2012 IL App (1st) 111977-U

THIRD DIVISION
May 30, 2012

No. 1-11-1977

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ADVANCE STEEL ERECTION, INC., an Illinois Corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 11 CH 7771
DESIGN DATA CORPORATION, a Nebraska Corporation,	)	Honorable LeRoy K. Martin, Jr., Judge Presiding.
Defendant-Appellee.	)	

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court properly granted defendant's motion to transfer venue to Nebraska pursuant to a forum selection clause contained in the parties' valid and fully executed software license agreement that plaintiff failed to show was unreasonable to enforce under the circumstances.

¶ 2 Plaintiff Advance Steel Erection, Inc. (Advance Steel) appeals from an order of the circuit court of Cook County granting defendant Design Data Corporation's (Design Data) motion to transfer venue to Lancaster County in Nebraska filed pursuant to sections 2-102,

2-104, 2-106, and 2-107 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-102, 2-104, 2-106, 2-107 (West 2010)). Design Data invoked a forum selection clause contained in a fully signed software license agreement providing for Nebraska as the exclusive forum in litigating disputes stemming from the agreement as the basis for its motion. On appeal, Advance Steel argues that the license agreement is unenforceable for lack of consideration, because it was executed after Advance Steel paid for and received the software. Advance Steel also argues that even if the agreement is deemed valid, the forum selection clause is unreasonable and should not be enforced under the circumstances, particularly that it lacked the opportunity to negotiate the clause. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Advance Steel is an Illinois corporation engaged in construction and doing business in Cook County, Illinois. Design Data is a Nebraska corporation that designs software and licenses its software, including to entities in the construction industry, and maintains its principal place of business in Lincoln, Nebraska. Design Data has no person or entity from Illinois distributing its products in the state. Design Data's registered agent is also located in Nebraska. Advance Steel and Design Data maintain offices solely in Illinois and Nebraska, respectively. On or about April 19, 2007, Dino Pertsalis, Advance Steel's general manager, met Michelle Eret, a Design Data sales representative, in New Orleans, Louisiana. According to Advance Steel, Pertsalis explained Advance Steel's operations and use for detailing software to her during the meeting. Advance Steel also contends Eret recommended Advance Steel purchase certain software (SDS/2) from Data Design. On April 26, 2007, Advance Steel received an invoice from Design

Data and paid $41,000 by credit card (American Express) to Design Data for the recommended software. The software was delivered to Advance Steel on the same date. Subsequent to the delivery of the software, Advance Steel received a paper copy of a license agreement from Data Design. The license agreement contained a forum selection clause and choice of law provision stating in pertinent part:

> "15. CONTROLLING LAW AND VENUE
>
> This Agreement shall be governed and construed pursuant to the laws of the State of Nebraska. Any litigation arising out of the Agreement shall be initiated in the State of Nebraska as the exclusive venue."

On May 8, 2007, Pertsalis signed the license agreement on Advance Steel's behalf and returned it to Design Data. H. James Dager, Design Data's president, executed the license agreement on May 11, 2007.

¶ 5 At some point after receiving the software, Advance Steel began experiencing problems with the software in or about May 2007. In or about August 2008, Advance Steel requested a full refund from Design Data in exchange for returning the software to Design Data. In September 2008, Advance Steel returned the software to Design Data. According to Advance Steel, the parties subsequently negotiated a refund of the purchase price, but no agreement was reached and Design Data stopped responding to Advance Steel's communications.

¶ 6 On March 1, 2011, Advance Steel filed a three-count verified complaint in the circuit court of Cook County, Illinois seeking the following relief from Design Data: rescission of the contract for breach of express warranty (count I); breach of implied warranty (count II); and fraud

(count III). A copy of the April 26, 2007, invoice and a verification pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2010)) signed by Pertsalis were attached to the verified complaint. On March 29, 2011, Design Data filed a motion for an extension of time until May 2, 2011, to plead in response to the verified complaint. However, on April 11, 2011, Design Data withdrew the motion for an extension of time to respond and filed a motion to transfer venue of the cause to Lancaster County in Nebraska pursuant to sections 2-102, 2-104, 2-106, and 2-107 of the Code based upon the forum selection clause contained in the parties' license agreement. In support of its motion to transfer venue, Design Data attached a copy of the license agreement and an affidavit.[1]

¶ 7 On May 9, 2011, Advance Steel filed its response in opposition to the motion to transfer venue asserting: (1) the license agreement executed after delivery of the software was a separate agreement for which consideration was warranted and lacking; and (2) even if the license agreement was valid, the forum selection clause was unreasonable and should not be enforced. Advance Steel also attached an affidavit from Pertsalis in support of its objection to Design Data's motion.

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[1]The affiant's first name is Michelle; however, the last name is not legible from the signature on the affidavit contained in the record (which also does not print the affiant's full name elsewhere in the document). Based upon the assertion in the affidavit about the location of the parties' meeting on or about April 19, 2007, which is also mentioned in Perstalis's affidavit attached to the verified complaint, this court will presume the affiant is the same Michelle Eret who met with Pertsalis.

¶ 8 On June 3, 2011, Design Data filed a reply in support of its motion, with the affidavit of Douglas Evans attached thereto. In the affidavit, Evans averred, among other things, that software users were required to execute a paper copy of the license agreement in addition to clicking an "I Accept" button to an electronic copy of the license agreement before each use of the software. Additionally, Evans stated the electronic version of the license agreement is "identical in every respect" to the agreement signed by the parties and attached as an exhibit to Design Data's motion to transfer venue.

¶ 9 On June 1, 2011, the circuit court set a hearing for June 10, 2011. After the parties fully briefed the motion and oral argument was heard from the parties, the circuit court entered an order granting Design Data's motion and transferred venue to Lancaster County in Nebraska.[2]

¶ 10 On July 7, 2011, Advance Steel filed a timely notice of appeal to this court.

¶ 11 DISCUSSION

¶ 12 Standard of Review

¶ 13 Before discussing the merits of the instant appeal, we first examine the appropriate standard of review for a circuit court's grant or denial of a motion to transfer venue. The parties disagree on how the motion to transfer should be viewed and the relevant standard of review. In civil cases, we review appeals from circuit court orders entering final judgments, provided the notice of appeal is filed within 30 days after a given judgment's entry. Ill. S. Ct. R. 303(a)(1)

[2]In the order, the circuit court also denied Design Data's request to schedule a hearing regarding its request for attorney fees pursuant to an indemnity clause in the license agreement. The indemnity claim is not an issue before us on appeal.

(eff. June 4, 2008). A defendant has a right to insist upon litigating a cause in the proper forum, provided that the party makes a timely objection to the venue. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 154 (2005) (citing *Williams v. Illinois State Scholarship Comm'n*, 139 Ill. 2d 24, 52-53 (1990)). Advance Steel contends Design Data's motion to transfer was the procedural equivalent of and should be treated as a motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)), presenting a question of law requiring us to conduct a *de novo* review (*Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006); *Federated Industries, Inc. v. Reisin*, 402 Ill. App. 3d 23, 27 (2010)). A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint's allegations, but raises defects, defenses or other affirmative matters defeating the action. *Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d 434, 438 (2011). This court accepts all well-pleaded facts and interprets pleadings and supporting documents in the light most favorable to the plaintiff. *Id.*

¶ 14 Design Data, on the other hand, insists that its motion to transfer is not the "procedural equivalence" of a motion to dismiss. Rather, Design Data urges this court to employ a dual standard of review as the motion to transfer venue presents separate questions of fact and law. In support of its contention, Design Data cites our supreme court's decision in *Corral*, 217 Ill. 2d at 153-54. Yet, after noting the absence of a transcript of the proceedings, which we discuss in more detail below, Design Data asserts that a *de novo* standard of review applies here since the circuit court resolved disputed factual issues based upon the testimony in the affidavits contained in the record and effectively dismissed the case by transferring venue to Nebraska. As *Corral* is instructive, we will follow our supreme court's analysis in reviewing Design Data's motion to

transfer venue given the record before us.

¶ 15 In adjudicating a motion to transfer venue, the trial court's determination involves making findings of facts and concluding whether, as a matter of law, venue is in the proper forum. *Corral*, 217 Ill. 2d at 153 (citing *Lake County Riverboat L.P. v. Illinois Gaming Board*, 313 Ill. App. 3d 943, 951 (2000) (citing *ServiceMaster Co. v. Mary Thompson Hospital*, 177 Ill. App. 3d 885, 891-95 (1988))). A circuit court's findings of fact are given deference and will not be disturbed on review unless those findings are against the manifest weight of evidence. *Corral*, 217 Ill. 2d at 154. A finding is against the manifest weight of the evidence " 'when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence.' " *Corral*, 217 Ill. 2d at 155 (quoting *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002)). Our review of the circuit court's conclusions of law is *de novo*. *Id*. A *de novo* review means that we perform the same analysis as the circuit court (*Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011)), unconstrained by the circuit court's reasoning (*John E. Reid v. Wicklander-Zulawski & Associates*, 255 Ill. App. 3d 533, 538 (1993)).

¶ 16 However, our analysis, based upon the record before us, does not end there. We note that the circuit court's order in the record before us only contains the circuit court's decision to grant Design Data's motion and transfer venue to Nebraska. In pertinent part, the circuit court's order provides:

> "1. That the motion to transfer venue is hereby granted.
>
> 2. That this cause shall be transferred to Lancaster County, Nebraska."

The order contains no specific findings of fact made by the circuit court.

¶ 17 As Design Data indicates, the record contains no transcript of the proceedings from the hearing on the motion before the circuit court judge for us to consider and review any findings of fact. Design Data asserts that the circuit court resolved disputed issues of fact based upon the testimony in the affidavits attached to the parties' pleadings. Since the record contains no transcript of the proceedings and the circuit court's order granting the motion in the record states only its conclusion regarding the disposition of the motion, we cannot say with certainty what findings of fact the trial court made in reaching its conclusion to grant Design Data's motion**.**

¶ 18 The appellant has the burden of providing an adequate record for review of the lower court's proposed errors. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "Any doubts arising from the inadequacy of the record will be resolved against the [appellant]." *Id.* In the absence of a report of proceedings, this court presumes the circuit court's holding is based upon sufficient facts and its order conforms with the law. *Id.* at 392. Design Data does not insist this court is unable to consider the merits of the appeal given the lack of a transcript of proceedings of the June 10, 2011, hearing or some record of the circuit court's factual findings. See Ill. S. Ct. Rs. 323(c), (d) (eff. Dec. 13, 2005) (parties can submit certified bystander's report or agreed statement of facts in the absence of a transcript of proceedings). Where there is no dispute regarding the facts relied upon by the circuit court in reaching its determination, the proper standard of review is *de novo*. *Corral*, 217 Ill. 2d at 153.

¶ 19 Even where the record on appeal is incomplete, the reviewing court may still consider the merits on appeal in reaching an adequate decision where the record contains sufficient information necessary to dispose of the issues presented in the appeal. *Luss v. Village*

of Forest Park, 377 Ill. App. 3d 318, 331 (2007); see also *Gonella Baking Co. v. Clara's Pasta Di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003) (review of trial court's ruling on a motion to dismiss in absence of transcript of the hearing on the motion, reasoning that the pleadings and supporting documents in the record were sufficient for reviewing court's decision). We find the absence of a report of proceedings, certified bystander's report, or agreed statement of facts does not preclude our review of the appeal's merits as the record sufficiently contains Design Data's motion, the license agreement at issue,[3] the parties' pleadings in support of and in opposition to the motion, along with attachments, presented to the circuit court to allow this court to dispose of the issues.

¶ 20 Moreover, Advance Steel's arguments challenge the formation and interpretation of a contract, both of which present questions of law for this court that are reviewed *de novo*. *Dearborn Maple Venture, LLC v. SCI Illinois Services, Inc.*, 2012 IL App (1st) 103513, ¶ 31 (citing *Gallagher v. Leinart*, 226 Ill. 2d 208, 219 (2007)); see also *Doornbos Heating & Air Conditioning, Inc. v. Schlenker*, 403 Ill. App. 3d 468, 488 (2010) (in construing written contract, court's primary objective is ascertaining and giving effect to the parties' intent as reflected in the agreement). As the instant appeal thus hinges upon matters of law, namely the interpretation of

[3]Schedules A and B, referenced on page two of the license agreement, are not attached to the copies of the agreement contained in the record. Similarly, the absence of the schedules does not preclude our review, particularly since the forum selection clause at issue appears on the first page of the agreement in the record and the parties do not object to the schedules' absence. See *Gonella Baking Co.*, 337 Ill. App. 3d at 388.

a contract, we will review the issues before us *de novo*. Having established the proper standard of review for Design Data's motion, we will now address Advance Steel's arguments in turn.

¶ 21 License Agreement's Validity

¶ 22 Advance Steel argues that the license agreement is invalid for lack of consideration. Specifically, Advance Steel contends there was no consideration for the license agreement, which was received and signed after Advance Steel had paid for and received the software. Alternatively, Advance Steel argues that even if the license agreement is deemed a modification of a preexisting contract, new consideration was warranted to bind Advance Steel to its terms.

¶ 23 As previously stated, determining whether a contract exists, as well as any interpretation interpretation, is a question of law reviewed *de novo*. *Dearborn Maple Venture,* ¶ 31 (citing *Gallagher*, 226 Ill. 2d at 219). A valid contract consists of an offer, acceptance, and consideration. *Watkins v. GMAC Financial Services*, 337 Ill. App. 3d 58, 64 (2003). "Consideration is defined as 'any act or promise which is of benefit to one party or disadvantageous to the other'-*i.e.*, some form of bargained-for exchange between the parties." *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 658 (2007) (quoting *Ahern v. Knecht*, 202 Ill. App. 3d 709, 715 (1990)).

¶ 24 Design Data responds that the execution of the paper copy of the license agreement concluded a single licensing transaction, for which the April 26, 2007, payment served as sufficient consideration. We agree. Design Data asserts that the transaction between the parties was typical of software licensing transactions in the industry. See, *e.g.*, *Berthold Types, Ltd. v. Adobe Systems, Inc*., 101 F. Supp. 2d 697, 698 (N.D. Ill. 2000) (license agreement did not

involve transfer of title to purchaser); *Shakkour v. Hamer*, 368 Ill. App. 3d 627, 635-36 (2006) (sale is not synonymous with license of asset, where the latter "is merely a party's authorized use of property that still legally belongs to the owner"). Design Data emphasizes that it was not selling the software to Advance Steel, but rather authorizing its use through the licensing agreement. Design Data highlights language in the invoice contained in the record indicating "LIC1" and "LIC2" for "SDS/2 Detailing Softwar[e]" for two work stations.

¶ 25 Additionally, we view the four corners of the license agreement, particularly relevant language printed on the first page. One, the document is referred to as a "computer software license" toward the top on the right-hand side. Two, at the top of the page, a prominent clause preceding the individual provisions refers to Advance Steel as the "licensee." Three, the very first provision is entitled "Grant of License," and the next provision clearly states that a license was granted by the agreement. Thus, plain language on the face of the printed agreement buttresses the conclusion that the transaction between Data Design and Advance Steel constituted a license purchased for use of the software.

¶ 26 Furthermore, Design Data states, in Evans's affidavit, that acceptance of the licensing agreement is integral to each transaction involving authorized use of its software, with a paper copy delivered to and signed in addition to an electronic copy that the user must accept by clicking on an "I Accept" button on the computer screen in order to access the software before each use. Advance Steel does not dispute that it was required to press this button before each use of the software, including prior to signing the paper copy of the license agreement. This undisputed fact bears significance during our discussion herein regarding the forum selection

clause at issue.

¶ 27 In short, we are unpersuaded that the sequence of events regarding the delivery of the paper copy negates the validity and binding effect of the license agreement. In an introductory statement at the top of the first page of the license agreement is conspicuous language stating that it is an agreement made on April 26, 2007, between Design Data and Advance Steel. April 26, 2007, is the same date on which Advance Steel admittedly received and paid for the software. Hence, the plain language of the document indicates the parties agreed to be bound by the terms of the agreement as of April 26, 2007. This court has previously upheld an agreement where a paper copy was delivered subsequent to an electronic copy received and accepted by the other party. See *Compass Environmental, Inc. v. Polu Kai Services, LLC*, 379 Ill. App. 3d 549, 556 (2008) (terms including forum selection clause upheld where full purchase order delivered via Fed Ex four days after version e-mailed to plaintiff). Given the advanced technology in our society, we find it reasonable and acceptable commercial reasons for contractual documents to be delivered in a soft format preceding a paper copy to afford parties a signed paper copy for their records. As we have concluded that the license agreement in this case is a valid contract as part of a single licensing transaction, for which the $41,000 payment was sufficient consideration, we need not address Advance Steel's alternative argument that the license agreement was a modification of an existing performance contract requiring additional consideration.

¶ 28 Forum Selection Clause

¶ 29 Next, Advance Steel argues that even if the license agreement is deemed valid, this court should find the forum selection clause unreasonable and therefore unenforceable. Advance Steel

enumerates various factors, particularly that the clause is preprinted, boilerplate language evidencing unequal bargaining power, it considers weigh heavily in favor of maintaining its chosen forum, Cook County, Illinois, in which to litigate its dispute with Design Data. From the outset, we emphasize that the case at bar does not involve the *forum non conveniens* doctrine**.** Thus, Advance Steel's reliance upon *Ferguson v. Bill Berger Associates, Inc.*, 302 Ill. App. 3d 61 (1998), as Design Data also notes, is misplaced. Indeed, Design Data's basis for transferring venue is that Nebraska is the *exclusive* forum, not a more *convenient* forum than Illinois as the argument would be under the *forum non conveniens* doctrine, for litigating the parties' dispute under the agreement.

¶ 30 Based upon the record presented to us, Advance Steel bears the burden of establishing the forum selection clause is unreasonable and should not be enforced by this court. "A forum selection clause in a contract is *prima facie* valid and should be enforced unless the opposing party shows that enforcement would be unreasonable under the circumstances." *Calanca v. D & S Manufacturing Co.*, 157 Ill. App. 3d 85, 87 (1987) (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)). In meeting the burden, Advance Steel must show:

> " 'that trial in the contractual forum will be so gravely difficult and inconvenient that [it] will for all practical purposes be deprived of [its] 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.' "
> *Calanca*, 157 Ill. App. 3d at 87-88 (quoting *The Bremen*, 407 U.S. at 18).

In other words, the opposing party must establish that enforcement of the forum selection clause

contravenes strong public policy of the forum or the chosen forum must be " '*seriously* inconvenient for the trial of the action.' " (Emphasis in original.) *Calanca*, 157 Ill. App. 3d at 88 (quoting *The Bremen*, 407 U.S. at 15-16). Yet, when parties freely enter into an agreement knowing about the inconvenience of any potential litigation in another state, one party's claim of inconvenience will not succeed as a reason to find the forum clause unreasonable. *Calanca*, 157 Ill. App. 3d at 88 (citing *The Bremen*, 407 U.S. at 16, 17-18). The First District of this court has continuously upheld agreements containing forum selection clauses entered into between experienced business entities. See *Compass Environmental*, 379 Ill. App. 3d at 556; *IFC Credit Corp. v. Rieker Shoe Corp.*, 378 Ill. App. 3d 77, 91 (2007); *Aon Corp. v. Utley*, 371 Ill. App. 3d 562, 570 (2006); *Calanca*, 157 Ill. App. 3d at 88; see also *Dace International, Inc. v. Apple Computers, Inc.*, 275 Ill. App. 3d 234, 240-41 (1995) (noting "impressive body of federal law" deeming forum selection clauses as presumptively valid and enforceable as exemplified in Supreme Court's decision in *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991)).

¶ 31 We consider the following factors when determining whether a forum selection clause is unreasonable: " '(1) which law governs the formation and construction of the contract; (2) the residency of the parties involved; (3) the place of execution and/or performance of the contract; * * * (4) the location of the parties and witnesses participating in the litigation. [Citation]. * * * (5) the inconvenience to the parties of any particular location; and (6) whether the clause was equally bargained for. [Citation].' " *Calanca*, 157 Ill. App. 3d at 88 (quoting *Clinton v. Janger*, 583 F. Supp. 284, 289 (N.D. Ill. 1984)); see also *Rubino v. Circuit City Stores, Inc.*, 324 Ill. App. 3d 931, 944-45 (2001) (reiterating *Calanca* factors when considering reasonableness of forum

selection clause). When we apply these factors to the instant case**,** we conclude that Advance Steel has failed to meet its burden in showing that the forum selection clause is unreasonable and unenforceable under the circumstances.

¶ 32 The first factor is in Design Data's favor as the clause identifies Nebraska substantive law as the governing law. The second factor is a draw as Advance Steel resides in Illinois and Data Design resides in Nebraska. Similarly, the third factor indicates a draw as the software was delivered from Nebraska to Illinois; the payment was sent from Illinois to Nebraska; and the parties signed the agreement in their respective states. Design Data also asserts performance regarding engineering, design, shipment, and packaging of the software occurred in Nebraska. As for the fourth factor, the parties have at least one potential witness from each state: Pertsalis for Advance Steel and Eret for Design Data. Advance Steel also asserts relevant testimony may be needed from individuals who attempted to install and use the software, further tying the case to Illinois. Notably, Advance Steel does not specifically identify any other potential witnesses outside of Nebraska who would testify on its behalf. Data Design maintains that its principal witnesses are located in Nebraska. Although Advance Steel claims inconvenience in compelling witnesses to travel to Nebraska for litigation, since some of the witnesses are its employees, their appearance can be compelled by Advance Steel. While live testimony is preferred, Advance Steel also has the option of conducting depositions here in Illinois and having the testimony read into evidence at trial in Nebraska. See *IFC*, 378 Ill. App. 3d at 86-87; *Calanca*, 157 Ill. App. 3d at 89. Simply stated, Advance Steel has failed to show that litigating its dispute in Nebraska would deny Advance Steel its day in court and cause it to abandon its claim.

¶ 33 Moreover, we find the fifth factor presents a draw since both parties will be inconvenienced in having to litigate the dispute in the other party's state. Design Data notes the close proximity between Illinois and Nebraska than the distance involved in *Dace International*, 275 Ill. App. 3d at 240, where this court enforced a forum selection clause with California as the contractual forum for litigation. For sure, Advance Steel cannot credibly argue that it was unaware Design Data was a Nebraska company. The invoice in the record lists a Nebraska address for Design Data. Additionally, at the top of the first page in the license agreement, Design Data is reflected as "of Lincoln, Nebraska."

¶ 34 Finally, we find the sixth factor does not weigh in Advance Steel's favor. Advance Steel spends an inordinate amount of time in its brief attempting to persuade us that the forum selection clause was not equally bargained for. Indeed, in its reply brief, Advance Steel asserts "it is worth reexamining the inequity in binding Advance to the disputed clause when a significant disparity existed in the parties' bargaining powers." Advance Steel argues that the provision was boilerplate language in a preprinted form that it was not allowed to negotiate and received after the software was paid for and delivered. We have already addressed the insignificance of its receipt of the paper agreement after delivery of the software (when it undisputedly had to accept the electronic version of the license agreement to access the software). Advance Steel indicates that it had no leverage to refuse or revise the terms since it could not use the software unless it consented to the license agreement, which included the forum selection clause now opposed. Again, we are unpersuaded by Advance Steel's arguments.

¶ 35 For sure, the fact that Advance Steel did not object to or attempt to negotiate the forum

selection clause is no reason to invalidate the provision. *Compass*, 379 Ill. App. 3d at 556 (quoting *IFC Credit*, 378 Ill. App. 3d at 87). "A forum selection agreement reached through arm's-length negotiation between experienced and sophisticated business people should be honored by them and enforced by the courts, absent some compelling and countervailing reason for not enforcing it." *IFC Credit*, 378 Ill. App. 3d at 86 (citing *Calanca*, 157 Ill. App. 3d at 88). However, a boilerplate forum selection clause suggests unequal bargaining power between the parties and the provision's significance is greatly reduced. *IFC Credit*, 378 Ill. App. 3d at 86 (citing *Williams*, 139 Ill. 2d at 72).

¶ 36 The record contains no dispute about or evidence that Advance Steel attempted to negotiate or objected to the provision that it received in the agreement shortly after the software was paid for and delivered to it. Advance Steel maintains it had no reason to expect "additional terms" after paying for and receiving the software. As we believe Advance Steel is a sophisticated business entity, we find this self-serving claim attempting to evade the consequences of signing an agreement it obviously opted not to voice concern about lacks credibility or otherwise invalidates the clause.

¶ 37 Similarly, Advance Steel offers no convincing argument that the forum selection clause was buried or hidden in fine print in the licensing agreement as evidence of unequal bargaining. Design Data points out that Advance Steel knowingly agreed to the clause, which was conspicuously stated on the first page of the agreement. We note, as does Design Data, that the licensing agreement was less than two full pages.

¶ 38 Moreover, we are unpersuaded that Advance Steel is an unsophisticated business entity

that needs protection rendering the forum selection clause unreasonable to enforce under the circumstances. Advance Steel can hardly be compared to the indigent students forced to agree to adhesion contracts in order to obtain student loans for their education (*Williams*, 139 Ill. 2d at 72), to renters forced to execute leases in order to acquire a place to live (*Martin-Trigona v. Roderick*, 29 Ill. App. 3d 553, 555 (1975)), or a certified public accountant with no experience in office equipment leasing and engaged in a newly organized proprietary business deemed akin to an ordinary consumer involved in a small transaction with a sophisticated office business entity (*Mellon First United Leasing v. Hansen*, 301 Ill. App. 3d 1041, 1046 (1998)). Here, Advance Steel indicates that it is in engaged in the construction industry. While the record does not indicate that it was a start-up company, which still would not change our analysis or conclusion, the record undisputedly shows that Advance Steel paid a sizeable sum ($41,000) by an American Express credit card for software**.** The apparent ability to acquire and require technology for its business operations strongly suggests Advance Steel is indeed a sophisticated and experienced business entity that was well aware that it was agreeing to litigate in Nebraska.

¶ 39 In short, we find that Advance Steel has failed to overcome the presumptive validity of the forum selection clause contained in the record. Accordingly, we find the provision reasonable and enforceable.

¶ 40 CONCLUSION

¶ 41 In sum, the circuit court properly granted Design Data's motion to transfer venue to Lancaster County in Nebraska based upon the forum selection clause in the parties' software license agreement specifying Nebraska as the exclusive forum to conduct any litigation arising

under the agreement. Contrary to Advance Steel's contention, we conclude that the license agreement was valid and part of the transaction involving Advance Steel's authorized use of Design Data's software for which the purchase price was sufficient consideration. Additionally, we find that Advance Steel failed to meet its burden to overcome the presumptive validity and enforcement of the bargained-for forum selection clause. For all of the aforementioned reasons, we affirm the judgment of the circuit court of Cook County.

¶ 42 Affirmed.