2015 IL App (1st) 131275-U
No. 1-13-1275

THIRD DIVISION
February 18, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMALIA MAZZOLIN AS TRUSTEE OF THE AMALIA MAZZOLIN 1988 TRUST B AND THE MAZZOLIN FAMILY LIMITED PARTNERSHIP, AN ILLINOIS LIMITED PARTNERSHIP,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	No. 11 CH 305
v.	)	The Honorable Thomas R. Allen, Judge Presiding.
LEHMAN BROTHERS REAL ESTATE FUND III, L.P.,	)	
Defendant-Appellee.	)	

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Mason concurred in the judgment.

O R D E R

¶ 1 *Held:* The circuit court did not err in granting defendant's motion to dismiss based on a forum selection clause. In executing investment subscription agreements, plaintiffs agreed to be bound by the terms of defendant's draft limited partnership agreement, which included the forum selection clause. Plaintiffs also expressly agreed to a power of attorney granting defendant's general partner the power to amend the partnership agreement, and the general partner subsequently executed the draft amending the limited partnership agreement. The facts of this

case do not establish any procedural unconscionability where plaintiffs were entities investing over $2 million, nor any factor that would invalidate the forum selection clause.

¶ 2 BACKGROUND

¶ 3 Defendant, Lehman Brothers Real Estate Fund III, L.P., is a Delaware limited partnership created in 2007 pursuant to a private placement memorandum (PPM) dated October 2007 for the purpose of investing in commercial real estate properties and portfolio companies. Defendant is an affiliate of Lehman Brothers Holdings (Lehman Brothers). Lehman Brothers Real Estate Associates III, L.P., also a Delaware limited partnership, is the general partner of defendant with full and exclusive management and control of the business of the partnership.

¶ 4 Amalia Mazzolin (Mazzolin) is trustee of plaintiff Amalia Mazzolin 1988 Trust B (Mazzolin trust) and is also the managing partner of plaintiff "The Mazzolin Family Limited Partnership" (Mazzolin family partnership), an Illinois limited liability partnership (LLP).[1]

¶ 5 Paul Tobin was the registered broker at Lehman Brothers who introduced plaintiffs to the investment opportunity with defendant.

¶ 6 Defendant's formational document is the Agreement of Limited Partnership dated June 25, 2007. The parties to this original agreement were Lehman Brothers Real Estate Associates III, L.P. (the general partner) and Real Estate Private Equity Inc., (the initial limited partner). Plaintiffs were not parties to this original limited partnership agreement.

¶ 7 The original limited partnership agreement provided that the partnership would be governed by Delaware law. The original agreement also memorialized the initial capital contributions of the general partner and the initial limited partner, allocated future profits, losses

[1] Although Amalia Mazzolin refers to herself as plaintiff, she is in fact trustee of the plaintiff trust. The other plaintiff is the Mazzolin family partnership. We therefore refer to the plaintiff entities as "plaintiffs."

and distributions, assigned management responsibilities to the general partner, and provided terms for the dissolution and wind-up of the partnership. The original limited partnership agreement also provided the following regarding any future amendments:

> "Amendments to the Partnership Agreement, including the admission of new partners to, and the withdrawal of the Limited Partner from, the Partnership, shall be approved solely by the General Partner, provided that no amendment which materially adversely affects the Limited Partner shall be adopted without the written approval of the Limited Partner."

¶ 8 In October 2007, plaintiffs' broker was sent a packet of offering documents designated for delivery to plaintiff. The packet included a "Private Placement Memorandum" (PPM), which summarized the investment opportunity and a subscription agreement. The subscription agreement contained representations and warranties of the investors and the partnership. When signed by the investor and accepted by the general partner, the subscription agreement would admit the investor as a limited partner in the partnership.

¶ 9 The PPM and its supplements explained the basic terms of the partnership and the investment opportunity. The PPM described the structure of the partnership and its goals and investment strategy. It explained the investment process and stated that properties currently held by Lehman Brothers could be transferred to the partnership's portfolio. The PPM also disclosed various investor risks in the partnership, including potential downturns in economic conditions. The PPM also contained a 17-page summary of the terms of the partnership agreement, but advised potential investors to consult the actual partnership agreement for the full and complete terms. The PPM provided that the summary of terms:

"is qualified in its entirety by reference to the Fund's limited partnership agreement (the 'Partnership Agreement'), a copy of which will be provided to each prospective investor upon request. The Partnership Agreement should be reviewed carefully."

¶ 10 In October 2007, Tobin solicited plaintiffs, through Mazzolin, to invest in defendant. Tobin provided Mazzolin with the PPM, the limited partnership agreement, and a subscription agreement. On October 30, Mazzolin executed the subscription agreement on behalf of plaintiff Mazzolin family partnership, which was accepted by defendant's general partner on November 30, 2007. On November 1, 2007, Mazzolin executed a subscription agreement on behalf of plaintiff Mazzolin trust, which was accepted by defendant's general partner on November 30, 2007.

¶ 11 The subscription agreement was the contract by which prospective investors agreed and contracted to invest in the limited partnership. The subscription agreement provided that an investor executing the agreement:

"agree[d] to be bound by all the terms and provisions of the Amended and Restated Agreement of Limited Partnership of the Partnership (as amended from time to time, the 'Partnership Agreement.') in substantially the form accompanying this Subscription Agreement."

¶ 12 The subscription agreement provided that an investor executing the agreement also represented and warranted the following:

"2. Representations and Warranties of the Investor. To induce the Partnership to accept this subscription, the Investor represents and warrants as follows:

(a) The Investor has been furnished and has carefully read the Confidential Private Placement Memorandum dated October 2007 relating to the Partnership (as

amended or supplemented through the date hereof, the 'Memorandum'), including the matters set forth under the caption 'Risk Factors and Potential Conflicts of Interest' in the Memorandum, and a form of the Partnership Agreement (collectively, the Memorandum, the Partnership Agreement and with this Subscription Agreement and any supplements or amendments thereto constitute the 'Offering Documents').

(b) The Investor has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of an investment in the Interests, is able to bear the risks of an investment in the Interests (including a complete loss of such investment) and understands the risks of, and other considerations relating to, a purchase of an Interest.

* * *

(n) *** This Subscription Agreement has been duly executed by the Investor and constitutes, and the Partnership Agreement, when the Investor is admitted as a Limited Partner, will constitute, a valid and legally binding agreement of the Investor.

* * *

(q) The Investor was offered the Interests through private negotiations, not through any general solicitation of general advertising ***.

(s) The Investor agrees that the foregoing representations and warranties may be used as a defense in any action relating to the Partnership or the offering of Interests in the Partnership, and that it is only on the basis of such representations and warranties that the Partnership may be willing to accept your subscription for Interests in the Partnership.

* * *

4. Further Representations and Assurances.

* * *

(b) The Investor has carefully read an understands the terms of the Offering Documents and the General Partner, on behalf of the Partnership, has made available to the Investor all other documents that the Investor has requested relating to an investment in the Interests, has afforded the Investor the opportunity to discuss the investment with and to ask questions of the General Partner and has provided answers to all of the Investor's questions concerning the offering of the Interests. The General Partner, on behalf of the Partnership, has also afforded the Investor the opportunity to obtain any additional nonproprietary information (to the extent the Partnership possess such information or can acquire it without unreasonable effort or expense) necessary to verify the accuracy of any information in the Memorandum. ***"

¶ 13 The subscription agreement also contained a power of attorney provision, which provides as follows:

"5. Power of Attorney.

(a) The Investor, by executing this Subscription Agreement, hereby appoints the General Partner, the general partner of the General Partner (including the officers of such general partner) and any successor of it or them with full power of substitution, as the Investor's true and lawful representative and attorney-in-fact, and agent of the Investor

(i) to execute, acknowledge, verify, swear to, deliver, record and file, in the Investor's name, place and stead the Partnership Agreement, any amendments to the Partnership Agreement or any other agreement or instrument which the General Partner deems appropriate ***."

¶ 14 According to defendant, plaintiffs were also sent a copy of a draft "Amended and Restated Agreement of Limited Partnership," which outlined the complete terms of the limited partnership. The amended limited partnership agreement provided the terms for investors' capital commitments, provided the guidelines for the acquisition of property interests, and set the terms for distributions to investors. The draft amended limited partnership agreement also contained a forum selection clause designating New York as the exclusive forum for any actions relating to the partnership agreement. Section 11.16 of the draft amended agreement provides:

> "Any action or proceeding between the parties relating in any way to this Agreement shall be brought and enforced in the Supreme Court of the State of New York, County of New York, or in the United States District Court for the Southern District of New York, and the parties irrevocably submit to the jurisdiction of both courts in respect of any such action or proceeding. The parties irrevocably waive, to the fullest extent permitted by law, any objection that they may now or hereafter have to the laying of venue of any such action or proceeding in the Supreme Court of the State of New York, County of New York or the United States District Court for the Southern District of New York and any claim that any such action or proceeding brought in any such court has been brought in any inconvenient forum."

¶ 15 Although the subscription agreement references the draft "Amended and Restated Agreement of Limited Partnership," and specifically provides that a signing investor agrees to be bound under its terms, plaintiffs dispute ever receiving it. Defendant alleges it sent a draft of the amended limited partnership agreement to Tobin and other retail investors prior to plaintiffs' decision to invest in defendant. An affidavit by Tanya Oblak, a managing director of Lehman Brothers Real Estate Private Equity Group, avers that she sent subscription agreements and

copies of the draft limited partnership agreement to Tobin and other retail investors, and that at the time of subscriptions the retail investors, including plaintiffs, were only given the amended limited partnership agreement, which included a forum selection clause. The draft amended limited partnership agreement is undated and unexecuted. Plaintiffs concede that they received copies of the PPM and the subscription agreement but contend they did not receive a copy of the draft amended limited partnership agreement.

¶ 16 Mazzolin signed the subscription agreement on behalf of plaintiff Mazzolin Family Limited Partnership, as partner, dated October 30, 2007, for the requested subscription amount of $2 million. Mazzolin also signed the subscription agreement on behalf of plaintiff Amalia Mazzolin 1988 Trust B, as trustee, dated November 1, 2007, for the requested subscription amount of $500,000.

¶ 17 On November 30, 2007, the general partner of defendant accepted plaintiffs' subscriptions and admitted plaintiffs as limited partners in defendant. Also on November 30, 2007, the general partner of defendant signed the amended and restated limited partnership agreement. The amended and restated limited partnership agreement is substantially identical to the draft amended and restated limited partnership agreement. The amended limited partnership agreement contains the identical forum selection clause as the draft amended limited partnership agreement.

¶ 18 Pursuant to the subscription agreements, the Mazzolin family partnership met defendant's capital calls totaling $917,225, and the Mazzolin trust met defendant's capital calls totaling $229,313.50. The Mazzolin family partnership paid $31,205 in management fees and the Mazzolin trust paid $9,504 in management fees. The Mazzolin family partnership and the

Mazzolin trust are subject to further capital calls of $1,083,775 and $270,686.50, respectively, as well as additional management fees.

¶ 19 Defendant closed on the purchase of its first property in May 2008 and subsequently made more purchases. Plaintiffs contend that defendant paid far in excess of market value for all its purchases. Mazzolin filed suit on behalf of plaintiffs in Cook County circuit court on January 5, 2011. Plaintiffs allege that the individuals controlling defendant were Lehman Brothers executives and that "they completed the purchases at greatly inflated prices to aid a struggling Lehman Brothers whose balance sheet was weighed down by such over priced properties." Plaintiffs' first amended complaint also alleges that defendant made fraudulent misrepresentations and omissions concerning the value of the properties transferred to the partnership and failed to disclose that "warehoused" or "legacy" Lehman Brothers investments would be transferred to defendant. Plaintiffs alleged that at the time they signed the subscription agreements defendant knew, but failed to disclose, that the properties had materially declined in value.

¶ 20 Defendant removed the case to the United States District Court for the Northern District of Illinois, Eastern Division, on February 10, 2011. On February 17, 2012, the District Court remanded the matter to the circuit court of Cook County.

¶ 21 Defendant then filed a combined motion to dismiss (735 ILCS 5/2-619.1 (West 2012)) pursuant to section 2-615 and 2-619 (735 ILCS 5/2-615, 2-619 (West 2012)). On September 10, 2012, the circuit court granted defendant's motion to dismiss pursuant to section 2-615 but granted plaintiffs leave to file an amended complaint. Plaintiffs filed a first amended complaint for rescission and other relief on October 9, 2012. Defendant filed a motion to dismiss the first

amended complaint pursuant to section 2-615 for failure to state a claim and pursuant to section 2-619 based on improper venue and the statute of limitations.

¶ 22 On March 25, 2012, the court granted defendant's section 2-619 motion to dismiss for improper venue. The circuit court ruled that plaintiffs were bound by the forum selection clause because in executing the subscription agreements, plaintiffs expressly agreed to "be bound by all of the terms and provisions of the amended and restated agreement of limited partnership," which contained the forum selection clause, regardless of whether plaintiffs ever received this document.

¶ 23 The court also ruled that plaintiffs were bound by the forum selection clause because the subscription agreements included the grant of power of attorney to the general partner to amend the partnership agreement, which included the forum selection clause in the amended partnership agreement. Plaintiffs appealed.

¶ 24 ANALYSIS

¶ 25 The trial court dismissed plaintiff's complaint pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-619(a)(9) (West 2012). A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of a plaintiff's claim but asserts certain defects or defenses outside the pleading that defeat the claim. *Solaia Technology, LLC v. Specialty Publishing Co*., 221 Ill. 2d 558, 579 (2006). "The purpose of a section 2-619 motion to dismiss is to dispose of a case on the basis of issues of law or easily proved issues of fact." *Hertel v. Sullivan*, 261 Ill. App. 3d 156, 160 (1994). Whether the trial court erred in dismissing the complaint as barred by affirmative matter are questions of law that we review *de novo*. *Kedzie & 103rd Currency Exchange, Inc., v. Hodge*, 156 Ill. 2d 112, 116 (1993). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v.*

BDO Seidman, LLP, 408 Ill. App. 3d 564, 578 (2011). Also, we can affirm a section 2-619 dismissal on any proper basis supported by the record. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill.2d 248, 261 (2004) (noting, on review of section 2–619 motion, that the court "can affirm * * * on any basis present in the record").

¶ 26 Plaintiffs present myriad arguments as to why they are not bound by (1) the forum selection clause in the amended partnership agreement or (2) by the power of attorney provision in the subscription agreements allowing amendment of the limited partnership agreement without their consent. None of their arguments are availing.

¶ 27 I. In Signing the Subscription Agreements, Plaintiffs Agreed to Be Bound By the Terms of the Draft Limited Partnership Agreement.

¶ 28 Plaintiffs first argue that they cannot be bound by the forum selection clause because it is procedurally unconscionable where the clause was not disclosed to plaintiffs before signing the subscription agreements. "Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it." *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 100 (2006). Plaintiffs argue they never received the draft amended partnership agreement prior to executing the subscription agreements. Plaintiffs go on to dispute the affidavit of Tanya Oblak regarding the packets of documents sent to plaintiffs and argue that "the best Defendant could offer was that a draft, undated and unexecuted amended partnership agreement was directed to a Lehman Brothers Broker – without any evidence that such draft document was delivered to the Plaintiff." Plaintiffs also contend that "[n]o draft of the ARLPA dated prior to the execution of either subscription agreement was ever spread of record," and that Oblak's affidavit does not refer to the draft amended limited partnership agreement, but to the final version.

¶ 29 First, we note plaintiffs' argument strains credulity factually. The subscription agreement provided that an investor executing the agreement:

> "agree[d] to be bound by all the terms and provisions of the Amended and Restated Agreement of Limited Partnership of the Partnership (as amended from time to time, the 'Partnership Agreement.') in substantially the form *accompanying this Subscription Agreemen*t." (Emphasis added.)

¶ 30 Had plaintiffs read the subscription agreement but not actually also received the amended limited partnership agreement, this should have prompted them to inquire with defendant to receive a copy of the limited partnership agreement. The only evidence that plaintiffs did not in fact receive a copy of the limited partnership agreement is plaintiffs' own contention in this case, which is directly contrary to their own express representation in signing the subscription agreement.

¶ 31 Moreover, even taking plaintiffs' factual contentions as true for purposes of reviewing the motion to dismiss, plaintiffs' argument fails legally. In executing the subscription agreements, plaintiffs specifically "*agree[d] to be bound by all the terms and provisions of the Amended and Restated Agreement of Limited Partnership of the Partnership*." (Emphasis added.) Well-established contract law dictates that the subscription agreements incorporated the terms of the amended partnership agreement by reference. See *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill. App. 3d 678 (2009) ("Where a contract incorporates another document by reference, its terms become part of that contract."). There was nothing difficult to find, read, or understand about this provision.

¶ 32 Indeed, this is precisely what the circuit court found: that this provision in the subscription agreements incorporated the amended limited partnership agreement's terms, which

included the forum selection clause, and that plaintiffs had agreed to this by signing the subscription agreements. Though plaintiffs quote select language, out of context, from the court's statements at the hearing indicating the court had misgivings, ultimately the court correctly applied the law and ruled that plaintiffs were bound by the forum selection clause.

¶ 33 Plaintiffs argue in their reply brief that the draft amended partnership agreement could not have been incorporated by reference in the subscription agreements because "there is no competent evidence that the draft Amended and Restate Limited Partnership Agreement *** existed *** when Plaintiff executed the subscription agreements ***." Plaintiffs go on to speculate "why a *draft* of any partnership document would be circulated to prospective investors?" [Emphasis in original.] Plaintiffs also dispute that they represented that they "received and read the draft Amended LPA" as stated in the subscription agreements. But if this was in fact the case, then why did plaintiffs sign the subscription agreements? Plaintiffs signed the subscription agreements with the representation that they have "been furnished" and "carefully read" the offering documents, including the "Partnership Agreement" "and any supplements or amendments thereto." This representation is clear and conspicuous on the first page of the subscription agreements, in paragraph 2(a).

¶ 34 Regardless, whether plaintiffs ever received the amended partnership agreement prior to executing the subscription agreements is irrelevant; plaintiffs agreed to be bound by its terms. Under the law, plaintiffs had a duty to read the subscription contracts. As this court reiterated in *Tucker v. Soy Capital Bank and Trust Co.*, 2012 IL App (1st) 103303:

> "One is under a duty to learn, or know, the contents of a written contract before he signs it, and is under a duty to determine the obligations which he undertakes by the execution of a written agreement. * * * And the law is that a party who signs an

instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by misrepresentations." (Internal citations and quotations marks omitted.) *Tucker*, 2012 IL App (1st) 103303, ¶ 27 (quoting *Nilsson v. NBD Bank of Illinois*, 313 Ill.App.3d 751, 762 (1999)).

¶ 35 Plaintiffs also argue that "the investments were made pursuant to the PPM." Plaintiffs argue that the PPM made no mention of the draft partnership agreement. But the PPM was merely the memo describing the investment opportunity. The PPM is not a contract. The subscription agreement was the contract by which prospective investors agreed and contracted to invest in the limited partnership.

¶ 36 Plaintiffs miss the point that the relevant contract here is the subscription agreement, which incorporates the terms of the draft amended limited partnership agreement and subsequent amended limited partnership agreement. Plaintiffs did in fact receive the subscription agreements and executed them, agreeing to all their terms, including the terms in the draft amended limited partnership agreement, which were incorporated by reference. This fact distinguishes plaintiffs' case from all of plaintiffs' cited authorities where the consumer did not receive the contract prior to a sale or agreement. See *Razor*, 222 Ill. 2d 75; *Securities & Exchange Commission v. Morgan Keegan & Co.*, 678 F. 3d 1233 (11th Cir. 2012); *Wigginton v. Dell, Inc.*, 382 Ill. App. 3d 1189 (2008); *Trujillo v. Apple Computer, Inc.*, 578 F. Supp. 2d 979 (N.D. Ill. 2008).

¶ 37 Plaintiffs also rely on a provision in the original limited partnership agreement providing that "no amendment which materially adversely affects the Limited Partner shall be adopted without the written approval of the Limited Partner." But the subscription agreements

specifically incorporated the terms of the amended partnership agreement, not the original partnership agreement. Plaintiff cannot rely on the original partnership agreement.

¶ 38 "A forum-selection clause in a contract is *prima facie* valid and, courts should enforce it unless the opposing party shows that enforcement would contravene the strong public policy of the state in which the case is brought *** or that enforcement would be unreasonable under the circumstances such that the selected forum will be so gravely difficult and inconvenient that [the opposing party] will for all practical purposes be deprived of [its] day in court." [Internal citations and quotation marks omitted.] *Fabian v. BGC Holdings, LP*, 2014 IL App (1st) 141576, ¶ 16. There is no public policy in Illinois disfavoring forum-selection clauses; in fact, Illinois public policy favors the enforcement of forum-selection clauses. *Id*. at ¶ 17.

¶ 39 Plaintiffs also have not shown that enforcement of the forum selection clause in this case would be unreasonable under the circumstances such that the selected forum will be so gravely difficult and inconvenient that plaintiffs will for all practical purposes be deprived of their day in court. The seminal case for determining the reasonableness of a forum-selection clause is *Calanca v. D & S Manufacturing Co*., 157 Ill. App. 3d 85, 87-88 (1987), which provides the following factors: (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; (5) the inconvenience to the parties of any particular location; and (6) whether the clause was equally bargained for. *Id*. at 88.

¶ 40 Plaintiffs make no argument as to the majority of the *Calanca* factors, arguing only the last factor that the clause was not equally bargained for. Plaintiffs argue that they did not have sufficient bargaining power and that the forum selection clause is boilerplate, which is indicative

of unequal bargaining power. But there is nothing procedurally unconscionable about the facts of this case. As defendant cogently points out, plaintiffs are entities, a limited partnership and trust, that are relatively sophisticated investors with means, dealing with over $2 million in a complex real estate investment deal. The contracts were for subscribing to become limited partners in defendant for investment purposes. They are not individual consumers who lack financial means and sophistication being forced into adhesion contracts. Further, in their subscription agreements plaintiffs expressly represented that they "ha[v]e such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of an investment." Thus, plaintiffs' own representations estop them now from claiming that they in fact did not have knowledge and experience and equal bargaining power.

¶ 41 Plaintiffs' citations in support of their procedural unconscionability argument are thus inapposite. Plaintiffs can hardly compare themselves – a trust and a limited liability partnership investing millions of dollars in an investment deal – to the indigent students in *Williams v. Illinois State Scholarship Commission*, 139 Ill. 2d 24 (1990), who were forced to agree to adhesion contracts to obtain student loans for their education, or to an "ordinary consumer involved in a small transaction" in *Mellon First United Leasing v. Hansen*, 301 Ill. App. 3d 1041, 1046 (1998). Nor can plaintiffs compare themselves to the plaintiff in *Razor*, where a warranty disclaimer was held to be procedurally unconscionable because it was contained in an automobile owner's manual, which was available to the plaintiff only after she purchased the automobile.

¶ 42 *IFC Credit Corp. v. Rieker Shoe Corp.*, 378 Ill. App. 3d 77 (2007), actually supports affirming the circuit court's finding that the forum selection clause was binding. In *IFC Credit Corp*., the forum selection clause was in "boilerplate" language on the reverse side of a contract,

but the front of the contract with plaintiff's signature referenced the terms on the back. There was no negotiating and defendants contended that the forum selection clause should not be enforced. Both plaintiff and defendants were business entities and not ordinary consumers. This court held as follows:

> "As defendants contend, it appears that the forum selection clause was boilerplate language in the preprinted agreement and the parties did not engage in any negotiation over those terms. Nevertheless, the fact that they did not object to or attempt to negotiate the clause is no reason to invalidate it. They were business entities as opposed to ordinary consumers, and this court is not persuaded that they were in need of protection when contracting for business services. Most of the defendants are corporations, a business form that suggests a certain level of sophistication. Moreover, the clause was not hidden in the contract simply because it was in small print on the back of the agreement. Although defendants may not have read the terms on the back of the agreement, a provision on the front page above their signatures referenced the conditions on the reverse side, and they initialed the back page. [Footnote.] Defendants have not shown that they were inexperienced in business matters, and the few facts we have about them suggest they were on a level playing field in terms of negotiating ***." *IFC Credit Corp.*, 378 Ill. App. 3d at 87.

¶ 43 Similarly in this case, plaintiffs are relatively sophisticated entities above the ordinary consumer, and there is no indication that they are in need of any protection. The fact that there was no actual negotiation does not mean that the transaction was not at arms-length. "A failure to negotiate *** does not equate to an inability to do so." *GPS USA, Inc. v. Performance Powdercoating,* 2015 IL App (2d) 131190, ¶ 39. Plaintiffs have thus not shown

unreasonableness of the clause under the *Calanca* factor of unequal bargaining power for invalidation.

¶ 44 Plaintiffs nevertheless maintain that "mere acquiescence" is not enough to bind the entities to the forum selection clause, citing to *Chateau des Charmes Wines Ltd. v. Sabate USA Inc*., 328 F. 3d 528 (9th Cir. 2003), and *Solae, LLC v. Hershey Canada Inc*., 557 F. Supp. 2d 452 (D. Del. 2008). But both of these cases are governed by other statutes and involved merchants dealing with seller invoices and confirmations by the buyer, where the buyer had to assent to the terms. In both *Chateau des Charmes Wines Ltd.* and *Solae, LLC*, the sales transactions were governed by the United Nations Convention on Contracts for the International Sale of Goods on the substantive question of contract formation as to forum selection clauses included on invoices, which required that forum selection clauses had to be part of a specific agreement between the parties. In *Chateau des Charmes Wines Ltd.*, the parties did not have an agreement regarding a forum selection clause; it was merely printed on the invoice, in contravention of the international statute. *Chateau des Charmes Wines Ltd.*, 328 F. 3d at 531. In *Solae, LLC*, the forum selection clause was in a modification among the many invoices and confirmations and the buyer did not agree to the modification. *Solae, LLC v. Hershey Canada Inc*., 557 F. Supp. 2d at 457-58. Here, we are not dealing with the statutory requirement for international sale of goods. Moreover, as defendant counters, plaintiff did more than merely acquiesce to the general terms of the contract; plaintiffs affirmatively agreed to be bound by the terms of the amended limited partnership agreement.

¶ 45 Plaintiffs either did not read the subscription agreements, or they read the subscription agreements and saw the reference to the draft amended partnership agreement and signed the subscription agreements anyway, without having requested the draft amended partnership

agreement, or they received both the subscription agreements *and* the draft amended partnership and signed the subscription agreements. The subscription agreement clearly references the draft limited partnership agreement, and provides that in executing the subscription agreement one is agreeing to be bound to the terms and conditions in the draft and restated limited partnership agreement. If plaintiffs allegedly did not receive the draft and restated limited partnership agreement, they should have requested a copy. Yet, even accepting plaintiffs' version of events as true, in signing the subscription agreements, plaintiffs agreed to be bound by the draft limited partnership agreement and they are thus bound to its terms, which include the forum selection clause.

¶ 46 II. Plaintiffs Expressly Agreed to Give Defendant's General Partner a Broad Power of Attorney to Make Amendments to the Limited Partnership Agreement.

¶ 47 Plaintiffs also argue that the general partner of defendant exceeded the authority in the "limited" power of attorney to amend the partnership agreement. Plaintiffs characterize the power of attorney as "ministerial in nature and limited in scope."

¶ 48 We disagree, as the power of attorney expressly grants broad power to defendant to execute any amendments defendant deemed appropriate:

> "execute, acknowledge, verify, swear to, deliver, record and file, in the Investor's name, place and stead the Partnership Agreement, *any amendments to the Partnership Agreement* or any other agreement or instrument *which the General Partner deems appropriate* ***." [Emphases added.]

¶ 49 The nature of amendments contemplated is not limited in any way. It is also not ministerial and limited to merely executing and filing documents, as plaintiffs contend, because

it states that defendant can execute any amendments to the partnership agreement that it "deems appropriate."

¶ 50 Plaintiffs also alternatively argue, for the first time in this appeal, that even if the amendment is not ministerial it violated provisions of Delaware law governing limited partnerships. Because plaintiff did not preserve this argument below, it is forfeited and we will not consider it. See *Huang v. Brenson*, 2014 IL App (1st) 123231 (noting that the failure to raise an issue in the trial court generally results in forfeiture of that issue on appeal; issues raised on appeal must be at least commensurate with those raised before the trial court).

¶ 51 Finally, plaintiffs argue that the amendment of the limited partnership agreement violated defendant's fiduciary duty to plaintiffs. Plaintiffs concede that their cited authority is not on point and that they have no on-point authority. Even if they did, any alleged breach of fiduciary duty claim would have to be litigated in New York under the binding forum selection clause. Thus, we do not reach this argument.

¶ 52 CONCLUSION

¶ 53 The circuit court did not err in granting defendant's motion to dismiss based on the forum selection clause. In executing the subscription agreements, plaintiffs agreed to be bound by the terms of the draft limited partnership agreement, which included the forum selection clause. Plaintiffs also expressly agreed to a power of attorney granting defendant's general partner the power to amend the partnership agreement. The facts of this case do not establish any procedural unconscionability or any factor that would invalidate the forum selection clause.

¶ 54 Affirmed.