



**In the
Missouri Court of Appeals
Western District**

JEFF REED,

Appellant,

v.

THE REILLY COMPANY, LLC,

Respondent.

WD80190

OPINION FILED:

May 2, 2017

**Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Marco Roldan, Judge**

Before Division Two:

Thomas H. Newton, P.J., James Edward Welsh, and Karen King Mitchell, JJ.

Jeff Reed appeals from the circuit court's dismissal of his petition for declaratory judgment, injunctive relief, fraudulent misrepresentation and concealment, and violations of the Missouri Merchandising Practices Act (MMPA), against his former employer, The Reilly Company, LLC (Reilly). The circuit court entered the dismissal stating that it was dismissing "without prejudice to the bringing of a future action in the jurisdiction and venue selected by the contract of the parties." The employment contract between Reed and Reilly provided that Johnson County, Kansas, was the sole proper jurisdiction and venue to interpret and enforce the agreement between the parties.

In this appeal, Reed presents six points. He contends that: (1) the circuit court erred in enforcing the outbound forum selection clause and dismissing the case because jurisdiction is proper in Missouri and venue is proper in Jackson County; (2) the circuit court erred in dismissing his MMPA claim because the exemptions in section 407.020.2(2), RSMo Cum. Supp. 2013, do not apply and Reilly failed to show that it fit within the exemptions; (3) the circuit court erred in enforcing the outbound forum selection clause and dismissing the case because he is not seeking to enforce any of the terms of the agreement; (4) the circuit court erred in enforcing the outbound forum selection clause and dismissing the case because his employment with Reilly was “at will,” no additional consideration was given in exchange for the outbound forum selection clause, and Reilly materially breached the agreement; (5) the circuit court erred in enforcing the outbound forum selection clause and dismissing the case because enforcement of the forum selection clause would be unfair and unreasonable; and (6) the circuit court erred in considering an affidavit allegedly concerning Reilly’s unaccepted “settlement offer” in ruling on the motion to dismiss. We affirm the circuit court’s judgment.

Reilly is a Kansas limited liability company engaged in the business of employing insurance agents to broker insurance sales. Reilly is registered as a foreign corporation with the State of Missouri, and maintains an office¹ and registered agent in Jackson County, Missouri.

On March 19, 2010, Reed, a resident of Jackson County, Missouri, entered into an Insurance Broker Agreement with Reilly. The agreement set forth the terms of Reed’s

¹In its application for registration as a foreign limited liability company with the Secretary of State, Reilly’s manager stated that the address of its registered office was “4301 NW Briarcliff Lane, Kansas City, MO 64116” and that “Tommy W. Taylor” was its registered agent at such office. Reilly claimed in its motion to dismiss that, while it was registered to do business in the State of Missouri, it did not maintain an office at “4301 NW Briarcliff Lane, Kansas City, MO 64116.” Reilly stated that address was (but no longer is) the residential address of the company’s previous agent, Tommy Taylor.

employment with Reilly, effective March 22, 2010. The agreement contained a forum selection clause stating:

Governing Law, Jurisdiction and Venue. This Agreement shall be construed according to and governed by the laws of the State of Kansas. In the event of a dispute, the Parties agree that the sole proper jurisdiction and venue to interpret and enforce any and all terms of the Agreement shall be the District Court of Johnson County, Kansas.

Reed is a licensed Missouri and Kansas insurance agent.

On June 30, 2016, Reed filed suit against Reilly, seeking a declaratory judgment that the employment agreement with Reilly is void and of no effect; seeking to permanently enjoin Reilly from enforcing or attempting to enforce the employment agreement, seeking damages from Reilly for fraudulently, intentionally, or negligently misrepresenting or concealing the illusory nature of the employment agreement, and seeking the disgorgement of commissions wrongfully withheld by Reilly in violation of the MMPA. On September 9, 2016, Reilly filed a motion to dismiss seeking dismissal of Reilly's petition based upon the contract's forum selection clause. The circuit court granted Reilly's motion to dismiss stating that it was dismissing "without prejudice to the bringing of a future action in the jurisdiction and venue selected by the contract of the parties." Reed appeals.

Generally, an order dismissing a case without prejudice is not final for purposes of appeal. *Doe v. Visionaire Corp.*, 13 S.W.3d 674, 676 (Mo. App. 2000). An exception to this rule arises, however, "where the dismissal has the practical effect of terminating the litigation in the form cast or in a plaintiff's chosen forum." *Id.* Because the dismissal in this case precluded Reed from proceeding in his chosen forum, we have jurisdiction to hear the appeal.

We review the circuit court’s grant of a motion to dismiss *de novo*. *Burke v. Goodman*, 114 S.W.3d 276, 279 (Mo. App. 2003).² “We must affirm the dismissal if it can be sustained on any ground supported by the motion to dismiss[.]” *Id.*

In his first point on appeal, Reed contends that the circuit court erred in dismissing the case because jurisdiction is proper in Missouri and venue is proper in Jackson County. Reed asserts that Missouri courts have jurisdiction to determine the validity of the disputed forum selection clause. Reilly agrees that personal jurisdiction and venue are proper in Jackson County, Missouri, for purposes of enforcing the outbound forum selection clause. Reilly also concedes that it is registered to do business in Missouri and is transacting business in the state of Missouri for the purposes of the exercise of jurisdiction. § 407.914, RSMo 2000. Thus, in this case, the circuit court in Jackson County had jurisdiction to determine the validity of the forum selection clause.

We are confused, however, as to why Reed thinks that the circuit court may have dismissed his case because the court believed that it did not have jurisdiction to determine the validity of the forum selection clause. Indeed, the circuit court exercised its jurisdiction in this case and declared that it was dismissing the case “without prejudice to the bringing of a future action in the jurisdiction and venue selected by the contract of the parties.” The circuit court did not declare that it did not have the jurisdiction to determine the validity of the forum selection

²In *Livers Bronze, Inc. v. Turner Constr. Co.*, 264 S.W.3d 638, 640-41 (Mo. App. 2008), the court found that where a motion to dismiss for lack of subject matter jurisdiction is presented on undisputed facts, *de novo* review is proper. Where, however, the parties contest the facts, the court found that review of the circuit court’s granting the motion to dismiss is for an abuse of discretion. *Id.* at 641. But, the court also noted that where the circuit court’s ruling is based on contract interpretation, its review would be *de novo* on appeal. *Id.* Other than the fact that the parties contest whether Reilly has a “registered office” in Missouri, the facts are undisputed in this case. Reilly concedes that it is registered to do business in Missouri and is transacting business in the state of Missouri for the purposes of the exercise of jurisdiction. Thus, any dispute about a registered office in Missouri is not pertinent to this appeal.

clause. To the contrary, the circuit court determined the validity of the forum selection clause and declared that the case should be brought in the jurisdiction and venue selected by the contract.³ Reed's first point on appeal is without merit.

In his second point on appeal, Reed asserts that the circuit court erred in dismissing his MMPA claim because the exemptions in section 407.020.2(2) do not apply and Reilly failed to show that it fit within the exemptions. In his petition, Reed specifically alleged that Reilly violated the MMPA by wrongfully withholding commissions in violation of section 407.912 and 407.913, RSMo Cum. Supp. 2013.

Section 407.020 provides:

1. The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. The use by any person, in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri of the fact that the attorney general has approved any filing required by this chapter as the approval, sanction or endorsement of any activity, project or action of such person, is declared to be an unlawful practice. Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

2. Nothing contained in this section shall apply to:

³To be clear, the enforceability of the forum selection clause is a separate issue from the enforceability of the remainder of the agreement in this case. See *Rucker v. Oasis Legal Fin., LLC*, 632 F.3d 1231, 1238 (11th Cir. 2011) ("A forum selection clause is viewed as a separate contract that is severable from the agreement in which it is contained."); *Nat'l Indus Group (Holding) v. Carlyle Inv. Mgmt. LLC*, 67 A.3d 373, 380 (Del. 2013) ("If the forum selection clause, standing alone, is found to be valid, the court having jurisdiction over the dispute is to decide whether the contract is enforceable or void ab initio."). In enforcing the forum selection clause, neither the circuit court nor this court make any declarations about whether the agreement between the parties was a valid and enforceable contract.

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(2) Any institution, company, or entity that is subject to chartering, licensing, or regulation by the director of the department of insurance . . . unless such director[] specifically authorize[s] the attorney general to implement the powers of this chapter or such powers are provided to either the attorney general or a private citizen by statute.

Reilly contends that, pursuant to section 407.0.020.2(2), the MMPA does not apply to insurance practices. We agree.

Section 407.020.1 prescribes as an unlawful practice any “act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce[.]” Section 407.020.2(2) also sets forth that these prescriptions against unlawful practices shall not apply to a company licensed or regulated by the director of the department of insurance. Sections 407.912 and 407.913 then specifically addresses the unlawful practice where a principal fails to timely pay a sales representative commissions in connection with the sale of merchandise in trade or commerce. In particular, section 407.912 prescribes:

1. When a commission becomes due shall be determined in the following manner:

(1) The written terms of the contract between the principal and sales representative shall control;

(2) If there is no written contract, or if the terms of the written contract do not provide when the commission becomes due, or the terms are ambiguous or unclear, the commission shall be paid when the product or service is delivered and accepted by the purchaser or the principal receives satisfaction in full;

(3) If neither subdivision (1) nor (2) of this subsection can be used to clearly ascertain when the commission becomes due, then the commission shall be due on the date the principal accepts the order and receives satisfaction in full,

unless the custom and usage prevalent in this state for the parties' particular industry is different, in which event such custom and usage shall prevail.

2. Nothing in sections 407.911 to 407.915 shall be construed to impair a sales representative from collecting commissions on products or services ordered prior to the termination of the contract between the principal and the sales representative but delivered and accepted by the purchaser after such termination.

3. When the contract between a sales representative and a principal is terminated, all commissions then due shall be paid within thirty days of such termination. Any and all commissions which become due after the date of such termination shall be paid within thirty days of becoming due.

Section 407.913 then states:

Any principal who fails to timely pay the sales representative commissions earned by such sales representative shall be liable to the sales representative in a civil action for the actual damages sustained by the sales representative and an additional amount as if the sales representative were still earning commissions calculated on an annualized pro rata basis from the date of termination to the date of payment.

Contrary to what Reed asserts, we do not find that the listed exemptions in section 407.020.2(2) apply only to section 407.020 and not to an action under the MMPA pursuant to sections 407.912 and 407.913 for the payment of commissions due upon the termination of a contract between a sales representative and a principal. As the Missouri Supreme Court has instructed, “[w]here one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible[.]” *Harrison v. MFA Mut. Ins. Co.*, 607 S.W.2d 137, 144 (Mo. banc 1980) (citation omitted). “[P]rovisions of one [statute] having special application to a particular subject will be deemed a qualification to another statute general in its terms.” *City of Raytown v. Danforth*, 560 S.W.2d 846, 848 (Mo. banc 1977). Section 407.912 and 407.913 are merely “qualifications” of section 407.020 as to what an unfair practice is in a case involving a principal who fails to timely pay commissions to a sales representative, and the exemptions in section 407.020.2(2) would be applicable in such an

action. Thus, we conclude that sections 407.912 and 407.913 of the MMPA do not apply to Reilly as it was a company licensed or regulated by the director of the department of insurance. We, therefore, deny Reed's second point on appeal.

In his third point on appeal, Reed contends that, because he is not seeking to enforce any of the terms of the agreement, the circuit court erred in enforcing the outbound forum selection clause. Specifically, Reed claims that he is not suing to enforce the employment agreement but is suing for a declaration that the employment agreement is illusory and unenforceable, for violations of the MMPA, and for fraud and misrepresentation. Reed, therefore, asserts that, because a forum selection clause will only be enforced if it includes precise language requiring tort claims to be litigated in the contractually selected forum, the forum selection clause cannot be enforced in this case because it contains no such precise language. We disagree.

We recognize that caselaw provides that “the 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. App. 2010) (language in the forum selection clause in the contract between the parties was not specific enough to encompass the tort claim for practice of law without a law license). Caselaw, however, also provides that, “[g]enerally speaking, 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.’” *Major v. McCallister*, 302 S.W.3d 227, 231 (Mo. App. 2009) (citation omitted). Indeed, the *McCallister* court emphatically stated that it never held or established “a per se rule” that “forum selection clauses apply only to contract claims [and] not tort actions.” *Id.* at 231. Instead, the court stated that it would analyze whether the tort claim

was independent of the contract terms, whether the claim required reference to the underlying contract, and whether the claim arose due to the parties' agreement. *Id.* Reed's claims in this case arise out of or are related to the employment agreement he entered into with Reilly; therefore, the outbound forum selection clause is applicable to Reed's claims.

Moreover, to the extent that Reed contends that the forum selection clause applies only to actions seeking "to interpret *and* enforce" the terms of the agreement and would not apply to his claims, we are not persuaded. Given that resolution of Reed's claims depends upon interpretation of the employment agreement, we find Reed's assertion that he is not seeking to interpret *and* enforce the terms of the agreement disingenuous. Enforcement of the agreement could also result in a finding by a court that the agreement does not preclude Reed from raising his claims. We merely hold that the outbound forum selection clause is applicable to Reed's claims. Reed's third point on appeal is without merit.

In his fourth point on appeal, Reed asserts that the circuit court erred in enforcing the outbound forum selection clause and dismissing the case because his employment with Reilly was "at will," no additional consideration was given in exchange for the outbound forum selection clause, and Reilly materially breached the agreement. Reed argues that, before the circuit court could dismiss his petition, the circuit court was required to determine whether the employment agreement was valid and enforceable and whether the outbound forum selection clause was supported by independent consideration. Just as we concluded in regard to Reed's third point on appeal, resolution of Reed's claims that an employment at will does not create a legally enforceable employment relationship, that no additional consideration was given in exchange for the outbound forum selection clause, and that Reilly materially breached the

agreement depends on interpretation of the employment agreement.⁴ All of these matters can be addressed and resolved by the District Court of Johnson County, Kansas. Because these claims arise out of or are related to the employment agreement Reed entered into with Reilly, the outbound forum selection clause is applicable to Reed's claims. Reed's fourth point on appeal is without merit.

In his fifth point on appeal, Reed contends that the circuit court erred in enforcing the outbound forum selection clause and dismissing the case because enforcement of the forum selection clause would be unfair and unreasonable. We disagree.

Historically, Missouri courts held that outbound forum selection clauses were "void as against the Missouri public policy of providing Missouri citizens with access to courts within the State of Missouri.'" *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 495 (Mo. banc 1992) (citation omitted). In *High Life Sales*, however, the Missouri Supreme Court concluded that "Missouri should no longer treat outbound forum selection clauses as per se violations of public policy." *Id.* at 496. The court reasoned:

[T]he public policy of allowing and encouraging freedom of contract and enforcing the parties' agreement whether they be citizens of Missouri or elsewhere, so long as doing so is neither unfair nor unreasonable, outweighs any public policy involved in guaranteeing Missouri citizens a right to the Missouri courts when they have entered into an arm's length agreement that provides otherwise.

⁴We note that, in making these challenges, Reed readily admits that he is not challenging the outbound forum clause specifically but is instead challenging the employment agreement as a whole. As we explained in note 3, a forum selection clause is treated as independent of the remainder of the agreement. Assuming that the forum selection clause is valid, challenges to the enforceability of the agreement as a whole should be addressed to the court chosen in the forum selection clause. By analogy, in arbitration cases, if a party challenges an arbitration clause specifically, such challenge may be reviewed by the court, but, if a party challenges that the arbitration agreement is unenforceable because the underlying contract is void, then such challenge is for the arbitrator to decide. *Ellis v. JF Enterprises*, 482 S.W.3d 417, 422 (Mo. banc 2016) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-46 (2006), and *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70-71 (2010)).

Id. Thus, “[p]arties to a contract” may now “agree in advance to submit to personal jurisdiction in a given court by means of a forum selection clause.” *Jitterswing*, 311 S.W.3d at 830; *Whelan Sec. Co., Inc. v. Allen*, 26 S.W.3d 592, 595 (Mo. App. 2000). “Once one party asserts that a contract contains a forum selection clause, the burden is shifted to the other party to demonstrate that the enforcement of the clause would be unjust or unreasonable.” *Jitterswing*, 311 S.W.3d at 830; *Whelan*, 26 S.W.3d at 595. “We enforce a forum selection clause unless the party seeking to avoid its application sustains a heavy burden to show that the clause is unfair or unreasonable.” *Jitterswing*, 311 S.W.3d at 830; *Whelan*, 26 S.W.3d at 595. “Whether or not the party presented sufficient evidence to show that enforcement of the clause would be unfair or unreasonable is a question of law that we review independently on appeal.” *Burke*, 114 S.W.3d at 280.

We, therefore, must first determine whether or not enforcement of the forum selection clause would be unfair. In making this determination, one consideration is whether or not the contract was adhesive. *Id.* “An adhesive contract is one in which the parties have unequal standing in terms of bargaining power (usually a large corporation versus an individual) and often involves take-it-or-leave-it provisions in printed form contracts.” *Id.* (citing *High Life Sales*, 823 S.W.2d at 497). “In other words, the forum selection clause must have been obtained through freely negotiated agreements absent fraud and overreaching.” *Burke*, 114 S.W.3d at 280 (citing *Whelan*, 26 S.W.3d at 596). In *Whelan*, the court held that enforcement of an inbound forum selection clause in an employment contract was not unfair because an employee is not forced to accept and to execute the contract but rather has the option to forego the employment if the terms of the contract are not satisfactory. 26 S.W.3d at 596. The same is true in this case. This employee agreement was not an adhesive contract.

Moreover, “[i]n determining fairness, we also consider whether or not the forum selection clause is neutral and reciprocal in nature.” *Burke*, 114 S.W.3d at 280. Although the forum selection clause in the employment agreement provides a specific venue where all litigation shall be brought, the forum selected was Johnson County, Kansas. This forum was the county in which Reilly had an office⁵ and was the county in which Reed’s office of employment was located.⁶ Just as the *Burke* court concluded, we find that, just because the forum selection clause provided a specific venue where all litigation shall be brought, this one factor is not controlling in determining fairness. *Id.* We find that enforcement of the outbound forum selection clause in the employment agreement is not unfair.

Next, we must determine whether or not the enforcement of the forum selection clause would be unreasonable. We do not find it unreasonable for the Kansas courts to interpret and enforce an employment agreement given that Reed’s office of employment was located in Johnson County, Kansas. Although “a forum selection clause may be unreasonable if it results in undue hardship, such as a necessity to travel or transport witnesses such a distance that expenses would render access to the courts impractical,” *Burke*, 114 S.W.3d at 281, no such concerns exist in this case given the proximity of Johnson County, Kansas, to Jackson County, Missouri.

Because Reed has not met his heavy burden to show that the outbound forum selection clause contained in the employment agreement is unfair or unreasonable, we conclude that the circuit court did not err in sustaining Reilly’s motion to dismiss.

⁵Reilly’s principal office was located in Leavenworth, Kansas.

⁶Although Reed’s petition did not state where his office was located, Reed does not contest that he worked at and out of Reilly’s office in Johnson County, Kansas, throughout his employment with Reilly.

In his final point on appeal, Reed contends that the circuit court erred in considering an affidavit allegedly concerning Reilly's unaccepted "settlement offer"⁷ in ruling on the motion to dismiss. We find nothing in the circuit court's dismissal order that evidences that the circuit court considered the affidavit in dismissing Reed's petition. Indeed, we fail to understand why Reed thinks the circuit court considered it given that the circuit court concluded that the outbound forum selection clause controlled. Reed's sixth point on appeal is without merit.

We affirm the circuit court's dismissal without prejudice of Reed's petition for declaratory judgment, injunctive relief, fraudulent misrepresentation and concealment, and violations of the MMPA against Reilly.

/s/ James Edward Welsh
James Edward Welsh, Judge

All concur.

⁷Reilly asserts that the affidavit it attached to its reply suggestions in support of the motion to dismiss was not a "settlement offer" but was an affidavit reflecting Reilly's tender of the post-termination contract commission obligations to Reed which Reilly contends rebutted Reed's argument that the employee agreement was void for lack of consideration or for a prior material breach.