all transactions contemplated hereunder and/or evidenced hereby shall be governed by, construed under, and enforced in accordance with the internal laws of the

² Green Horizon suggests in its opening brief that MWC is a company incorporated in California, an issue it also raised in the trial court. This assertion is contrary to allegations in the pleadings and evidence submitted in support of the motion to stay or dismiss, which includes a certificate showing MWC was an Arizona limited liability company in good standing and a declaration by Irish that states, “MWC was incorporated in Arizona on January 25, 2010. . . . [¶] . . . The company named Meridian Working Capital, LLC identified in the [declaration of Green Horizon’s counsel] . . . is not the party to the contract with Green Horizon that is at issue in this dispute. That company is a wholly distinct entity that was formed in California on April 27, 2009. It discontinued business and was closed on or around April 29, 2010, and it never filed a tax return. . . . That company did not have any business dealings with Green Horizon or any of its representatives.”

Controlling State.” A forum selection clause was set forth in paragraph 21.6: “The parties agree that any suit, action or proceeding arising out of the subject matter hereof, or the interpretation, performance or breach of this Agreement, shall, if [MWC] so elects, be instituted in the United States District Court for the District of the Controlling State in which [MWC]’s chief executive office is located or any court of said state (the ‘Acceptable Forums’), each party agrees that the Acceptable Forums are convenient to it, and each party irrevocably submits to the jurisdiction of the Acceptable Forums, irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement, and waives any and all objections to jurisdiction or venue that it may have under the laws of the Controlling State or otherwise in those courts in any such suit, action or proceeding. Should such proceeding be initiated in any other forum, [Green Horizon] waives any right to oppose any motion or application made by [MWC] as a consequence of such proceeding having been commenced in a forum other than an Acceptable Forum.”

Green Horizon filed a first amended complaint (FAC) in the San Francisco County Superior Court which named MWC, MPOF and Irish as defendants and attached a copy of the Agreement as Exhibit 1. Although the FAC alleges Green Horizon signed a second contract with MPOF, a copy of which is attached as Exhibit 2, that contract is not signed and the allegations in the FAC appear to pertain to the Agreement attached as Exhibit 1. The FAC sets forth causes of action for fraud and usury, requests an accounting of the loans made under the Agreement, seeks an injunction prohibiting foreclosure under a lien, and asks for declaratory relief on the theories asserted in the other causes of action. It alleges MPOF has taken over all the assets and liabilities of MWC and is its successor in interest.

Defendants filed a motion to dismiss or stay the action under sections 410.30 and 418.10, subdivision (a)(2) (see *Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 358 (*Berg*)), arguing the Agreement required the action to be brought in Arizona rather than California. Green Horizon opposed the motion, arguing the proper forum was California because the Agreement required the action to be commenced “in

the United States District Court for the District of the Controlling State in which [MWC]’s chief executive office is located,” and the chief executive office of MWC was located in Chula Vista, California, where Irish lived and had his office. Green Horizon alternatively argued the Agreement was ambiguous and should be interpreted against defendants, that defendants had failed to demonstrate California was an inconvenient forum, and that it would violate public policy to litigate the case in Arizona, which “basically has no usury laws.” It urged the court to allow the fraud cause of action to remain in California even if the remainder of the action was dismissed or stayed, claiming the alleged fraud has nothing to do with the Agreement.

The trial court granted the motion and stayed the action. Its written order explained: “Plaintiff should have commenced this action in Arizona pursuant to pars. 1.6 and 21.6 of the contract. The contract is not ambiguous and Plaintiff’s interpretation of par. 21.6 is unreasonable. The language regarding the CEO’s office describes the federal district court in Arizona where a party should commence an action. The CEO language does not determine the ‘controlling state.’ The entire action, including the fraud cause of action, is stayed. The fraud claim is directly tied to the contract. Plaintiff failed to demonstrate that enforcement of the mandatory forum selection clause would be unreasonable under the present circumstances.”

II. DISCUSSION

Contractual forum selection clauses play an important role in national and interstate commerce by providing a degree of certainty for businesses and their customers that contractual disputes will be resolved in a particular forum. (*Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, 588.) “While it is true that the parties may not *deprive* courts of their jurisdiction over causes by private agreement [citation], it is readily apparent that courts possess discretion to *decline* to exercise jurisdiction in recognition of the parties’ free and voluntary choice of a different forum. . . . [¶] No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm’s length. . . . [F]orum selection clauses are valid and

may be given effect, in the court’s discretion and in the absence of a showing that enforcement of such a clause would be unreasonable.” (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495-496.)

When no conflicting extrinsic evidence has been presented, the interpretation of a forum selection clause is a legal question we review de novo. (*Animal Film, LLC v. D.E.J. Productions, Inc.* (2011) 193 Cal.App.4th 466, 471.) Here, paragraph 1.6 of the Agreement defines the “Controlling State” as Arizona. Paragraph 21.6 requires that any suit arising from the Agreement “shall, if [MWC] so elects, be instituted in the United States District Court for the District of the Controlling State in which [MWC]’s chief executive office is located or any court of said state[.]” In other words, an action arising from the Agreement must be instituted in the United States District Court for the District of *Arizona* in which [MWC]’s chief executive office is located or any court of *said state*. The plain meaning of this clause is that litigation under the Agreement would take place in an Arizona court.

Green Horizon argues the forum selection clause requires a suit under the Agreement to be brought where MWC’s “chief executive office is located.” It submits MWC’s chief executive office was located in Chula Vista, California, rather than Arizona; hence, the forum selection clause actually requires the action to be brought in California. Green Horizon’s opposition shows Irish worked from Chula Vista, but it does not follow that Chula Vista was the site of the MWC’s “chief executive office.” And more importantly, Green Horizon’s interpretation of paragraph 21.6 as a reference to California completely disregards the Agreement’s specific definition of the “Controlling State” as Arizona. The only reasonable interpretation of paragraph 21.6 is that suit must be commenced in the federal district court in the district of *Arizona* where the chief executive office is located, or any court in *Arizona* (“said state”).³ This interpretation is also consistent with other provisions in the Agreement stating it was “entered into and

³ The United States District Court for the District of Arizona covers the entire state, but is divided into three divisions. (Rules of Practice, U.S. District Court, District of Arizona, Rule 77.1(a).)

would be performed in the Controlling State (Arizona);” that notices would be sent to an office in Arizona; and that the laws of the Controlling State (Arizona) would apply. None of these other provisions refer to MWC’s chief executive office and they would be incongruous with a forum selection clause requiring an action to be filed in California.

Green Horizon characterizes the Agreement as a contract of adhesion and argues any ambiguity in the forum selection clause should be construed against MWC as the drafter of the Agreement. We are skeptical this relatively sophisticated lending agreement between two business entities is one of adhesion, that is, “a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms.” (*Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 201 (*Intershop*); see *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758, 771.) In any event “[a] forum selection clause within an adhesion contract will be enforced ‘as long as the clause provided adequate notice to the [party] that [it] was agreeing to the jurisdiction cited in the contract.’ ” (*Intershop*, at pp. 201-202.) The forum selection clause is not ambiguous and provided notice to Green Horizon that Arizona would be the forum state.

Having determined Arizona is the forum designated in the Agreement, we next consider whether it would be unreasonable to enforce the forum selection clause. A mandatory forum section clause such as the one at issue here ordinarily is given effect without any analysis of convenience, unless enforcement of the clause would be unfair or unreasonable, or would bring about a result contrary to the public policy of the forum. (*CQL Original Products, Inc. v. National Hockey League Players’ Assn.* (1995) 39 Cal.App.4th 1347, 1354, 1358-1359 (*CQL*); *Berg, supra*, 61 Cal.App.4th at p. 358.)⁴ A party opposing the enforcement of a forum selection clause bears a “substantial burden” of proving the clause should not be enforced. (*CQL, supra*, 39 Cal.App.4th at p. 1354.)

⁴ Though the trial court did not expressly determine the clause was “mandatory” rather than merely “permissive,” courts have found clauses containing similar language to be mandatory. (*CQL, supra*, 39 Cal.App.4th at p. 1358 [“ ‘[A]ny claims arising hereunder shall, at the Licensor’s election, be prosecuted in the appropriate court of Ontario[, Canada]’ ”].) Green Horizon does not argue otherwise.

The question of whether a forum selection clause should be enforced is reviewed for abuse of discretion, and we find no abuse in this case. (*Trident Labs, Inc. v. Merrill Lynch Commercial Finance Corp.* (2011) 200 Cal.App.4th 147, 154; *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 9.) MWC is an Arizona limited liability company. Under the terms of the Agreement, MWC was to provide financing to Green Horizon's suppliers, who could have been located anywhere. While it might be easier for Green Horizon, a California company, to litigate the case in California, inconvenience or additional expense does not render a forum selection clause unreasonable. (*Berg, supra*, 61 Cal.App.4th at pp. 358, 359.)

Green Horizon argues the forum selection clause of the Agreement should not be given effect because it would violate California's strong public policy against usury. (See Cal. Const., art. XV, § 1.) We are not persuaded.

“The purpose of the usury law is “. . . to protect the necessitous, impecunious borrower who is unable to acquire credit from the usual sources and is forced by his economic circumstances to resort to excessively costly funds to meet his financial needs.” (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 804-805.) “Usury laws are designed to protect the public from sharp operators who would take advantage of “unwary and necessitous borrowers.” ” (*Park Terrace Limited v. Teasdale* (2002) 100 Cal.App.4th 802, 807.) California “has no strong public policy against a particular rate of interest so long as the charging of that rate is permitted by law to the specific lender.” (*Gamer v. DuPont Glove Forgan, Inc.* (1976) 65 Cal.App.3d 280, 287.) Courts “have treated commercial loan transactions in a special manner and have enforced contracts which are valid in the state of making and performance although they are usurious in the state of the forum[.]” (*Ury v. Jewelers Acceptance Corp.* (1964) 227 Cal.App.2d 11, 19 (*Ury*); see also *Seeman v. Philadelphia Warehouse Co.* (1927) 274 U.S. 403 [business was not precluded from agreeing to the law of a particular forum, even if that law would ostensibly violate the usury laws of the objecting parties' home state].)

Green Horizon has not provided us with any authority to support its threshold claim the usury laws of Arizona would provide less protection than the usury laws of

California, though it stated in its opposition papers below (again without any citation to authority) that under Arizona law, “[a]ny loan or forbearance is considered non-usurious if it is memorialized in a written agreement.” “[I]t is appellant’s burden to affirmatively show error. [Citation.] To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error.’ [Citations.]” (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1457.)

Even if we assume Arizona’s usury law would not apply to this transaction, this does not run afoul of California public policy. “That California does not have such a strong public policy against any and all contracts which would be usurious if they were made and to be performed here, appears from the fact that the constitutional prohibition of usury . . . exempts from its provisions banks, building and loan associations, industrial loan companies, credit unions, licensed pawnbrokers and personal property brokers, and several other kinds of lenders, and gives the Legislature the right to prescribe maximum limits for the exempted lenders. A strong public policy, based on a settled concept of justice or morality would not be meshed with such alterable rates as the Legislature might choose to impose.” (*Ury, supra*, 227 Cal.App.2d at p. 20.)

Green Horizon asserts in a cursory fashion that MWC violated the public policy effected by California’s Finance Lenders Law (Fin. Code, § 22000 et seq.) because MWC was not licensed to make loans in California. We reject the claim because the FAC did not include a cause of action for violation of the Finance Lenders Law. (Contrast *Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312, 1316 [Nevada choice-of-law provision not enforced in suit under Finance Lenders Law brought against Nevada lender by nonresident members of military living in California].)

Finally, Green Horizon argues its cause of action for fraud should not be stayed and should proceed in California because the forum selection clause only applies to claims “arising out of the subject matter hereof, or the interpretation, performance or breach of this Agreement.” We disagree.

As to the fraud cause of action, the FAC alleged one Don Chaon⁵ had approached Green Horizon about different types of lending programs; Green Horizon had said it was primarily interested in securing a \$2 million loan for “seed financing” in a bond program that could lead to up to \$400 million in capitalization; Chaon had introduced Green Horizon to Irish, who advised Green Horizon it should enter into a purchase order financing agreement to enhance its financial image for potential investors; Green Horizon entered into the Agreement based on this recommendation; Chaon and Irish later advised Green Horizon they had found a lender willing to make the \$2 million loan it sought; based on this representation, Green Horizon stopped working with other lenders; Chaon and Irish later told Green Horizon they did not have the lender for the \$2 million, a disclosure that came so late Green Horizon lost its opportunity to participate in the bond program; and Chaon and Irish had promised Green Horizon the \$2 million loan to induce it into entering the Agreement for the financing of purchase orders. “The true facts were that neither CHAON, IRISH nor [MWC] had any intention of providing the \$2,000,000 loan GREEN HORIZON sought. In fact, they had engaged in a classic bait and switch game. They told GREEN HORIZON that they would provide the seed money for the bond program, but in fact, intended only to induce GREEN HORIZON into entering the Loan Agreements for the financing of purchase orders.”

It is apparent from these allegations the fraud claim arises out of the Agreement, and the trial court did not err ruling it was governed by the forum selection clause. (See *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1676 [false promises allegedly made during course of negotiating contracts fell within scope of forum selection clause applying to “ ‘any case or controversy arising under or in connection with the Agreement[s]’ ”].)

We therefore affirm the trial court’s order staying the action based on the forum selection clause. We note that while the parties assume enforcement of the forum selection clause will inevitably lead to the application of Arizona law, the validity of the

⁵ Chaon was initially named as a defendant but has been dismissed from the action and is not a party to this appeal.

choice of law provision contained in paragraph 21.5 of the agreement was not raised in the trial court, has not been briefed by the parties, and is not directly before us. We therefore do not decide that issue here. Because no party has suggested we should apply the law of Arizona when interpreting the forum selection clause, we have relied on California law for our analysis of that issue, though it appears Arizona law is generally in accord. (*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 469, fn. 7; *Desarrollo Inmobiliario v. Kadar Holdings* (Ariz. App. 2012) 276 P.3d 1, 6-7.)

III. DISPOSITION

The order staying the action is affirmed. Defendants/respondents shall recover ordinary costs on appeal.

Needham, J.

We concur:

Jones, P.J.

Simons, J.