STATE OF MICHIGAN

COURT OF APPEALS

WALBRIDGE ALDINGER COMPANY,

Plaintiff-Appellee,

v

ANGELO IAFRATE CONSTRUCTION COMPANY, APPLIED HANDLING, INC., APPLIED BTU, INC., d/b/a ENVIRONMENTAL ENGINEERING, B & B CONCRETE PLACEMENT, INC., BOHL CRANE, INC., BOOMER COMPANY, CHANCE BROTHERS MARBLE & TILE, INC., CHELSEA ARCHITECTURAL MILLWORK, CWW, INC., d/b/a CREATIVE WINDOWS & WALLS, C & Z CONSTRUCTION, INC., FRED CHRISTEN & SONS COMPANY, GENERAL INTERIORS II, INC., GRAVES SHEET METAL COMPANY, INC., HAGERMAN CONSTRUCTION CORPORATION, HELSER CARPET, INC., HOOVER & WELLS, INC., INDIANA BRIDGE-MIDWEST STEEL, INC., INDUSTRIAL MAINTENANCE SPECIALISTS, INC., IRVING MATERIALS, INC., LAFORCE, INC., MADISON HEIGHTS GLASS COMPANY, INC., MITCHELL REINFORCING, INC., MICHAEL FABRICATING, INC., MID-STATES PAINTING COMPANY, MOTOR CITY ELECTRIC TECHNOLOGIES, INC., OHIO TRANSMISSION CORPORATION, AIR TECHNOLOGIES, OVERHEAD DOOR COMPANY OF INDIANAPOLIS, INC., PERRY ACOUSTICS, INC., PPMI FIRESTOP, INC., REPRO GRAPHICS DIGITAL IMAGING, INC., ROYAL RESTORATION & WATERPROOFING, L.L.C., SHAMBAUGH & SON, L.P., STEPHENS MACHINE, INC., TOM MILLER INVESTMENTS, d/b/a TMI INDUSTRIAL AIR SYSTEMS, TRIDENT NATIONAL CORPORATION, UNISTRUT

UNPUBLISHED
July 25, 2013

No. 308223
Oakland Circuit Court
LC No. 2010-115521-CK

CORPORATION, UNIVERSAL WALL SYSTEMS, INC., VFP FIRE SYSTEMS, INC., and WINDMILL HOLDINGS, INC.,

Defendants,

and

MOOREHEAD ELECTRIC COMPANY, INC.,

Defendant-Appellant.

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

In this suit for declaratory relief, defendant Moorehead Electric Company, Inc. appeals by right the trial court's order granting Walbridge's motion for summary disposition. Moorehead also appeals the trial court's earlier order denying its motion for summary disposition premised on jurisdiction. Because we conclude that there were no errors warranting relief, we affirm.

Moorehead first contends that the trial court erred when it denied its motion for summary disposition premised on the choice of law provision contained in its subcontract with Walbridge. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of contracts and statutes. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001).

In a subcontract agreement with Walbridge,[1] Moorehead agreed to perform work on a project in Indiana. Although the project was in Indiana, Moorehead agreed that the subcontract would be subject to Michigan law and that any litigation would be in Oakland County, Michigan:

> This Subcontract shall be governed by the laws of the State of Michigan, unless provided otherwise by the Agreement Between Owner and Contractor. Both the Subcontractor and the Contractor agree that resort to litigation in connection with this Subcontract shall only be to courts of applicable jurisdiction and venue located with the County of Oakland, State of Michigan or the U.S. district court for the Eastern District of Michigan.

[1] The parties executed agreements on April 24, 2008, and December 7, 2007, with substantially the same provisions.

Because this provision is unambiguous, we must enforce it as written unless it is contrary to public policy or otherwise prohibited by law. *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005). Michigan courts will generally enforce forum-selection clauses as a valid exercise of the parties' freedom to contract. *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 348; 725 NW2d 684 (2006). In addition, the Legislature has required Michigan courts to "entertain" actions premised on a contractual dispute where the parties have provided in writing that the controversy may be brought in Michigan, under certain conditions:

> If the parties agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state shall entertain the action if all the following occur:
>
> (a) The court has power under the law of this state to entertain the action.
>
> (b) This state is a reasonably convenient place for the trial of the action.
>
> (c) The agreement as to the place of the action is not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> (d) The defendant is served with process as provided by court rules. [MCL 600.745(2).]

Here, there is no dispute that Moorehead was properly served and that the trial court had the power to declare the parties' rights under their contract. Moreover, although Moorhead claims that Walbridge made a misrepresentation, that allegation did not relate to the forum-selection clause. As such, the only issue is whether Oakland County was a reasonably convenient place for the declaratory action. MCL 600.745(2)(b).

Moorehead argues that Michigan is not a reasonably convenient place for trial because it is an Indiana company with limited contacts with Michigan. This Court has previously held that "a determination of what is a 'reasonably convenient' place for trial requires a determination whether Michigan is a logical venue that is well-suited for the purpose of deciding this action." *Lease Acceptance Corp v Adams*, 272 Mich App 209, 225-226; 724 NW2d 724 (2006). And Michigan Courts have traditionally examined the following factors when determining whether Michigan was a reasonably convenient place for the litigation:

> (1) the private interest of the litigants, including the location of the parties, ease of access to sources of proof, the distance from the incident giving rise to the litigation, and other practical problems that contribute to the ease, expense, and expedition of the trial; (2) matters of public interest, including consideration of which state law will govern the case, potential administrative difficulties, and people concerned by the proceeding; and (3) reasonable promptness on the part of the defendants in raising the issue of forum non conveniens dismissal. [*Id.* at 226-227, citing *Cray v Gen Motors Corp*, 389 Mich 382, 395-396; 207 NW2d 393 (1973).]

Examining these factors, we conclude that the trial court properly determined that it was a reasonably convenient place for trial. Although an Indiana company, Moorehead nevertheless elected to do business with a Michigan corporation. The geographic distances from the relevant locations in Indiana to the court's location in Michigan are also not particularly long or overly burdensome. Further, as Walbridge aptly noted, half the subcontractors involved in the declaratory action are Michigan businesses, making Michigan equivalent to Indiana with regard to the convenience of the forum for the litigants. Moreover, given that the issues involve a declaration of rights under various agreements, the proofs are readily available to all parties without the need for visits to distant sites. Finally, the fact that the parties agreed to litigate in Michigan must be considered when determining the forum's convenience:

> Where the inconvenience of litigating in another forum is apparent at the time of contracting, that inconvenience is part of the bargain negotiated by the parties. Allowing a party who is disadvantaged by a contractual choice of forum to escape the unfavorable forum-selection provision on the basis of concerns that were within the parties' original contemplations would unduly interfere with the parties' freedom to contract and should generally be avoided. [*Turcheck*, 272 Mich App at 250.]

Moorehead also contends that Walbridge's agreement with the landowner specifically required Walbridge to resolve any disputes concerning the project in Indiana. We, however, cannot agree that Walbridge's agreement with the owner modified Walbridge's agreement with Moorehead in the way suggested. Walbridge's agreement with the owner provided that it was "the entire and integrated agreement between the Owner and the Construction Manager . . . ." And, in a separate provision (§ 9.2.3), the parties agreed that their agreement—as opposed to agreements with third parties—was "governed by the law of the place where the Project is located." Thus, there is nothing to suggest that Walbridge agreed to forego its right to freely negotiate a different forum-selection clause with its subcontractors.

In seeking to apply this forum-selection clause, Moorhead cites the provision within its own agreement that purports to incorporate the terms of Walbridge's agreement with the owner:

> Subcontractor shall be bound by the terms of the Agreement Between Owner and Contractor and all documents incorporated therein, including without limitation, the General and Special Conditions, and assumes towards the Contractor, with respect to the Subcontractor's Work, all of the obligations and responsibilities that the Contractor, by the Agreement Between Owner and Contractor has assumed toward the Owner.

This provision specifically refers to the "work to be performed," which strongly suggests that the parties intended it to apply solely to a subcontractor's work requirements. Moorehead also notes that the parties agreed that the subcontract would be "governed by the laws of the State of Michigan, unless provided otherwise by the Agreement Between Owner and Contractor." But the forum-selection provision in the agreement between Walbridge and the owner limits its application to that agreement alone; it does not incorporate, explicitly or implicitly, any separate agreements between Walbridge and its subcontractors. Moorehead's preferred reading is too attenuated and not supported by the actual language of the respective agreements. Moorehead

agreed to litigate any disputes over its agreement with Walbridge in Michigan and the references to Walbridge's agreement with the landowner did not negate that provision.

Moorehead further asserts that, under Indiana law, the forum-selection provision is unenforceable. IC 32-28-3-17 provides that a "provision in a contract for the improvement of real estate in Indiana is void if the provision" makes the "contract subject to the laws of another state" or otherwise "requires litigation, arbitration, or other dispute resolution process on the contract occur in another state." As noted by the trial court, the existence of this statutory provision does not control a determination of jurisdiction or restrict the situs of litigation. The mere fact that an Indiana statute voids a choice of law provision under Indiana law does not preclude Michigan courts from properly exercising the jurisdiction provided under Michigan law.

Next, defendant asserts the trial court erred in denying its motion for summary disposition concerning jurisdiction.

> When reviewing a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(1), the trial court and this Court consider the pleadings and documentary evidence submitted by the parties in a light most favorable to the nonmoving party. The plaintiff bears the burden of establishing jurisdiction over the defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. The plaintiff's complaint must be accepted as true unless specifically contradicted by affidavits or other evidence submitted by the parties. Thus, when allegations in the pleadings are contradicted by documentary evidence, the plaintiff may not rest on mere allegations but must produce admissible evidence of his or her prima facie case establishing jurisdiction. [*Yoost v Caspari*, 295 Mich App 209, 221-222; 813 NW2d 783 (2012) (citations omitted).]

Here, the trial court clearly had jurisdiction as a result of the forum selection clause. See MCL 600.711 and MCL 600.745. "[F]orum-selection clauses are inherently bound up with notions of personal jurisdiction." *Turcheck*, 272 Mich App at 344. "[A] valid forum-selection clause, even standing alone, can confer personal jurisdiction." *TruServ Corp v Flegles, Inc*, 419 F3d 584, 589 (CA 7, 2005) (citation and quotation marks omitted).

Moorehead did not contest the trial court's subject matter jurisdiction or the service of process. Further, although it asserted misrepresentation regarding the pay-if-paid provision of the subcontract, it did not assert a similar argument regarding the forum selection clause. As such, whether the trial court had jurisdiction under MCL 600.745 was limited to determining whether the forum was reasonably convenient. And the trial court properly addressed the convenience of the forum. As the trial court noted, because the liens pertaining to the property in Indiana had been resolved and "many of the co-defendants are also based in Michigan", jurisdiction in this state was favored. Having considered the relevant factors, the trial court did not err in its determination that Moorehead was not denied due process and was subject to jurisdiction in Michigan as "[s]tate and federal courts are virtually uniform in the conclusion that enforcement of a forum selection clause that was validly entered into does not violate due process as long as the party will not be deprived of its day in court." *Lease Acceptance Corp*,

272 Mich App at 229. Based on our determination that the forum selection clause conveyed jurisdiction, it is unnecessary for this Court to address Moorehead's contentions pertaining Michigan's long-arm statute.

Moorehead also argues that the trial court erred when it refused to dismiss Walbridge's claim under the doctrine of forum non conveniens. This Court reviews a trial court's decision to dismiss a case on the basis of the doctrine of forum non conveniens for an abuse of discretion. *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 214; 813 NW2d 752 (2011).

"'Forum non conveniens' is defined as the 'discretionary power of [a] court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum.'" *Id.* at 223 (citations omitted). "It is a common-law doctrine that allows a court to decline to hear a case even though the court otherwise has jurisdiction." *Id.* However, because the factors applied to decisions regarding the convenience of the forum are the same as those applied to a determination that Michigan is a reasonably convenient forum for trial, see *Lease Acceptance Corp*, 272 Mich App at 225-226, a determination that Michigan is reasonably convenient for purposes of trial within the meaning of MCL 600.745(2)(b) will necessarily meet the requirements of the common law doctrine. Because the trial court properly determined that Michigan was a reasonably convenient location for trial, we cannot conclude that it abused its discretion when it denied Moorehead's motion premised on forum non conveniens.

Finally, Moorehead challenges the trial court's grant of a declaratory relief concerning the enforceability of the pay-if-paid provision within the subcontract. Specifically, Moorehead argues that the agreement was unenforceable because Walbridge fraudulently induced Moorhead to agree to the terms by misrepresenting facts about the project's owner. "When reviewing a motion under MCR 2.116(C)(10), [this Court] consider[s] all the evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457-458; 750 NW2d 615 (2008) (citations omitted). This Court also reviews de novo the interpretation of a contract as a question of law. *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003).

In the subcontract, Moorehead agreed that it was relying on the owner's credit and ability to pay and that Walbridge would have no obligation to pay Moorehead if the owner failed to pay Walbridge:

> ARTICLE XXII – PAYMENTS: Subcontractor acknowledges that it has considered the Owner's solvency and Owner's ability to perform the terms of its contract with Contractor before entering into this Subcontract. Subcontractor acknowledges that it relies on the credit and ability to pay of the Owner, and not the Contractor, for payment for work performed hereunder. Subcontractor is entering into this Subcontract with the full understanding that Subcontractor is accepting the risk that the Owner may be unable to perform the terms of its contract with Contractor. Subcontractor agrees that as a condition precedent to Contractor's obligation to make any payment to Subcontractor, the Contractor must receive payment from the Owner. Upon written request by Subcontractor,

> Contractor will provide subcontractor access to all information in Contractor's possession, if any, regarding the Owner's solvency and ability to perform the terms of Owner's contract with Contractor.
>
> In the event that the Contractor does not receive all or any part of the payment from the Owner in respect of Subcontractor's Work, whether because of a claimed defect or deficiency in the Subcontractor's Work or for any other reason, the Contractor shall not be liable to the Subcontractor for any sums in respect thereto. In the event the Contractor shall incur any cost or expense of any nature in preparing for the prosecution of, and prosecuting any claim against the Owner, whether by means or negotiations, arbitration or legal action, arising out of the Owner's refusal to pay the Contractor for Work done by the Subcontractor, Contractor shall be entitled to deduct such costs and expenses from the amount due Subcontractor.

These terms are not ambiguous and are otherwise enforceable. See, e.g., *Berkel & Co Contractors v Christman Co*, 210 Mich App 416, 418-421; 533 NW2d 838 (1995). The pay-if-paid clause explicitly indicates that Walbridge's receipt of payment from the owner is a condition precedent to its obligation to pay Moorehead. "A condition precedent is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor." *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006) (citations and quotation marks omitted). The "[f]ailure to satisfy a condition precedent prevents a cause of action for failure of performance." *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 583; 739 NW2d 696 (2007) (citation and quotation marks omitted). Because the pay-if-paid provisions is enforceable on its face and clearly establishes a condition precedent that was plainly not met, Moorehead could not establish that Walbridge breached its duty to pay under the contract without establishing that this provision was unenforceable as a matter of law. Moorehead attempted to do just that by arguing that Walbridge wrongfully induced it to enter into the agreement by misrepresenting facts about the project owner. Moorehead further implies that Walbridge's purported mismanagement would also create a factual question that would serve as an exception to the pay-if-paid provision. Specifically, it argues that some courts have construed pay-if-paid provisions to merely delay and not preclude an obligation to pay.

At the outset, we note that Moorehead did not assert that Walbridge mismanaged the project or present any evidence of mismanagement before the trial court. In fact it acknowledged that "there is no dispute that [Walbridge] has taken all steps necessary to secure payment on behalf of [Moorehead.]" As such, this claim is without merit. See *Barnard Mfg*, 285 Mich App at 380-381 (noting that this Court's review on a motion for summary disposition is limited to reviewing the evidence and arguments actually raised before the trial court).

Next, in support of its contention that other states or jurisdictions have interpreted pay-if-paid provisions as only permitting a reasonable delay in payment and not complete abrogation of the obligation for payment, Moorehead cites *Thomas J Dyer Co v Bishop Internat'l Engineering Co*, 303 F2d 655 (CA 6, 1962). *Dyer*, however, is distinguishable given the express wording of the provision in this case. As noted in *BMD Contractors, Inc v Fidelity and Deposit Co of*

Maryland, 679 F3d 643, 649-650 (CA 7, 2012), although *Dyer* is the "leading case" regarding the necessity of "explicit language shifting the risk of nonpayment to the subcontractor," courts must be careful not to construe *Dyer's* requirement that there be explicit language with a requirement that the parties use particular language:

> We do not disagree that to transfer the risk of upstream insolvency or default, the contracting parties must expressly demonstrate their intent to do so; that is the rule from *Dyer*. But by clearly stating that the contractor's receipt of payment from the owner is a condition precedent to the subcontractor's right to payment, the parties have expressly demonstrated exactly that intent. Adding specific assumption-of-risk language would reinforce that intent but is not strictly necessary to create an enforceable pay-if-paid clause. *Dyer* does not hold otherwise.

As such, Moorehead's reliance on *Dyer* and similar rulings is misplaced. The parties here plainly and unequivocally shifted the risk that the owner would not pay to Moorehead.

Finally, Moorehead's primary contention is that the pay-if-paid clause is not enforceable because Walbridge fraudulently induced it to enter into the agreement by misrepresenting the project owner's identity. In support of this contention, Moorehead submitted an affidavit by its president, Jerry L. Albrecht:

> 8. Because of the representations by Walbridge that the Owner of the Facility and Site was a large multinational company, I had no concern about Moorehead being paid for its work on the Project and therefore did not feel that it was necessary to engage in negotiations with Walbridge to strike the "pay if paid" clause as I had previously, and I proceeded to execute the Second Subcontract on behalf of Moorehead. . . .
>
> * * *
>
> 10. Walbridge's representations in the Subcontracts as to the identity of the true Owner of the Project and Site were false. Indeed, upon suspension of the Work . . . Moorehead determined that the true Owner of the Facility and Site at all relevant times was an entity believed to be an affiliate of Getrag, namely Getrag Transmission Manufacturing, LLC. . . . Following suspension of the Work, the Affiliate filed for and was discharged in bankruptcy.

To establish a claim of fraudulent misrepresentation, Moorehead had to establish that it reasonably relied on Walbridge's false representation. *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009). And it could not do so where it had the means to determine that the alleged misrepresentation was not true at its disposal. *Alfieri v Bertorelli*, 295 Mich App 189, 194-195; 813 NW2d 772 (2012). In particular, a "misrepresentation regarding the terms of written documents that are available . . . cannot support the element of reasonable reliance." *Cummins*, 283 Mich App at 698.

Here, the subcontract contained explicit language that, "[u]pon written request by Subcontractor, Contractor will provide subcontractor access to all information in Contractor's possession, if any, regarding the Owner's solvency and ability to perform the terms of Owner's contract with Contractor." Thus, Moorehead had at its disposal the means to establish the true identity of the owner and its solvency. Consequently, given the undisputed evidence, Moorehead could not establish its fraudulent inducement claim.

There were no errors warranting relief.

Affirmed. As the prevailing party, Walbridge may tax its costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ /Kathleen Jansen
/s/ Michael J. Kelly