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IN THE COURT OF APPEALS OF INDIANA

Paul Svindland, Kathryn Wouters, Chase Welsh, and Jon Russell,

Appellants-Defendants,

v.

TA Dispatch, LLC,

Appellee-Plaintiff.

September 14, 2022

Court of Appeals Case No. 22A-CT-774

Appeal from the Hamilton Superior Court

The Honorable Jonathan M. Brown, Judge

Trial Court Cause No. 29D02-2109-CT-6291

Bradford, Chief Judge.

Case Summary

[1] Following the purchase of certain commercial interests from the Celadon Group, Inc. ("Celadon"), TA Dispatch, LLC ("TA Dispatch") sued former Celadon officers Paul Svindland, Kathryn Wouters, Chase Welsh, and Jon Russell (collectively, "Appellants"), alleging negligent misrepresentation of certain material facts, suppression of various material facts, and tortious interference with a contractual relationship. Appellants sought to invoke a forum-selection clause that was agreed to by the parties, and, pursuant to the forum-selection clause, requested that the matter be transferred to the Delaware state court system. This appeal stems from the denial of that request. Concluding that the forum-selection clause applies to TA Dispatch's lawsuit, we reverse and remand with instructions for the trial court to dismiss the matter without prejudice so that TA Dispatch can, if it so chooses, refile the underlying lawsuit in the forum agreed to by the parties, *i.e.*, Delaware.

Facts and Procedural History

[2] In April of 2019, TA Dispatch entered into an asset purchase agreement (the "Purchase Agreement") under the terms of which it agreed to purchase certain commercial interests from Celadon. With respect to potential remedies and or indemnification for losses incurred by the parties, the Purchase Agreement provided, in relevant part, as follows:

> 5.01 Indemnification.

(a) Subject to the limitations set forth in this Article 5, and without limiting the rights of Buyer under the R&W Policy, each of the Sellers hereby agrees, jointly and severally…, to indemnify and hold Buyer and its Affiliates, and each of their respective stockholders, partners, members, managers, directors, officers, employees, Affiliates, successors and assigns (collectively, the "Buyer Indemnified Parties") harmless from and against the aggregate of all expenses, losses, costs, deficiencies, liabilities, Taxes, penalties, damages and amounts paid in settlement (including related investigation costs and reasonable counsel, witness, paralegal and other professional fees and expenses) (collectively, "Losses") that are incurred or suffered by any of the Buyer Indemnified Parties *arising out of, relating to or resulting from*: (i) *any inaccuracy in or breach of a representation or warranty made by Sellers in or pursuant to this Agreement*; (ii) the ownership or operation of the Purchased Assets or the Business arising prior to the Effective Time; (iii) any non-fulfillment or breach of the covenants or agreements made by Sellers in or pursuant to this Agreement; (iv) any Excluded Liabilities; (v) any Seller Taxes; (vi) any broker, finder or investment banker fees of Sellers; and (vii) the matters disclosed on Schedule 2.08 (collectively, "Buyer Indemnifiable Damages").…

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5.09 Sole and Exclusive Remedy. Except as specifically provided elsewhere in this Agreement…, this Article 5 sets forth the sole and exclusive remedy with respect to any and all rights, claims and causes of action any party may have against any other party hereto *relating to the subject matter of this Agreement and the transactions contemplated hereby*, whether arising under or based upon any law or otherwise (including any right, whether arising at law or in equity, to seek indemnification, contribution, cost recovery, *damages, or any other recourse or remedy*, including as may arise under common law). Notwithstanding the foregoing or any other provision of this Agreement to the contrary, the liability of the parties under this Article will be *in addition to*, and not

> exclusive of, (a) any other liability that such Person may have at law or equity due to the fraud or criminal or intentional misconduct of such Person; and (b) any equitable relief to which a Person may be entitled relating to the breach of any covenant or agreement contained in this Agreement or the Ancillary Documents.

Appellants' App. Vol. II pp. 178; 184–85 (emphases added). The Purchase Agreement also included a forum-selection clause which provided that the parties agreed

> that jurisdiction and venue in any suit, action, or proceeding brought by any party seeking relief under or pursuant to this agreement shall properly and exclusively lie in any federal court (or, if such federal court does not have jurisdiction over such suit, action, or proceeding, in a state court) in Delaware.

Appellants' App. Vol. II pp. 194–95.

[3] On March 2, 2021, TA Dispatch filed suit against the Appellants in the Marion County Superior Court, alleging that Appellants engaged in: Count I – negligent misrepresentation of several facts relating to the sale of Celadon's commercial interests to TA Dispatch, Count II – statutory suppression of various relevant material facts, and Count III – tortious interference with a contractual relationship. Appellants subsequently filed a motion to transfer and dismiss. In this motion, Appellants asserted that the case should be transferred to the trial court because Hamilton County was the only county of preferred venue under Trial Rule 76. Appellants also asserted that given the forum-selection clause agreed to by the parties, proper venue for the case was in the

"courts of Delaware;" that Counts I and II should be dismissed for failure to allege misrepresentations or omissions with particularity, as required by Trial Rule 9(B); and that Count III should be dismissed because TA Dispatch failed to allege that they "are strangers to the transaction consummate by their employer, which is required to sustain a tortious interference claim." Appellants' App. Vol. II p. 66.

[4] At the agreement of the parties, the matter was subsequently transferred to the trial court. The trial court held hearings on the remaining portions of Appellants' motion to transfer and to dismiss. On January 24, 2022, the trial court denied both Appellants' motion to transfer the case to Delaware and Appellants' motion to dismiss TA Dispatch's complaint.

Discussion and Decision

[5] Appellants contend on appeal that the trial court erred in determining that the forum-selection clause did not apply to the underlying lawsuit. As the Indiana Supreme Court recently held,

> [p]arties to a contract are generally free to bargain for the terms that will govern their relationship. They can decide, among other things, what law will govern; whether disputes arising between them will be resolved publicly (in a court of law) or privately (in arbitration); and where any disputes will be resolved.

O'Bryant v. Adams, 123 N.E.3d 689, 692–93 (Ind. 2019).

[6] Appellants argue that they have standing to invoke the forum-selection clause under the transaction-participant doctrine. TA Dispatch concedes that "the transaction-participant doctrine" applies to the Appellants. Appellee's Br. pp. 10, 19–20. TA Dispatch argues, however, that the forum-selection clause does not apply because the underlying lawsuit raises tort claims that do not fall within the scope of the Purchase Agreement. Specifically, TA Dispatch asserts that the forum-selection clause "is not an all-embracing reference to any cause of action," but is limited to certain claims arising out of the contract and that the forum-selection clause "does not encompass TA Dispatch's claims." Appellee's Br. p. 11.

[7] The Seventh Circuit considered a similar claim in *American Patriot Insurance Agency, Inc. v. Mutual Risk Management, Ltd.*, 364 F.3d 884, 888 (7th Cir. 2004). In that case, the party trying to avoid application of the forum-selection clause argued that the disputes before the court were "not purely contractual disputes, because fraud [was] also charged" and that none of the defendants were "actually a party to the Shareholder Agreement." *Am. Patriot Ins.*, 364 F.3d at 888. The Seventh Circuit noted that the party's arguments were

> really the same argument, and amount to saying that a plaintiff can defeat a forum-selection clause by its choice of provisions to sue on, of legal theories to press, and of defendants to name in the suit. If this were true, such clauses would be empty. It is not true.

Id. In finding that the forum-selection clause applied, the Seventh Circuit held that

> As for the fact that the defendants are charged with fraud rather than breach of contract, this can get the plaintiff nowhere in its efforts to get out from under the forum-selection clause. Not only does the clause refer to disputes concerning the contractual relationship between the parties, however those disputes are characterized. More important, a dispute over a contract does not cease to be such merely because instead of charging breach of contract the plaintiff charges a fraudulent breach, or fraudulent inducement, or fraudulent performance. The reason is not that contract remedies always supersede fraud remedies in a case that arises out of a contract; sometimes they do, sometimes they don't. It is that the existence of multiple remedies for wrongs arising out of a contractual relationship does not obliterate the contractual setting, does not make the dispute any less one arising under or out of or concerning the contract, and does not point to a better forum for adjudicating the parties' dispute than the one they had selected to resolve their contractual disputes.

Id. at 889 (internal citations omitted).

[8] The Court of Chancery of Delaware has also concluded that

> Courts in Delaware and other jurisdictions have found that a forum selection clause should not be defeated by artful pleading of claims not based on the contract containing the clause if those claims grow out of the contractual relationship. That rule not only prevents parties from escaping their contractual commitments to adjudicate their disputes in a particular forum but also allows the court to police the important boundary between the application of contract and tort doctrines. Tort claims related to a contractual relationship frequently require a determination of the contract's scope and of how the rights and duties created by that contract interact with the parties' general tort duties—questions that are typically freighted with public policy concerns.

Ashall Homes Ltd. v. ROK Ent. Grp. Inc., 992 A.2d 1239, 1252–53 (Del. Ch. 2010) (cleaned up). Also, in rejecting a claim that a forum-selection clause should not apply because the plaintiff was asserting tort, rather than contract claims, the United States Court of Appeals for the Tenth Circuit held that the public policy purpose of forum-selection clause enforcement "is especially important where 'claims grow out of the contractual relationship or if "the gist" of those claims is a breach of that relationship.'" *Kelvion, Inc. v. PetroChina Canada Ltd.*, 918 F.3d 1088, 1094 (10th Cir. 2019) (quoting *BMR & Assocs., LLP v. SFW Cap. Partners, LLC*, 92 F. Supp. 3d 128, 136 (S.D.N.Y. 2015)).

[9] We acknowledge that TA Dispatch argues that forum-selection clauses may, under certain circumstances, be limited to certain types of claims when expressly stating so. While it is true that parties could contract to limit the types of claims covered by a forum-selection clause, the forum-selection clause agreed to by the parties in this case does not contain any expressly limiting language. In this case, the forum-selection clause agreed to by the parties applies to "any suit, action or proceeding brought by any party seeking relief under or *pursuant to*" the Purchase Agreement. Appellants' App. Vol. II pp. 194–95 (emphasis added). The term "pursuant to" means "in the course of carrying out: in conformance to or agreement with: according to." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1848 (Phillip Babcock Gove et al. eds., G.&C. Merriam Company 1964).

[10] Further, Article 5 of the Purchase Agreement sets forth agreements relating to indemnification for all claims arising out of or relating to the Purchase

Agreement, not just contract claims. For example, Section 5.01 of the Purchase Agreement provides that Celadon agreed to indemnify TA Dispatch for claims "*arising out of, relating to or resulting from*: (i) *any inaccuracy in or breach of a representation or warranty made by Sellers in or pursuant to this Agreement*." Appellants' App. Vol. II p. 178 (emphasis added). Section 5.09 of the Purchase Agreement indicates that Article 5 includes the sole and exclusive remedy for

> all rights, claims and causes of action any party may have against any other party hereto *relating to the subject matter of this Agreement and the transactions contemplated hereby*, whether arising under or based upon any law or otherwise (including any right, whether arising at law or in equity, to seek indemnification, contribution, cost recovery, *damages, or any other recourse or remedy*, including as may arise under common law).

Appellants' App. Vol. II p. 184 (emphases added). The above-quoted language demonstrates that the parties contemplated the possibility that claims other than contract claims (*i.e.*, tort claims) might arise from or pursuant to the Purchase Agreement. TA Dispatch's claims, which alleged inaccurate representations made during the negotiation of the Purchase Agreement that were allegedly relied on by TA Dispatch in agreeing to the Purchase Agreement, undoubtedly relate to the subject matter of the Purchase Agreement and the sale of the Celadon property. TA Dispatch's claims were therefore brought pursuant to the Purchase Agreement and are covered by the forum-selection clause.

[11] Appellants have invoked the forum-selection clause and the underlying lawsuit should be heard in the forum agreed to by the parties, *i.e.*, the Delaware courts.

On remand, we instruct the trial court to grant the Appellants' motion to dismiss without prejudice so to allow TA Dispatch the opportunity to refile the case in Delaware, if it should so choose.

[12] We reverse and remand to the trial court with instructions.

Mathias, J., and Pyle, J., concur.