WILLIAMS v. DEUTSCHE BANK SECS. INC.

Court of Appeal of California, First Appellate District, Division Four

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Reporter
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THOMAS M. WILLIAMS, Plaintiff and Appellant, v. DEUTSCHE BANK SECURITIES INC. et al., Defendants and Respondents.

Prior History: San Francisco County Super. Ct. No. CGC-04-427869.

Disposition: The order staying this action is affirmed.

Judges: RIVERA, J.; KAY, P.J., SEPULVEDA, J. concurred.

Opinion by: RIVERA

Opinion

Plaintiff and appellant Thomas M. Williams contends the trial court wrongly stayed this action based on a forum selection clause in a contract between him and Deutsche Bank AG. Williams argues that defendants lacked standing to enforce the forum selection clause and that enforcement would be unreasonable. We affirm.

I. BACKGROUND

Williams brought this action against defendants Deutsche Bank Securities Inc. (DBSI), Deutsche Banc Alex. Brown (DBAB), and John Maierhofer, alleging causes of action for negligence, negligent misrepresentation, breach of fiduciary duty, constructive fraud, and unfair competition. Maierhofer was an employee in the San Francisco office of DBAB, a division [*2] of DBSI. Williams had securities accounts at DBAB, and Maierhofer was his investment broker.

Williams held a large number of shares of Cisco Systems, Inc., on margin in his DBAB account. [1] The value of his stock declined, and during 2002 Williams became subject to margin calls, which required him to pay cash to DBAB. He used a vehicle known as a forward purchase contract to raise cash to meet his margin calls. Under such an agreement, the customer agrees to deliver shares of stock for sale at a future date. In consideration for that future sale, the other party agrees to prefund the sale by immediately paying the customer a portion of the then-current value of the shares. According to a declaration submitted by defendants, such agreements allow the customer to raise immediate cash while deferring delivery of the shares. A forward purchase contract also "affords the customer downside protection should the share price decline, as well as some limited upside participation should the share price increase." According to the complaint, Williams entered into a forward purchase contract on defendants' recommendation, but defendants failed to advise him that the arrangement severely limited [*3] his ability to benefit from any appreciation in the value of Cisco stock-an appreciation that later took place.

The parties to the forward purchase contract were Williams, as seller, and Deutsche Bank AG (DBAG), as purchaser. DBSI is a subsidiary of DBAG. The agreement gives DBAG's address for notices as "c/o [DBSI]." The signature page of the forward purchase contract is signed on behalf of both DBAG and "[DBSI], [P] acting solely as Agent for Deutsche Bank AG London."

According to a declaration submitted by defendants, the complete agreement consisted of the forward purchase contract, a pledge and security annex to the forward purchase contract, an account control agreement, and a confirmation of transaction under the forward purchase contract. The forward purchase contract, which contains the forum selection clause at issue here, defines the "Agreement" as "this [*4] Forward Purchase Contract, the Security Annex, and all Confirmations

[1] According to Williams's March 2000 monthly account statement, the value of his Cisco stock was approximately $ 65 million at that time.

. . . between the parties." The record contains a "Confirmation of Transaction Under Forward Purchase Contract" on DBSI letterhead. It is signed by Williams, DBAG, and DBSI "acting solely as Agent in connection with this Transaction." The account control agreement is signed by Williams, DBAG, and DBSI "as Securities Intermediary Affiliate." The account control agreement appears to supplement, and be a part of, the forward purchase contract and the pledge and security annex.

The forward purchase contract contained the following forum selection clause: "Any legal action or proceeding with respect to this Agreement, the security interests created by the Security Annex or the rights and remedies of parties may be brought against Deutsche only in, and may be brought against [Williams] in any courts including without limitation, the courts of the State of New York sitting in the Borough of Manhattan in New York City or of the United States for the Southern District of New York, and, by execution and delivery of this Agreement, [Williams] hereby irrevocably accepts, for itself and in respect of its property, generally [*5] and unconditionally, the jurisdiction of the aforesaid courts. . . . Nothing herein shall affect the right of Deutsche to serve process in any other manner permitted by law or to commence legal proceedings or otherwise proceed against [Williams] in any other jurisdiction."

Defendants moved to dismiss or stay this action, contending the trial court should enforce the forum selection clause. The trial court granted the motion. This timely appeal ensued. (Code Civ. Proc., § 904.1, subd. (a)(3).)

II. DISCUSSION

A. Standard of Review

The court in *Bancomer, S. A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1457 (*Bancomer*), described the standard of review of a trial court's decision to enforce a forum selection clause as follows: "A forum selection clause is valid in the absence of the resisting party meeting a heavy burden of proving enforcement of the clause would be unreasonable under the circumstances of the case. (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 496, 131 Cal. Rptr. 374 . . . [*Smith*]; *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1493 [*6] . . . [*Lu*].) 'We review a trial court's decision to enforce [or refuse to enforce] a forum selection clause for an abuse of discretion.' (11 Cal.App.4th at p. 1493; *Furda v. Superior Court* (1984) 161 Cal. App. 3d 418, 424, 207 Cal. Rptr. 646 . . . .) 'The standard of abuse of discretion . . . presumes deference to the trial court. Such deference makes sense where the issue usually involves primarily factual disputes. In its emphasis on deference, the abuse of discretion standard is similar to the substantial evidence rule.' [Citation.]" (See also *Schlessinger v. Holland America* (2004) 120 Cal.App.4th 552, 557; *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 7-9.) [2] Thus, as to the question of whether it is reasonable to enforce the forum selection clause, we review the trial court's action for abuse of discretion. As to the question of defendants' standing to enforce the clause, however, the standard is different: The facts are not in dispute, and the question is "one of law subject to our independent review." (*Bugna v. Fike* (2000) 80 Cal.App.4th 229, 233 (*Bugna*).)

[*7] B. Standing to Enforce Forum Selection Clause

Williams contends defendants did not have standing to enforce the forward purchase contract's forum selection clause because they were not signatories to the forward purchase contract. A nonsignatory has standing if it " 'demonstrates that it was "so closely related to the contractual relationship" that it is entitled to enforce the forum selection clause.' " (*Bugna*, *supra*, 80 Cal.App.4th at p. 233, quoting *Bancomer*, *supra*, 44 Cal.App.4th at p. 1461.) To do so, " 'it must show by specific conduct or express agreement that (1) it agreed to be bound by the terms of the . . . agreement, (2) the contracting parties intended [defendant] to benefit from the . . . agreement, or (3) there was sufficient evidence of a defined and intertwining business relationship with a contracting party.' " (*Ibid*.) As stated in *Bugna*, the key inquiry "is whether the nonsignatories were close to the contractual relationship, not whether they were close to the third party signator." (*Bugna, supra*, 80 Cal.App.4th at p. 235.)

The court in *Bugna* concluded this test was met on its [*8] facts. Several doctors, a clinic, and a surgery center sued their former office administrator and business partner, a healthcare consultant, an attorney, an accountant, and a company, SCN, alleging causes of action for fraud and conspiracy, negligent misrepresentation, breach of fiduciary duty, and other counts. According to the complaint, the office administrator encouraged the plaintiffs to contract with a physician management company; he and the healthcare consultant recommended SCN. The attorney represented the plaintiffs, and the accountant provided accounting services. (*Bugna*, *supra*, 80 Cal.App.4th at pp. 231-232.) The deal included an asset purchase and merger. In that transaction, the office administrator, healthcare consultant's company, and attorney's firm received substantial amounts of money; none of the

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[2] However, the court in *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1680-1681 (*Cal-State*), applied the substantial evidence test. Under either standard, the result in this case would be the same.

doctors received anything from the clinic merger and they received only relatively small amounts from the surgery center merger. (*Ibid.*) The agreements each contained a forum selection clause requiring the plaintiffs to bring any action against SCN in Colorado. (*Id.* at p. 232.) The plaintiffs brought suit in California, and three [*9] of the defendants moved to dismiss or stay the California action. The trial court granted the motion, and the plaintiffs appealed the order as to the office administrator, healthcare consultant, attorney, and accountant, three of whom were not signatories to the agreements. (*Id.* at pp. 232-233.) The Court of Appeal affirmed, concluding the nonsignatories were close to the contractual relationship. (*Id.* at pp. 235-236.) As the court noted, "they were key transaction participants-the deal makers who negotiated, evaluated and otherwise put together the very SCN transactions that appellants now attack." (*Id.* at p. 235.) [3]

In reaching this conclusion, the court relied in part [*10] on *Lu*. (*Bugna, supra*, 80 Cal.App.4th at p. 233.) In *Lu*, the plaintiffs had entered into a franchise agreement with Dryclean-U.S.A. of California, Inc., to operate a drycleaning business. They sued the franchiser and its corporate parent and grandparent for rescission and damages, alleging the defendants had misrepresented the advantages of operating the business. (*Lu*, *supra*, 11 Cal.App.4th at p. 1492.) They argued that a forum selection clause should not be enforced because two of the defendants, the corporate parent and grandparent, did not sign the agreement containing the forum selection clause. (*Id.* at pp. 1493-1494.) The Court of Appeal rejected this contention, stating: " ' "[A] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses." [Citations.]' (*Manetti-Farrow, Inc. v. Gucci America, Inc.* (9th Cir. 1988) 858 F.2d 509, 514, fn. 5.) Here, the alleged conduct of Dryclean Franchise [parent] and Dryclean U.S.A. [grandparent] is closely related to the contractual relationship. They are alleged to have participated in the fraudulent [*11] representations which induced plaintiffs to enter into the Agreement. Indeed, plaintiffs go so far as to allege Dryclean Franchise and Dryclean U.S.A. are the 'alter ego' of Dryclean California, which did sign the Agreement containing the forum selection clause. Under these circumstances, the fact that Dryclean Franchise and Dryclean U.S.A. did not sign the Agreement does not render the forum selection clause unenforceable. [Citations.] To hold otherwise would be to permit a plaintiff to sidestep a valid forum selection clause simply by naming a closely related party who did not sign the clause as a defendant." (*Id.* at p. 1494, fn. omitted.)

As in *Lu* and *Bugna*, we see no error in the trial court's conclusion that nonsignator defendants could enforce the forum selection clause. It is true that the forward purchase contract provided that DBSI was not a principal. However, the record as a whole demonstrates that defendants were closely connected to the contractual relationship between Williams and DBAG. It is not disputed that DBSI is a subsidiary of DBAG, and that DBAB is a division of DBSI. Further, DBSI, although not a principal to the transaction, was a direct participant. [*12] The account control agreement, which formed part of the forward purchase contract, was signed by DBAG, DBSI and Williams, and operated to appoint DBSI as the "Securities Intermediary Affiliate" for the transaction. As part of the agreement, DBSI took on a number of obligations, including carrying out Williams's directions regarding voting rights, crediting interest, dividends or distributions to Williams's account, providing monthly statements to both DBAG and Williams, and reporting income, gains, expenses and losses recognized in Williams's account to the IRS. In his complaint Williams himself relies on the corporate affiliations between DBAB/DBSI and DBAG as the basis for his claim that defendants had a conflict of interest when they recommended the forward purchase contract with DBAG. Thus, paraphrasing *Bugna,* there is no question but that defendants were closely related to the contractual relationship between DBAG and Williams; indeed, they were key transaction participants and deal makers who put together the very transaction that Williams now attacks. (*Bugna*, *supra*, 80 Cal.App.4th at p. 235.)

Contrary to Williams's contention, this conclusion is buttressed, [*13] not undermined, by *Bancomer*. There, a bank designated in a purchase agreement to establish a trust and collect payments under the agreement did not have standing to enforce a forum selection clause because there was not "sufficient evidence of a defined and intertwining business relationship with a contracting party." (*Bancomer*, *supra*, 44 Cal.App.4th at pp. 1453- 1454, 1461.) The court concluded that as an independent financial conduit the bank was not closely enough related to the contractual relationship to be entitled to enforce the clause. (*Id.* at pp. 1453-1454, 1459-1461.) [4] Here, in contrast, not only is there undisputed evidence of the corporate affiliations among DBAG, DBSI and DBAB, but Williams relies upon those intertwining

[3] The court also pointed out the complaint alleged that SCN and its officer conspired with the nonsignatories to create a fraudulent scheme under the guise of an arm's length negotiation, and that the plaintiffs had also sued SCN. (*Bugna, supra*, 80 Cal.App.4th at p. 235.)

[4] The court also noted there was no evidence that the bank agreed to be bound by the terms of the agreement or that the parties intended the bank to benefit from the agreement. (*Bancomer*, *supra*, 44 Cal.App.4th at p. 1461.)

relationships as a basis for his claims.

[*14] Our conclusion is not changed by the fact that Williams did not name DBAG as a defendant. Whether or not he had grounds to do so, we conclude that defendants were closely involved in the transactions leading up to the formation of the contract and, therefore, had standing to assert the forum selection clause. (See *Berclain America Latina v. Baan Co.* (1999) 74 Cal.App.4th 401, 408-409 [stating in concluding defendant had no standing to enforce forum selection clause: "whether [plaintiff] sued [a signatory] or not does not change [nonsignatory defendant's] standing to assert the forum selection clause"].) [5]

[*15] **C. Scope of Forum Selection Clause**

The forum selection clause in the forward purchase contract applies to "any legal action or proceeding with respect to this Agreement, the security interests created by the Security Annex or the rights and remedies of [the] parties . . . ." Williams contends that language does not cover his complaint, which contains only tort causes of action, and which alleges wrongdoing before Williams entered into the forward purchase contract. We disagree. In our view, the trial court acted within its discretion in concluding that this language was broad enough to encompass Williams's claims.

In the complaint Williams alleged that defendants breached their duties by recommending an agreement that would benefit themselves and their affiliates and then failing to disclose the conflicts of interest thus created. Williams alleged further that defendants failed to explain that the contract "would be construed by defendants" in a manner that ran counter to his stated investment objectives, and that, "under . . . the defendants' interpretation of the Forward Sale Contract, plaintiff Williams has been significantly damaged . . . ." These allegations put [*16] at issue the proper interpretation of the agreement, and the extent to which its terms met, or failed to meet, Williams's objectives. Additionally, defendants can be expected to defend Williams's claims by reference to other provisions in the agreement, reciting that Williams has "sought and obtained [his] own advice of experts . . . [and] is not relying on any investment advice of Deutsche or any of its affiliates (whether written or oral) . . . ," and that Williams "has a valid business purpose for entering into this Agreement and has determined that each Transaction hereunder is suitable in light of [Williams's] investment objectives, financial situation, and level of investment sophistication." Accordingly, this action can reasonably be seen as an action "with respect to" the forward purchase contract. (See *Smith*, *supra*, 17 Cal.3d at p. 497 [clause selecting forum for actions " 'with respect to any matters arising under or growing out of' " agreement broad enough to encompass causes of action for unfair competition and intentional interference with advantageous business relationships (italics omitted)]; and see *Bancomer, supra*, 44 Cal.App.4th at p. 1461 [*17] [whether forum selection clause applies to a tort claim depends on whether resolution of claims relates to interpretation of contract].)

Williams points out, however, that the court in *Bancomer* concluded the forum selection clause there did not apply to tort causes of action alleging a bank had fraudulently induced the plaintiff to enter into a contract. (*Bancomer*, *supra*, 44 Cal.App.4th at pp. 1461-1462.) The forum selection clause in *Bancomer*, however, was narrower than that at issue here; it provided that " 'any conflict which may arise regarding the interpretation or fulfillment of this contract' " would be decided in a Mexican court. (*Id.* at p. 1461.) The Court of Appeal concluded the allegations against the bank did not relate to the interpretation or fulfillment of the contract, stating: "Since the terms of the purchase agreement, and their interpretation, are irrelevant to the claims alleged by [the plaintiff], we conclude the tort causes of action do not relate to 'any conflicts' 'regarding the interpretation or fulfillment' of the agreement. Accordingly, [the plaintiff's] claims do not fall within the scope of the forum [*18] selection clause." (*Id.* at pp. 1461-1462.) Unlike that in *Bancomer*, the forum selection clause here is not limited to conflicts regarding the interpretation or fulfillment of the contract, but includes all claims *with respect to* the agreement-language that can reasonably be construed to refer to claims that defendants acted wrongfully in recommending and advising Williams about the agreement. Additionally, Williams has put at issue the interpretation of the agreement; consequently *Bancomer* does not apply here.

D. Reasonableness of Forum Selection Clause

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[5] Williams quotes language in the forum selection clause out of context to argue that only DBAG may enforce the forum selection clause. The clause states in pertinent part that any legal action "may be brought against Deutsche only in, and may be brought against [Williams] in any courts including without limitation, the courts of the State of New York . . . or of the United States for the Southern District of New York." Williams's opening brief quotes this language selectively as follows: " 'Any legal action or proceeding with respect to this Agreement, the security interests created by the Security Annex or the rights and remedies of parties may be brought ***against Deutsche only*** in . . . the courts of the State of New York.' " (Emphasis in original.) Read in context, it is clear that the language "against Deutsche only" means DBAG may be sued only in New York, not that DBAG's affiliates were excluded from the scope of the forum selection clause.

We next consider whether the forum selection clause is unreasonable and, thus, unenforceable. As noted above, the plaintiff seeking to defeat such a clause has the "heavy burden" of demonstrating that enforcement would be "unreasonable under the circumstances of the case." (*Lu*, *supra*, 11 Cal.App.4th at p. 1493; see also *Smith*, *supra*, 17 Cal.3d at p. 496.) Our Supreme Court has interpreted unreasonableness to mean "that the forum selected would be unavailable or unable to accomplish substantial justice." (*Smith*, *supra*, 17 Cal.3d at p. 494.) [*19] Thus, a forum selection clause will normally be enforced if it appears " 'in a contract entered into *freely* and *voluntarily* by parties who have negotiated *at arms' length,*' " and where enforcement would not be unreasonable. (*Cal-State*, *supra*, 12 Cal.App.4th at p. 1679, quoting *Smith*, *supra*, 17 Cal.3d at pp. 495-496.)

Williams contends enforcement of the forum selection clause would be unreasonable because it is not reciprocal. As he points out, the clause requires him, but not DBAG, to bring an action in New York. Williams is correct that reciprocity has been considered as a factor in determining whether a forum selection clause is reasonable. (See *Smith*, *supra*, 17 Cal.3d at p. 496 [parties contemplated in their negotiations the expense and inconvenience of litigation in distant forum, as was inherent in reciprocal clause]; *Bugna*, *supra*, 80 Cal.App.4th at p. 236 [forum selection clause reciprocal].) However, Williams has cited no cases indicating that lack of reciprocity in itself makes a forum selection clause unreasonable.

In view of the circumstances as a whole, we conclude the [*20] nonreciprocal nature of the forum selection clause does not render enforcement unreasonable. There is evidence that the transaction was concluded at arms length. The record also supports the conclusion that Williams was not an unsophisticated investor; as of March 2000, his investments with DBAB amounted to more than $ 74 million. Further, according to a declaration prepared by Maierhofer, Williams had retained an investment advisory firm, the Portola Group, to act as his agent in directing his investments at DBAB. Maierhofer discussed the forward purchase contract not only with Williams, but also with his two advisors at the Portola Group who reviewed the terms of the agreement and participated in structuring the transaction. Although Williams avers he did not read the documents comprising the forward purchase contract before signing them, there is no evidence that he could not have negotiated the terms of the agreement. Additionally, there has been no showing that other fora are unavailable or unable to accomplish substantial justice. [6] (See *Smith*, *supra*, 17 Cal.3d at p. 494.)

[*21] We note that the trial court stayed this action rather than dismissing it; accordingly, should New York or other courts become unavailable for any reason, Williams may seek to reinstate his California action. (See *Smith*, *supra*, 17 Cal.3d at p. 496.) In the circumstances, the forum selection clause, though nonreciprocal, was not unreasonable. The trial court did not abuse its discretion in enforcing it.

III. DISPOSITION

The order staying this action is affirmed.

RIVERA, J.

We concur:

KAY, P.J.

SEPULVEDA, J.

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[6] Williams has provided us with a copy of a decision from the federal court in the Southern District of New York, where Williams is pursuing the same claims against defendants. We decline to consider the merits of the court's decision, but note that the court has retained jurisdiction over the case, without prejudice to a renewed motion to transfer the matter to the federal court in the Northern District of California. Because we do not consider the merits of that decision, respondents' related request for judicial notice is denied.