2013 IL App (5th) 120279-U

NO. 5-12-0279

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

J.F. ELECTRIC, INCORPORATED,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 11-L-1117
	)	
HD SUPPLY, INC.,	)	Honorable
	)	David A. Hylla,
Defendant-Appellee.	)	Judge, presiding.

PRESIDING JUSTICE SPOMER delivered the judgment of the court.
Justices Chapman and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court correctly dismissed the plaintiff's complaint where forum selection clause in contract in question was enforceable and required the complaint to be filed in Cobb County, Georgia.

¶ 2 The plaintiff, J.F. Electric, Incorporated, appeals the March 23, 2012, order of the circuit court of Madison County that granted the motion to dismiss filed by the defendant, HD Supply, Inc. For the reasons that follow, we affirm the circuit court's order.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal are as follows. On October 28, 2011, the plaintiff filed a one-count complaint against the defendant, alleging a breach of contract. The complaint alleged, *inter alia*, the following: (1) the plaintiff requested bids from several vendors for steel utility poles to be used in an overhead utility line installation project in Wichita, Kansas, (2) in response, the defendant, through employee Gary Heasley, sent the plaintiff Quote #U00159232.02 (the quote), which the plaintiff accepted, (3) as the

project progressed, it became apparent to the parties that the defendant would not be able to meet the bid specification that the steel utility poles had to be fabricated and galvanized in the United States, (4) the poles the defendant intended to supply also "did not comply with the material thickness specifications" of the bid request, and (5) the defendant's failure to supply poles meeting the required specifications amounted to a breach of contract, with the plaintiff damaged in the amount of approximately $362,392.57, the additional cost incurred by the plaintiff to purchase the poles from a different supplier.

¶ 5 On January 24, 2012, the defendant filed a motion to dismiss the plaintiff's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2010)), along with a verified copy of the quote, a copy of which had not been filed with the plaintiff's complaint. The quote, which is part of the record on appeal, is 10 pages long. The pages of the quote are numbered in the bottom right corner of each page, with the first page being numbered as "Page 1 of 10," the second page as "Page 2 of 10," and each subsequent page being numbered accordingly. The last page of the quote, which is numbered in the bottom right corner as "Page 10 of 10," is entitled "Terms and Conditions of Sale ('Terms')." Paragraph 12 of the terms and conditions of sale states, *inter alia*, that "any legal action arising under or related to this Agreement shall be brought in Cobb County, Georgia," which, according to the plaintiff's complaint, is the location of the defendant's corporate headquarters. The defendant contended, in its motion to dismiss, that the above language constituted a valid and enforceable forum selection clause (the clause), and that, accordingly, the court should dismiss the plaintiff's complaint "because the parties contractually agreed to the exclusive forum and venue in Cobb County, Georgia." The trial judge agreed, and dismissed the complaint. He denied the plaintiff's subsequent motion to reconsider, and this timely appeal followed. Additional facts will be provided as necessary throughout the remainder of this order.

¶ 6 ANALYSIS

¶ 7 We begin by noting the law relevant to the defendant's motion to dismiss, as well as our standard of review. "Section 2-619(a)(9) permits the dismissal of a claim when 'the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim.' 735 ILCS 5/2-619(a)(9) (West 2002); *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999)." *Moody v. Federal Express Corp.*, 368 Ill. App. 3d 838, 841 (2006). " 'The phrase "affirmative matter" refers to something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint.' " *Moody*, 368 Ill. App. 3d at 841 (quoting *Glisson*, 188 Ill. 2d at 220). When ruling upon a section 2-619 motion to dismiss, the court "must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004). "The standard of review for an order granting a motion to dismiss pursuant to section 2-619(a)(9) is *de novo*." *Moody*, 368 Ill. App. 3d at 841 (citing *Glisson*, 188 Ill. 2d at 220).

¶ 8 On appeal, the plaintiff contends the clause is unenforceable and invalid, and that therefore the trial judge erred in granting the defendant's motion to dismiss. The plaintiff first contends the clause is procedurally unconscionable, because, according to the plaintiff, the clause was neither negotiated nor agreed upon, and because the plaintiff had no "fair notice" of the clause. Each of the arguments presented by the plaintiff on this point is dependent upon the fact, asserted in the affidavit of plaintiff's employee Tom Schrage in opposition to the defendant's motion to dismiss, that Schrage never read page 10 of the quote because he believed page 9 of the quote was "the conclusion of the quote, with most of that page left blank following the indication of the total price." However, neither Schrage, nor any other employee of the plaintiff, averred that page 10 was not delivered to the plaintiff along with the other 9 pages of the quote. Throughout the argument section of the plaintiff's

briefs, the plaintiff disparages the business practices of the defendant and implies deception and "unfair surprise" on the part of the defendant. But the simple fact is that the record on appeal shows that a 10-page quote was transmitted to the plaintiff, that each page of the quote was clearly marked as being 1 of 10 pages, and that the plaintiff nevertheless failed to read the final page of the quote, which delineated the terms and conditions that would govern the parties' relationship if the quote were accepted. Accordingly, any "surprise" visited upon the plaintiff resulted from a lack of diligence and attention to detail on the part of the plaintiff, not from deception on the part of the defendant. The cases cited by the plaintiff in support of its argument involve situations where a diligent party could reasonably be expected to not be aware of the existence of certain contract terms, because they had been effectively hidden by the other party. In the case at bar, no such situation exists. All 10 pages of the quote were transmitted to the plaintiff; the plaintiff simply failed to adequately apprise itself of the content of the quote, each aspect of which was conspicuously presented to the plaintiff within the body of the 10 pages. This can hardly be said to be the fault of the defendant, particularly where, as here, both parties were sophisticated business enterprises with extensive experience in complex transactions.

¶ 9 The plaintiff next contends the clause is unreasonable. The seminal Illinois case discussing when a forum selection clause may be invalidated on the basis that it is unreasonable is *Calanca v. D&S Manufacturing Co.*, 157 Ill. App. 3d 85 (1987). Therein, the appellate court held that "[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*, 157 Ill. App. 3d at 87. To prevail, the party opposing the clause must prove " 'that trial in the contractual forum will be so gravely difficult and inconvenient that [the party] will for all practical purposes be deprived of [the party's] day in court.' " *Calanca*, 157 Ill. App. 3d at 87-88 (quoting *The Bremen v. Zapata Off-Shore Co.*,

407 U.S. 1, 18 (1972)). Factors to consider when determining whether a forum selection clause is unreasonable include the following: (1) which law governs the formation and construction of the contract, (2) the residency of the parties, (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. *Calanca*, 157 Ill. App. 3d at 88.

¶ 10 Applying these six factors to the case at bar, we conclude that the plaintiff has failed to meet its burden to prove that trial in Cobb County, Georgia, would be "so gravely difficult and inconvenient" that the plaintiff would "for all practical purposes be deprived of" the plaintiff's day in court. The plaintiff posits that, with regard to the first factor, the law of Kansas, Illinois, or Ohio could govern the formation and construction of the contract, whereas the defendant contends that the plain language of the quote dictates that Georgia law governs. Even assuming, *arguendo*, that Georgia law does not apply, the plaintiff does not explain, with regard to Kansas or Ohio law, why an Illinois court would be in a better position than would be a Georgia court to apply such law. Accordingly, we cannot find that this factor strongly favors invalidation of the clause. With regard to the second factor, the plaintiff concedes in its opening brief that because one party is an Illinois resident and the other is a Georgia resident, "the second factor does not favor either party," and we agree with this concession. With regard to the third factor, the plaintiff notes that the contract was executed, by the plaintiff's acceptance of the quote and its terms, in Illinois, and that it was to be performed in Kansas. With regard to the fourth factor, the parties agree that witnesses are spread across Illinois, Kansas, and Ohio, with the defendant contending that witnesses are also located in its home state of Georgia. With regard to the fifth factor, although it may be inconvenient for the plaintiff to litigate in the defendant's home state of Georgia, it would just as likely be inconvenient for the defendant to litigate in Illinois. With regard to the sixth

factor, we have already rejected the idea that the plaintiff's failure to read the clause somehow means the clause was not equally bargained for. In sum, careful consideration of the factors does not lead us to conclude that trial in Cobb County, Georgia, would be "so gravely difficult and inconvenient" that the plaintiff would "for all practical purposes be deprived of" the plaintiff's day in court.

¶ 11 The final contention of the plaintiff is that the clause is contrary to the public policy of Illinois. The plaintiff points to language in section 10 of the Building and Construction Contract Act (815 ILCS 665/10 (West 2010)) that would invalidate the clause if the construction project at issue was to be performed in Illinois. The plaintiff concedes that because the project in the case at bar was to be performed in Kansas, section 10 "does not directly invalidate the clause." Nevertheless, the plaintiff contends section 10 announces "the public policy of Illinois disfavoring forum selection clauses in construction contracts." We do not agree. Had the General Assembly wished to craft section 10 so that it invalidated forum selection clauses in construction contracts to be performed outside of Illinois, but nevertheless involving Illinois parties, it could have done so. It did not. Accordingly, we are not persuaded that an Illinois public policy exists that disfavors forum selection clauses in all construction projects involving Illinois parties, regardless of where the projects are to be performed.

¶ 12 CONCLUSION

¶ 13 For the foregoing reasons, we affirm the trial court's dismissal of the plaintiff's complaint.

¶ 14 Affirmed.