

CASE No. 08-14599-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CLATUS JUNKIN,

Appellant,

v.

EMERALD GRANDE, INC.,

Appellee.

Appeal from the United States District Court
for the Northern District of Florida, Pensacola Division
Case No.: 3:07cv364/MCR/EMT
M. Casey Rodgers, U.S. District Judge

BRIEF OF APPELLEE EMERALD GRANDE, INC.

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

CLATUS JUNKIN,)	Case No: 08-14599-E
)	
Appellant)	
v.)	
)	
EMERALD GRANDE, INC.,)	
)	
Appellee)	

Appellee Emerald Grande, Inc., hereby states that no parent corporation or publicly held corporation owns 10% or more of it's stock. The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification of recusal:

Destin Land & Title, Inc., Escrow Agent for Appellee

Emerald Grande, Inc., Appellee

Green, Wilson F., Attorney for Appellant

Junkin, Clatus, Appellant

McCarthy, Patrick K., Attorney for Appellee

Rodgers, M. Casey, United States District Court Judge

STATEMENT REGARDING ORAL ARGUMENT

The Appellee, Emerald Grande, Inc, respectfully requests this Court deny Appellant, Clatus Junkin's, request for oral argument. Oral discussion of the facts and applicable precedent would be an unnecessary expenditure of this Court's time and resources.

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STATEMENT OF THE ISSUES

Did the District Court err in remanding this cause of action to the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida based on the Article IX.Y forum selection clause contained in the executed purchase agreements?

STATEMENT OF THE CASE

I. Course of Proceedings

Appellee Emerald Grande, Inc. (“Emerald Grande”) initially filed this action in the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida (“Circuit Court”). (Complaint, Exhibit A to Notice of Removal, R. 1-9; Appendix Tab 2).¹ Appellant Clatus Junkin (“Junkin”) filed an Answer, (Answer, R. 5-1; Appendix Tab 3), and removed the case to the United States District Court for the Northern District of Florida, Pensacola Division (“District Court”) on the basis of diversity of citizenship of the parties, pursuant to 28 U.S.C. § 1332(a). (Notice of Removal, R. 1-1; Appendix Tab 2).

Emerald Grande filed a Motion to Remand and supporting Memorandum contending that the forum selection clause contained in the purchase agreements at issue in this case mandated the exclusive forum for resolution of these matters is the Circuit or County Courts of Okaloosa County, Florida and thus removal was improper. (Amended Motion to Remand, R. 15-1 *et. seq.*; Appendix Tab 5). Junkin then filed a Response to the Motion to Remand arguing that a separate article contained in the purchase agreements allowed the removal of issues arising

¹ Citations to the Record contain the title of the document, document number in the district court, and page number(s), separated by a hyphen. Additionally, Appellee has referenced Appellant’s Appendix of Record Excerpts by the Appendix Tab number.

under said contracts to the District Court. (Defendant's Memorandum in Support of Response in Opposition to Motion to Remand, R. 23-1 et. seq.; Appendix Tab 6).

On July 15, 2008, the District Court entered an Order granting Emerald Grande's Motion to Remand to the Florida state court on the grounds that the mandatory forum selection clause of Article IX of the purchase contracts required remand. (Order of Remand, R. 44-1 et. seq.; Appendix Tab 7). This appeal followed. (Notice of Appeal, R. 45-1; Appendix Tab 8).

II. Statement of the Facts

In June 2005, Emerald Grande and Junkin executed two contracts for the purchase and sale of two condominium units located in the Emerald Grande condominium development in Okaloosa County, Florida (collectively "Purchase Contracts"). (Purchase Contracts attached to Notice of Removal, R. 1-20, R. 1-41; Appendix Tab 2). Additionally, Emerald Grande and Junkin executed a contract for the furniture, fixtures, and furnishings for one of the units purchased by the abovementioned contracts ("Furnishings Contract"). (Furnishings Contract attached to Notice of Removal, R. 1-62; Appendix Tab 2). Both of the Purchase Contracts, but not the Furnishings Contract, contained a forum selection clause designating that the Circuit and County Courts of the First Judicial Circuit, in and for Okaloosa

County, Florida would be the venue for any dispute related to the Purchase Contract or any other agreement executed in connection therewith. Each of the Purchase Contracts contained the following forum selection clause in Article IX, Section Y (“Article IX”):

[T]o the extent not prohibited by Article VIII, the Circuit and County Courts of the 1st Judicial Circuit, in and for Okaloosa County, Florida (“Okaloosa Courts”) will be the venue for any dispute, proceeding, suit or legal action concerning the interpretation, construction, validity, enforcement, performance of, or related in any way to, this Contract or any other agreement or instrument executed in connection with this Contract.

(Purchase Contracts attached to Notice of Removal, R. 1-33, R. 1-54; Appendix Tab 2).

Article VIII of the Purchase Contract is entitled “Arbitration” and states, in relevant part, as follows:

Any post-closing disputes between Purchaser and Seller relating to the purchase of the Unit, including the marketing, sale, design, construction, condition or conveyance of the Unit, shall be resolved exclusively through binding arbitration.

...

Nevertheless, in the event for any reason any litigation is filed other than to enforce the decision of the arbitration proceeding, the parties accept the jurisdiction of the State, Federal and local courts located in Okaloosa County, Florida as having exclusive jurisdiction over controversies arising from or relating to this Agreement and agree that Florida has sufficient contacts with the subject matter of this Agreement and agree that any litigation arising out of this Agreement will take place only in such courts, and both parties

hereto consent to the personal jurisdiction of such courts and do hereby waive any objection to such courts based on the forum not being convenient or otherwise.

(Purchase Contracts attached to Notice of Removal, R. 1-30, R. 1-50; Appendix Tab 2). The Furnishings Contract contains similar language. (Furnishings Contract attached to Notice of Removal, R. 1-62; Appendix Tab 2).

Emerald Grande brought suit against Junkin in the Circuit Court in and for Okaloosa County, Florida seeking damages and specific performance from Junkin's failure to close on the purchase of the condominiums and furnishings pursuant to the Purchase and Furnishings Contracts. (Complaint, Exhibit A to Notice of Removal, R. 1-9; Appendix Tab 2).

III. Statement of Standard of Review

The enforceability of a forum selection clause is a question of law which is to be reviewed de novo. Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992); see also Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 320 (10th Cir. 1997) (noting that de novo review is appropriate because the issue turns on an analysis of the language of a contractual clause).

SUMMARY OF THE ARGUMENT

Emerald Grande and Junkin executed two contracts for the purchase and sale of two separate condominiums and one contract for the furniture, fixtures, and furnishings of one of the units. (R. 1-20, R. 1-41, R. 1-62; Appendix Tab 2). Emerald Grande brought suit against Junkin in the Circuit Court in and for Okaloosa County, Florida seeking damages and specific performance from Junkin's failure to close on the purchase of the condominiums and furnishings pursuant to the Purchase and Furnishings Contracts. (R. 1-9; Appendix Tab 2).

Each of the Purchase Contracts contained the following forum selection clause in Article IX, Section Y:

[T]o the extent not prohibited by Article VIII, the Circuit and County Courts of the 1st Judicial Circuit, in and for Okaloosa County, Florida ("Okaloosa Courts") will be the venue for any dispute, proceeding, suit or legal action concerning the interpretation, construction, validity, enforcement, performance of, or related in any way to, this Contract or any other agreement or instrument executed in connection with this Contract.

(R. 1-33, R. 1-54; Appendix Tab 2). The language of Article IX is unambiguous, dictates a specific forum, and incorporates explicit venue language; therefore, it is a mandatory and enforceable forum selection clause.

Article VIII, referred to in Article IX and entitled "Arbitration", provides in pertinent part:

Any post-closing disputes between Purchaser and Seller relating to the purchase of the Unit, including the marketing, sale, design, construction, condition or conveyance of the Unit, shall be resolved exclusively through binding arbitration.

...

Nevertheless, in the event for any reason any litigation is filed other than to enforce the decision of the arbitration proceeding, the parties accept the jurisdiction of the State, Federal and local courts located in Okaloosa County, Florida as having exclusive jurisdiction over controversies arising from or relating to this Agreement and agree that Florida has sufficient contacts with the subject matter of this Agreement and agree that any litigation arising out of this Agreement will take place only in such courts, and both parties hereto consent to the personal jurisdiction of such courts and do hereby waive any objection to such courts based on the forum not being convenient or otherwise.

(R. 1-30, R. 1-50; Appendix Tab 2). This litigation is not a “post-closing dispute[]” and is not subject to the arbitration provisions of Article VIII. However, even if this Court finds that Article VIII is generally applicable and not limited to “post closing disputes,” removal to the District Court is not permitted because Article VIII does not contain a mandatory forum selection clause.

Although the Furnishings Contract executed by the parties did not specifically include Article IX in its terms, it was executed as part of the same transaction as the Purchase Contracts. Therefore, pursuant to the terms on the contracts and common law, the Purchase and Furnishings Contracts should be read together and all

controversies related to such contracts must be litigated in the First Judicial Circuit, in and for Okaloosa County, Florida.

ARGUMENT

Article IX of the Purchase Contracts contains a mandatory forum selection clause that is valid and enforceable. The language of Article VIII of the Purchase Contracts does not prevent enforcement of the mandatory forum selection clause in Article IX. Therefore, all controversies related to the June 2005 Purchase and Furnishings Contracts must be litigated in the First Judicial Circuit, in and for Okaloosa County, Florida.

I. Article IX of the Purchase Contracts contains a mandatory forum selection clause that is valid and enforceable.

Each of the Purchase Contracts executed by Emerald Grande and Junkin contained the following forum selection clause in Article IX:

[T]o the extent not prohibited by Article VIII, the Circuit and County Courts of the 1st Judicial Circuit, in and for Okaloosa County, Florida (“Okaloosa Courts”) *will be the venue* for any dispute, proceeding, suit or legal action concerning the interpretation, construction, validity, enforcement, performance of, or related in any way to, this Contract or any other agreement or instrument executed in connection with this Contract.

(R. 1-33, R. 1-54) (emphasis added).² Contrary to the citation of authority in Appellant’s brief, federal law, rather than state law, governs the determination of

² Any reference to “Article IX” shall refer to this clause unless specifically noted otherwise.

whether to enforce a forum selection clause in a diversity jurisdiction case. See P&S Business Machines, Inc. v. Canon USA, Inc., 331 F.3d 804, 807 (11th Cir. 2003); Stewart Organization Inc. v. Ricoh Corp., 810 F.2d 1066, 1067 (11th Cir. 1987). Forum selection clauses are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972). Such clauses will be enforced absent a clear showing that enforcement of the clause would be “unjust and unreasonable” or execution of the contract was a result of “fraud or overreaching.” Id. Junkin does not contend that Article IX is unjust, unreasonable, or the result of fraud or overreaching.

Where a contract contains a valid forum selection clause, the issue then becomes whether the clause is “permissive” or “mandatory.” Florida Polk County v. Prison Health Servs., 170 F.3d 1081, 1083 (11th Cir. 1999). A mandatory clause requires that contemplated litigation must be brought in a particular forum. Citro Florida, Inc., v. Citrovale, S.A., 760 F.2d 1231, 1232 (11th Cir. 1985). On the other hand, a permissive clause simply consents to jurisdiction and venue in a named forum but does not exclude jurisdiction or venue in another forum. Id.

A forum selection clause is viewed as mandatory when it confers exclusive jurisdiction on the designated forum or incorporates obligatory venue language. Phillips v. Audio Active, Ltd., 494 F.3d 378, 386 (2d Cir. 2007); see also John

Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distributers., Inc., 22 F.3d 51, 52-53 (2d Cir. 1994) (holding if explicit venue language is employed then the forum selection clause will be enforced as mandatory); Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987) (holding forum selection clauses which require litigation in a specific court meet the requirement of conferring exclusive jurisdiction). In the instant case, Article IX’s forum selection clause confers exclusive jurisdiction to a specific designated forum; “[t]he Circuit and County Courts of the First Judicial Circuit, in and for Okaloosa County, Florida.” (R. 1-22; 1-53). Additionally, the language in Article IX incorporates obligatory venue language requiring that any litigation be brought in a specific forum; “[t]he Circuit and County Courts of the First Judicial Circuit, in and for Okaloosa County, Florida will be the venue.” Id. (emphasis added). The language of Article IX is unambiguous, dictates a specific forum, and incorporates explicit venue language; therefore, it is a mandatory and enforceable forum selection clause.

II. Article VIII of the Purchase Contracts does not prevent enforcement of the mandatory forum selection clause in Article IX.

Article VIII applies exclusively to arbitration, therefore, is not applicable here.

This Article, entitled “Arbitration”, provides in pertinent part:

Any post-closing disputes between Purchaser and Seller relating to the purchase of the Unit, including the marketing, sale, design,

construction, condition or conveyance of the Unit, shall be resolved exclusively through binding arbitration.

...

Nevertheless, in the event for any reason any litigation is filed other than to enforce the decision of the arbitration proceeding, the parties *accept the jurisdiction* of the State, Federal and local courts located in Okaloosa County, Florida as having exclusive jurisdiction over controversies arising from or relating to this Agreement and agree that Florida has sufficient contacts with the subject matter of this Agreement and agree that any litigation arising out of this Agreement will take place only in such courts, and both parties hereto *consent to the personal jurisdiction* of such courts and do hereby waive any objection to such courts based on the forum not being convenient or otherwise.

(R. 1-30, R. 50; Appendix Tab 2) (emphasis added).³

A single clause or paragraph of a contract cannot be read in isolation, but must be read in context. E.g. United States ex rel. AWL Indus. v. Site Remediation Servs. Corp., 92 F. Supp. 2d 132, 136 (E.D.N.Y. 2000); Cheseroni v. Nationwide Mut. Ins. Co., 402 A.2d 1215, 1217 (Del. Super. Ct. 1979). When reading Article VIII in context, it is clear that it is an arbitration clause. Article VIII is entitled “Arbitration.” Additionally, the first sentence of the Article provides that “[a]ny post-closing disputes between Purchaser and Seller relating to the purchase of the Unit ... shall be resolved exclusively through binding arbitration.” In the instant case, Junkin never closed on the condominium units

³ Any reference to “Article VIII” shall refer to this clause specifically unless noted otherwise.

he agreed to purchase. This litigation thus is not a “post-closing dispute[]” and is not subject to the arbitration provisions of Article VIII.

However, even if this Court finds that Article VIII is generally applicable and not limited to “post closing disputes,” removal to the District Court is not permitted because Article VIII does not contain a mandatory forum selection clause. Federal courts distinguish between mandatory and permissive forum selection clauses. McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 345-46 (8th Cir. 1985), cert. denied, 474 U.S. 948 (U.S. 1985). While a mandatory forum selection clause uses specific language to clearly designate a forum, permissive clauses merely provide a consent to jurisdiction and venue, but do not require a specific forum. Citro Florida, Inc., 760 F.2d at 1232.

Mandatory forum selection clauses contain clear language showing that jurisdiction is appropriate *only* in the designated forum; without the possibility of jurisdiction in another forum. Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir. 1997). A forum selection clause is viewed as mandatory when it confers jurisdiction on the designated forum or incorporates obligatory venue language. Phillips, 494 F.3d at 386.

When only jurisdiction is specified, forum selection clauses will generally be held as permissive without some further language indicating the parties’ intent to restrict all other jurisdiction. Docksider, Ltd. v. Sea Technology, Ltd., 875 F.2d

762, 764 (9th Cir. 1989); see e.g., John Boutari & Son, Wines & Spirits, S.A., 22 F.3d at 52 (clause providing “any dispute arising between the parties . . . shall come within the jurisdiction of the competent Greek courts” held permissive); Redondo Constr. Corp. v. Banco Exterior de Espana, S.A., 11 F.3d 3, 5 (1st Cir. 1993) (clause providing that “borrower and guarantors each hereby expressly submits to the jurisdiction of all federal and state courts located in the state of Florida” held permissive); Hunt Wesson Foods, Inc., 817 F.2d at 76 (clause providing “the courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract” held permissive); Keaty v. Freeport Indonesia, Inc., 503 F.2d 955, 956 (5th Cir. 1974) (clause providing “this agreement shall be . . . enforceable according to the law of New York and the parties submit to the jurisdiction of the courts of New York” held permissive); S & D Coffee, Inc. v. GEI Autowrappers, 995 F. Supp. 607, 609 (M.D. N.C. 1997) (clause providing the contract “shall be governed by and construed in accordance with English law, and both parties shall submit to the jurisdiction of the English courts,” held permissive); Guy F. Atkinson Constr., A Div. of Guy F. Atkinson Co. v. Ohio Mun. Elec. Generation Agency Joint Venture 5, 943 F. Supp. 626, 630 (S.D.W. Va. 1996) (clause providing “the owner and the contractor jointly and severally submit to the personal jurisdiction of the state and federal courts of Franklin County, Ohio,” held permissive).

The language of Article VIII does not contain clear language designating jurisdiction to a specific forum. To the contrary, Article VIII contains consent to jurisdiction in state, federal, *and* local courts located in Okaloosa County, Florida. (R. 1-30, R. 50; Appendix Tab 2). This language does not designate a specific forum; rather, it designates all available forums. Additionally, Article VIII contains no language requiring a specific venue or intent to restrict other forums.

Furthermore, it is a venerable principle of contract law that the provisions of a contract should be construed so as to give every provision meaning. Florida Polk County, 170 F.3d at 1084; see Maccaferri Gabions, Inc. v. Dynateria Inc., 91 F.3d 1431, 1439 (11th Cir. 1996) (“an interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions meaningless”) (citations and internal quotation marks omitted); Jameson v. Mutual Life Ins. Co. of N.Y., 415 F.2d 1017, 1020 (5th Cir. 1969) (“an interpretation which gives a reasonable meaning to all provisions is preferable to one which leaves a portion of the [contract] useless, inexplicable or creates surplusage”). To read Article VIII as mandatory would render the forum selection clause of Article IX completely meaningless. On the other hand, to read Article IX as mandatory would not render Article VIII as meaningless because both Articles provide consent to jurisdiction in Florida state court in Okaloosa County and designate it as an appropriate forum. Additionally, to enforce Article

VIII as mandatory would create surplusage, as the First Judicial Circuit, in and for Okaloosa County, Florida already possessed the authority to entertain any controversy arising out of the contracts at issue in this case. See § 47.011, Fla. Stat. (2007). Thus, even if this Court finds that this matter is covered by the arbitration provisions of Article VIII, removal would still be improper due to Article VIII constituting a permissive forum selection clause.

The language of Article IX providing that “[t]o the extent not prohibited by *Article VIII*, the Circuit and County Courts of the First Judicial Circuit, in and for Okaloosa County, Florida will be the venue ...”, does not prevent this Court from holding Article IX’s forum selection clause mandatory and exclusive. (R. 1-33, R. 1-54; Appendix Tab 2) (emphasis added). For instance, in General Electric v. G. Siempelkamp GmbH & Co., 29 F.3d 1095, 1099 (6th Cir. 1994), the Sixth Circuit considered a forum selection clause consisting of three sentences that initially stated the place of jurisdiction for all disputes arising in connection with the contract shall be at the principal place of business of the supplier. The final sentence, however, stated that “the supplier is also entitled to file a suit at the principal place of business of the purchaser.” Id. The Sixth Circuit found that the forum selection clause was exclusive and mandatory and that the final sentence did not vitiate the exclusive nature of the clause, stating that “the clause is clear and should be enforced according to its terms.” Id.

Additionally, in Union Steel Am. Co. v. M/V Sanko Spruce, 14 F. Supp. 2d 682, 687 (D. N.J. 1998), the United States District Court for the District of New Jersey considered a forum selection clause that first provided that “any dispute arising under this bill of lading shall be decided in the country where the Carrier has his principal place of business.” Id. The clause also included a second sentence stating that “the carrier has the option to elect to have any disputes arising under the bill of lading submitted to arbitration in New York.” Id. Despite the presence of the second sentence, the Court concluded that the forum selection clause was “mandatory and exclusive.” Id.

Therefore, despite the introductory language of Article IX and the language of Article VIII, Article IX’s forum selection clause is mandatory and exclusive.

III. The Furnishings Contract is subject to Article IX’s mandatory forum selection clause.

The Furnishings Contract executed by the parties, although not specifically including the language of Article IX, is subject to its mandatory forum selection clause. Junkin alleges that because the District Court’s opinion never addressed the Furnishings Contract and the contract did not specifically include Article IX, it was not subject to its provisions.

Contrary to Junkin’s allegations, the District Court specifically addressed the Furnishings Contract on Page 6, Footnote 6 of its opinion. (R. 44-1 et. seq.;

Appendix Tab 7). As the court correctly pointed out, the Purchase Contracts and the Furnishings Contract were executed as part of the same transaction and Junkin does not dispute that fact. When related documents are executed as part of the same transaction, they should be read together. See Gilmore v. Citigroup, Inc., 535 F.3d 45, 54 (1st Cir. 2008); Hopfenspirger v. West, 949 So. 2d 1050, 1053 (Fla. 5th DCA 2006) (“Florida law is well-settled that where two or more documents are executed by the same parties at or near the same time, in the course of the same transaction, and concern the same subject matter, they will be read and construed together”).

Furthermore, Article IX of the Purchase Contracts specifically provides that the First Judicial Circuit, in and for Okaloosa County, Florida will be the venue for any dispute related to the Purchase Contracts or “any other agreement or instrument executed in connection with this Contract.” (R. 1-33, R. 1-54; Appendix Tab 2). Accordingly, the mandatory forum selection clause located in Article IX is binding on any dispute related to the Furnishings Contract.

CONCLUSION

For these reasons, the District Court did not err in remanding this action to the First Judicial Circuit, in and for Okaloosa County, Florida. This Court should affirm the District Court's Order of Remand.

Respectfully submitted this the 21st day of November, 2008.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(A), no certificate of compliance is necessary, since this principal brief does not exceed 30 pages.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing is being served by United States Mail, postage prepaid and properly addressed, on this the 21st day of November, 2008, on the following counsel of record:

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