
IN THE APPELLATE COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Thieret Family, LLC, and)	
Dennis A. Thieret, Trustee of the)	
Dennis A. Thieret Revocable Trust)	
dated January 27, 1998)	From the Circuit Court
)	Thirty-Second Judicial Circuit
Plaintiffs-Appellants,)	Perry County, Missouri
)	No. 19PR-CC00068 (Div. 6)
v.)	
)	
Delta Plains Services, LLC,)	
Justin Brown, Adam Horton, and)	
Mike Still)	Hon. Scott Allan Lipke
)	Judge Presiding
Defendants-Appellees.)	

APPELLANTS' BRIEF

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TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 4

STATEMENT OF FACTS 5

POINTS RELIED ON 8

ARGUMENT 10

I. The Circuit Court erred in granting Appellees’ Motion to Dismiss as to Brown, Horton, and Still because Brown, Horton, and Still lack standing to invoke the forum selection clauses in the finance agreements in that they are neither parties to nor third party beneficiaries of such finance agreements. 10

II. The Circuit Court erred in granting Appellees’ Motion to Dismiss Counts I and II because the forum selection clauses lack precise language requiring litigation of fraud claims in Texas and resolution of the claims does not relate to interpretation of the contract.13

III. The Circuit Court erred in granting Appellees’ Motion to Dismiss Counts I and II because enforcement of the forum selection clauses would not be fair and reasonable in that the forum selection clauses were procured by fraud and such enforcement would risk duplication of effort, collateral estoppel or res judicata problems, or inconsistent adjudications...... 15

CONCLUSION 18

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages(s)</u>
<i>Burke v. Goodman</i> , 114 S.W.3d 276 (Mo. Ct. App. E.D. 2003).....	11, 13, 15
<i>Jitterswing, Inc. v. Francorp, Inc.</i> , 311 S.W.3d 828 (Mo. Ct. App. E.D. 2010).....	15
<i>Jones v. Paradies</i> 380 S.W.3d 13 (Mo. Ct. App. E.D. 2012).....	11, 12
<i>Nitro Distrib., Inc. v. Dunn</i> , 194 S.W.3d 339 (Mo. 2006).....	11, 12
<i>Reed v. Reilly Co.</i> , 534 S.W.3d 809 (Mo. banc 2017)	10, 13, 14, 15
<i>Riley v. Lucas Lofts Inv'rs, LLC</i> 412 S.W.3d 285 (Mo. Ct. App. E.D. 2013).....	15
<i>Scott v. Tutor Time Child Care Sys, Inc.</i> , 33 S.W.3d 679 (Mo. Ct. App. W.D. 2000)	16
<i>Springfield Iron & Metal, LLC v. Westfall</i> , 349 S.W.3d 487 (Mo. Ct. App. S.D. 2011).....	11, 12
<i>Triarch Indus. v. Crabtree</i> 158 S.W.3d 772 (Mo. 2005).....	14
<i>Verni v. Cleveland Chiropractic Coll</i> 212 S.W.3d 150 (Mo. banc 2007)	10
 <u>Statutes</u>	 <u>Page(s)</u>
§ 512.020(5), R.S.Mo.	4

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to § 512.020(5), R.S.Mo. because (1) this action involves an appeal from a final judgment of the circuit court for Perry County, Missouri (the “Circuit Court”) filed January 19, 2021 (the “Judgment”) and (2) a timely notice of appeal was filed with respect to the Judgment.

On August 14, 2020, the Circuit Court entered its Judgment and Order denying in part and granting in part Defendants-Appellees’ Motion to Dismiss (the “Order”). (D25). The Order dismissed fraud claims against Delta Plains Services, LLC (“Delta Plains”), Justin Brown (“Brown”), Adam Horton (“Horton”), and Mike Still (“Still”) on the basis of a forum-selection clause, but did not dispose of all claims in the lawsuit. Thus, the Order was not a final judgment for purposes of § 512.020(5), R.S.Mo.

On January 19, 2021, the Circuit Court entered the Judgment. The Judgment, which granted summary judgment in favor of Appellants’ on their remaining claims, was a final judgment for purposes of § 512.020(5), R.S.Mo. (D28).

On January 29, 2021, Appellants timely filed their Notice of Appeal in the Circuit Court, appealing from the Order and the Judgment (D29).

This case does not involve the validity of a statute or constitutional provision or the construction of revenue laws or title to any state office. Therefore, the grounds for exclusive jurisdiction in the Missouri Supreme Court do not apply and jurisdiction of this Court is properly invoked pursuant to Article 5, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

On December 16, 2019, Appellants Thieret Family, LLC (“Family”) and Dennis A. Thieret, Trustee of the Dennis A. Thieret Revocable Trust dated January 27, 1998, (“Trustee”) filed their Petition for Damages in the Circuit Court (the “Petition”). (D17).

Counts I and II of the Petition allege fraud against Delta Plains, Brown, Horton, and Still on behalf of Family and Trustee, respectively (D17, pp. 3-5). Counts III and IV allege Delta Plains’ issuance of bad checks to Family and Trustee. (D17, pp. 5-7).

Count I and II allege the following:

- On or about May 8, 2019, Brown, Horton, and Still, acting in concert, represented to Family and Trustee that Delta Plains was ready, willing, and able to perform certain finance agreements (the “Finance Agreements”). (D17, pp. 3, 4).
- These representations were false when made in that Delta Plains had no intention of performing the Finance Agreements, and Brown, Horton, and Still knew that such representations were false. (D17, pp. 3, 4).
- In reliance on these false representations, Appellants paid \$300,000.00 to Delta Plains (D17, pp. 3, 5).

The parties identified in the Finance Agreements are Delta Plains, Family, and Trustee. (D18, p. 1; D19, p. 1). Brown signed the Finance Agreements on behalf of Delta Plains as a “Managing Member” and as a personal guarantor. (D18, p. 4; D19, p. 4). Neither Horton nor Still signed the Finance Agreements in any capacity. (D18; D19).

The Petition and Exhibits do not set forth the nature of the relationship between Horton, Still, and Delta Plains. (D17 – D19).

The Finance Agreements contain forum selection clauses (the “FSCs”) providing that “[a]ny lawsuit or litigation arising under, out of, in connection with, or in relation to this agreement, or any amendment hereof, or the breach hereof, shall be brought in the courts of Dallas County, Texas, which courts shall have exclusive jurisdiction over any such lawsuit or litigation.” (D18, p. 3; D19, p. 3).

On March 5, 2020, Appellees moved to dismiss Counts I and II of the Petition on the basis of the FSCs (D23). On August 14, 2020, the Circuit Court dismissed Counts I and II of the Petition, reasoning that “[t]he Plaintiffs consistently allege that both the Delta Plains Defendant and the 3 individual defendants were all intertwined and a part of the transactions around the financing agreement. It is clear that the Plaintiffs intended that all of the defendants were intertwined and were involved in some way or another with the financing agreement.” (D25). On October 2, 2020, Appellants moved for reconsideration of the Circuit Court’s dismissal of Counts I and II of the Petition, arguing in part that the Circuit Court had erred in dismissing the fraud claims against Brown, Horton, and Still because these individuals lacked standing to invoke the FSCs and it would be unreasonable to enforce the FSCs where some of the claims at issue would be litigated in Texas and other related claims would be litigated in Missouri. (D26).

On January 19, 2021, the Circuit Court denied Appellants’ Motion for Reconsideration. At the same time, the Circuit Court also granted summary judgment

against Delta Plains on Counts III and IV for Delta Plains' issuance to Appellants of two bad checks. (D28).

This appeal followed.

POINTS RELIED ON

Point I

The Circuit Court erred in granting Appellees' Motion to Dismiss as to Brown, Horton, and Still because Brown, Horton, and Still lack standing to invoke the forum selection clauses in the finance agreements in that they are neither parties to nor third party beneficiaries of the finance agreements.

Verni v. Cleveland Chiropractic Coll.,

212 S.W.3d 150 (Mo. banc 2007);

Nitro Distrib., Inc. v. Dunn,

194 S.W.3d 339, 345 (Mo. 2006);

Jones v. Paradies,

380 S.W.3d 13 (Mo. Ct. App. E.D. 2012);

Springfield Iron & Metal, LLC v. Westfall,

349 S.W.3d 487 (Mo. Ct. App. S.D. 2011).

Point II

The Circuit Court erred in granting Appellees' Motion to Dismiss Counts I and II because the forum selection clauses lack precise language requiring litigation of fraud claims in Texas and resolution of the claims does not relate to interpretation of the contract.

Jitterswing, Inc. v. Francorp, Inc.,

311 S.W.3d 828 (Mo. Ct. App. E.D. 2010)

Riley v. Lucas Lofts Inv'rs, LLC,

412 S.W.3d 285, 292 (Mo. Ct. App. E.D. 2013)

Reed v. Reilly Co., LLC,

534 S.W.3d 809 (Mo. banc 2017)

Point III

The Circuit Court erred in granting Appellees' Motion to Dismiss Counts I and II because enforcement of the forum selection clauses would not be fair and reasonable in that they were procured by fraud and such enforcement would result in duplication of effort and the risk of collateral estoppel, res judicata, or inconsistent adjudications.

Scott v. Tutor Time Child Care Sys, Inc.,

33 S.W.3d 679 (Mo. Ct. App. W.D. 2000)

Burke v. Goodman,

114 S.W.3d 276, 278 (Mo. App. Ct. E.D. 2003)

ARGUMENT

- I. The Circuit Court erred in granting Appellees' Motion to Dismiss as to Brown, Horton, and Still because Brown, Horton, and Still lack standing to invoke the forum selection clauses in the finance agreements in that they are neither parties to nor third party beneficiaries of such finance agreements.**

“Review of a circuit court’s order granting a motion to dismiss is de novo.” *Reed v. Reilly Co., LLC*, 534 S.W.3d 809, 811 (Mo. banc 2017).

The Circuit Court granted Appellees’ Motion to Dismiss as to Brown, Horton, and Still (the “Individual Defendants”) on the basis of two identical forum selection clauses (the “FSCs”). This was reversible error because Brown, Horton, and Still lack standing to invoke the FSCs in that they were neither parties to nor third party beneficiaries of the contracts containing the FSCs. This error was preserved for appellate review because this issue was presented to and decided by the Circuit Court (D24, pp. 4-5).

In the Judgment, the Circuit Court allowed the Individual Defendants to invoke the FSCs on the ground that “Plaintiffs consistently allege that both the Delta Plains Defendant and the 3 individual defendants were all intertwined and a part of the transactions around the financing agreement.” (D25).

Under Missouri law, however, “[o]nly parties to a contract and any third-party beneficiaries of a contract have standing to enforce that contract.” *Verni v. Cleveland*

Chiropractic Coll., 212 S.W.3d 150, 153 (Mo. banc 2007).¹ “To be bound as a third-party beneficiary, the terms of the contract must clearly express intent to benefit that party or an identifiable class of which the party is a member.” *Nitro Distrib., Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. 2006).

In *Jones v. Paradies*, 380 S.W.3d 13 (Mo. Ct. App. E.D. 2012), this Court held that non-signatories to an arbitration agreement, a type of forum-selection clause, could not compel arbitration of claims relating to contracts containing mandatory arbitration clauses. *Id.* at 17-18. This Court recognized that “one cannot enforce an arbitration agreement if he is not a party to that agreement.” *Id.* at 17 (quoting *Springfield Iron & Metal, LLC v. Westfall*, 349 S.W.3d 487 (Mo. Ct. App. S.D. 2011)). And this Court expressly rejected the argument that arbitration of claims against a non-signatory could be compelled even if those claims are “inextricably intertwined” with signatory claims. *Id.* at 18. (“To compel arbitration of claims against a non-signatory—even if those claims are ‘inextricably intertwined’ with signatory claims—is inconsistent with the overarching principle that arbitration is ultimately a matter of agreement between the parties.”).

Likewise, the agents of signatories to arbitration agreements do not enjoy standing to enforce such agreements. *See Springfield*, 349 S.W.3d at 490 (“We reject the

¹ Where a plaintiff alleges that a party to a contract containing a forum-selection clause is the “alter-ego” of a non-party, the non-party may have standing to enforce the forum-selection clause. *See Burke v. Goodman*, 114 S.W.3d 276, 279 (Mo. App. Ct. E.D. 2003). The Petition contains no allegations that the Individual Defendants are or were the “alter-ego” of Delta Plains.

Griesediecks' argument that, as GB's agents, they share GB's power to compel arbitration under the operating agreement."").

Here, the Individual Defendants are neither parties to nor third-party beneficiaries of the Financing Agreements, which do not clearly express an intent to benefit the Individual Defendants or a class to which they belong. *See Nitro*, 194 S.W.3d at 345. Moreover, any relationship between the claims in the Petition against Delta Plains and the claims against the Individual Defendants does not provide a basis for permitting the Individual Defendants to enforce the FSCs. *See Jones*, 380 S.W.3d at 18. In fact, while the Petition's exhibits refer to Brown as Delta Plains' Managing Member, the Petition does not allege the nature of the relationship between Horton, Still, and Delta Plains. (D17). Thus, the Circuit Court could not have properly determined on a motion to dismiss that the FSCs should be enforced because of a relationship between the Individual Defendants and Delta Plains. Finally, even if the Individual Defendants were operating as agents of Delta Plains, that fact alone does not afford them standing to enforce the FSCs. *See Springfield*, 349 S.W.3d at 490.

Therefore, the Individual Defendants lack standing to invoke the FSCs regardless of whether the claims against the Individual Defendants relate in some manner to the Finance Agreements.

Accordingly, the Circuit Court erred in granting Appellants' Motion to Dismiss as to Brown, Horton, and Still.

II. The Circuit Court erred in granting Appellees’ Motion to Dismiss Counts I and II because the forum selection clauses lack precise language requiring litigation of fraud claims in Texas and resolution of the claims does not relate to interpretation of the contract.

“Review of a circuit court’s order granting a motion to dismiss is de novo.” *Reed v. Reilly Co., LLC*, 534 S.W.3d 809, 811 (Mo. banc 2017).

The Circuit Court erred in applying the FSCs to Counts I and II because the FSCs lack precise language requiring litigation of fraud claims in Texas and resolution of the fraud claims does not relate to interpretation of the contract. This error was preserved for appellate review because the issue was presented to and decided by the Circuit Court (D24, pp. 2-4).

“[T]he existence of a forum selection clause in a contract that requires contractual disputes to be litigated in a specific forum, does not require tort claims between the same parties to be litigated in that forum absent *precise language* to that effect.” *Jitterswing, Inc. v. Francorp, Inc.*, 311 S.W.3d 828, 830 (Mo. Ct. App. E.D. 2010) (internal quotations and citations omitted) (emphasis added).

Here, there is no precise language about tort or fraudulent misrepresentation claims in the FCSs, which weigh against their application. Instead, the FSCs are limited to disputes “arising under, out of, in connection with, or in relation to th[e] Agreement . . . or its breach.” In addition to lacking precise language, the FSCs are not written broadly enough to cover all disputes between the parties. *Cf. Burke v. Goodman*, 114 S.W.3d 276, 278, 279 n.5 (Mo. App. Ct. E.D. 2003) (forum selection clause provided: “Exclusive venue for the resolution of disputes shall be in Dade County, Florida,” and Court

explained this language “applies to the resolution of any disputes between the parties” as opposed to a clause that is “reserved for disputes arising only under the [contract]”).

To the extent any doubt exists about whether Plaintiffs’ claims fall within the scope of the Forum-Selection Clause, such doubt must be resolved against Delta Plains, who drafted the Financing Agreements. *See Triarch Indus. v. Crabtree*, 158 S.W.3d 772, 776 (Mo. 2005).

Accordingly, based on the plain language in the Finance Agreements, the FSCs should not apply to the non-contract claims here.

Finally, to the extent the plain language presents a closer call, the Missouri Supreme Court has explained that “whether a forum selection clause that by its terms applies to contract actions also reaches non-contract claims ‘depends on whether resolution of the claims relates to interpretation of the contract.’” *Reed v. Reilly Co., LLC*, 534 S.W.3d 809, 811 (Mo. banc 2017).

Here, Plaintiffs’ fraud claims in Counts I and II do not rely on any terms of the Financing Agreements as the basis for Defendants’ liability and do not require interpretation of the Financing Agreements. Plaintiffs have not asserted a breach of contract claim against Defendants. Instead, Plaintiffs assert that they were fraudulently induced to enter into and perform the Financing Agreements and seek restitution of the sums they paid to Delta Plains in reliance on Defendants’ fraudulent misrepresentations. The only significance of the Financing Agreements is that Plaintiffs would not have entered into and performed the Financing Agreements but for Defendants’ fraudulent misrepresentations. This is not sufficient to trigger the FSCs’ application. *See*

Jitterswing, 311 S.W.3d at 830 (“[A] forum selection clause in a contract does not control the site for litigation of a tort claim simply because the dispute that produced the tort claim would not have arisen absent the existence of a contract.”).

Accordingly, Counts I and II are not subject to the FSC. *See Riley v. Lucas Lofts Inv’rs, LLC*, 412 S.W.3d 285, 292 (Mo. Ct. App. E.D. 2013). (“Plaintiff did not assert any breach of contract claims against Defendants. Instead, Plaintiff asserted tort claims of fraud, negligent misrepresentation, fraudulent inducement, and breach of the Missouri Merchandising Practices Act based on Defendants’ allegedly false representations about the building’s leaking roof. Although Plaintiff referenced the contract in his petition and attached it as an exhibit, he did not rely on any provision of the contract as a basis for liability.”).

III. The Circuit Court erred in granting Appellees’ Motion to Dismiss Counts I and II because enforcement of the forum selection clauses would not be fair and reasonable in that the forum selection clauses were procured by fraud and such enforcement would risk duplication of effort, collateral estoppel or res judicata problems, or inconsistent adjudications.

“Review of a circuit court’s order granting a motion to dismiss is de novo.” *Reed v. Reilly Co., LLC*, 534 S.W.3d 809, 811 (Mo. 2017).

The Circuit Court erred in concluding that enforcement of the FSCs would be fair or reasonable. This error was preserved for review because it was presented to and decided by the Circuit Court (Transcript of July 15, 2020 Hearing on Appellants’ Motion to Dismiss, pp. 7-8; D26 pp. 5-6).

Even if the FSCs apply to Plaintiffs’ claims, they should still not be enforced because to do so would be unfair. In *Burke*, this Court explained that it would be unfair

to enforce a forum selection clause obtained by fraud and overreaching. 114 S.W.3d at 280. This is precisely the case here. Defendants gained Plaintiffs' trust, made false representations, and induced them into paying Defendants \$300,000 that they had no intention of returning. Defendants' deceit in obtaining Plaintiffs' signature on documents containing the FSCs makes their enforcement unfair.

In addition or in the alternative, to the extent some, but not all, of the Appellees can enforce the FSCs, it would be unreasonable to enforce the FSCs and split similar claims among multiple courts in different jurisdictions.

In *Scott v. Tutor Time Child Care Sys, Inc.*, 33 S.W.3d 679 (Mo. Ct. App. W.D. 2000), a franchisee had breach of contract and negligence claims against a franchisor and another party that had not signed the franchise agreement containing an outbound forum-selection clause to Florida. *Id.* at 681. Because the claims against the non-signatory that could not invoke the forum-selection would remain in Missouri, the Court of Appeals found it was error for the trial court to enforce the Florida forum-selection clause, holding it would be unreasonable to enforce the forum-selection clause when aspects of the similar litigation would remain in Missouri:

To avoid duplication of effort, and to avoid potential problems of collateral estoppel or res judicata or inconsistent adjudications which could theoretically result from separating the trials of these related claims, it makes sense to keep all the litigation here and it is unreasonable to do otherwise.

Id. at 683.

Here, if only Delta Plains (or Delta Plains and Brown) can enforce the FSCs as signatories to the Finance Agreements but Horton and Still, as non-signatories, cannot,

enforcing the FSCs would be unreasonable in that much of the litigation surrounding Appellees' fraudulent scheme will remain in Missouri while other portions of the litigation will proceed in Texas. Fraud claims against only Delta Plains or Delta Plains and Brown arising from Appellants' fraudulent scheme will proceed in Texas, while fraud claims against Horton and Still arising from the same scheme will proceeding simultaneously in Missouri. As in *Scott*, the interest in avoiding duplication of effort, potential problems of collateral estoppel or res judicata, and inconsistent adjudications make enforcement of the FSCs unreasonable to the extent some, but not all, of the Appellee's can invoke the FSCs.

Accordingly, the Circuit Court erred in granting Appellees' Motion to Dismiss Counts I and II of the Petition.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the Circuit Court's granting of Appellees' Motion to Dismiss Counts I and II of the Petition and remand this action to the Circuit Court for further proceedings.

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned certifies as follows:

- That he signed the original of the above document and will maintain the original signed filing for a period of not less than the maximum allowable time to complete the appellate process.
- That the above brief was filed electronically on April 26, 2021, pursuant to Missouri Supreme Court Rule 103.08(a) and that the electronic filing system served the above brief on counsel for Appellees.
- That the above brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b).
- That the above brief contains 3,673 words.

/s/ Thomas C. Horscroft