COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1339 **Cir. Ct. No. 2007CV8093**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

TRAKLOC MIDWEST, LLC,

PLAINTIFF-RESPONDENT,

V.

TRAKLOC INTERNATIONAL, LLC AND TRAKLOC NORTH AMERICA, LLC,

DEFENDANTS,

PACIFIC ROLLFORMING, LLC AND TODD E. BEASLEY,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DI MOTTO, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Higginbotham and Bridge, JJ.

¶1 BRIDGE, J. This interlocutory appeal arises from the circuit court's denial of a motion brought by Pacific Rollforming, LLC and Todd E. Beasley

(collectively Pacific) to dismiss this action due to improper venue. Pacific and Trakloc Midwest, LLC (Midwest) entered into two contractual agreements regarding the manufacture, use and sale of certain technology. One of the agreements placed venue in California, and the second placed venue in Alaska. Midwest argues that the circuit court correctly ruled that venue in Wisconsin was proper because the two agreements served to establish a franchisee/franchisor relationship between it and Pacific, and that as a result, it is entitled to the protections of the Wisconsin Franchise Investment Law (WFIL), WIS. STAT. §§ 553.01 – 553.78 (2007-08).[1] It argues that public policy reasons underlying the WFIL justify rendering the forum selection clauses unenforceable. Midwest also argues that the fact that the two agreements each place venue in a different jurisdiction renders them void for ambiguity. We disagree and therefore reverse.

BACKGROUND

¶2 Pacific is an Alaska corporation which at all times relevant to this appeal was licensed to sell certain technology developed by Trakloc International, LLC, (Trakloc) which is located in California. The Trakloc technology is a system for installing studs in partition walls. Pacific entered into several written agreements with Midwest, a Wisconsin corporation, involving the use of this technology. Of the several agreements, only two are at issue in the present case. These agreements purported to grant Midwest the right to manufacture, use and sell the Trakloc technology in Illinois, Minnesota and Wisconsin. The agreements are titled a "Sublicense Agreement" and a "Limited Liability Company

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Contribution Agreement." The Sublicense Agreement provides for a California forum applying California law,[2] while the Contribution Agreement provides for an Alaska forum applying Alaska law.[3]

¶3 Midwest filed an amended complaint in Milwaukee County alleging that the two agreements constituted a franchisee/franchisor agreement between Midwest and Pacific, and that certain conduct by Pacific violated the WFIL.[4]

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[2] The Sublicense Agreement provides in relevant part as follows:

> **25.4 Governing Law and Choice of Forum.** This Agreement shall be construed and enforced in accordance with the laws of the State of California applicable to contracts wholly executed and wholly performed therein. The parties agree that, and hereby submit themselves to, the exclusive jurisdiction and venue for the purposes of resolving any action or proceeding brought by either party against the other arising out of or related to this Agreement shall be brought only in a state or federal court of competent jurisdiction located in Orange County, California.

[3] The Contribution Agreement provides in relevant part as follows:

> 7.7 Interpretation/Venue. If any portion of this Agreement shall be held to be void or unenforceable, the balance thereof shall nonetheless be effective. This Agreement has been made and entered into in the State of Alaska and shall be governed by the laws of the State of Alaska. The Company's attorney prepared this Agreement. However, Contributor has had an opportunity to seek legal counsel and to review and revise this Agreement. Therefore, the normal rule of construction that ambiguities are to be resolved against the drafting party shall not apply to this Agreement. Venue for any dispute shall be Fairbanks, Alaska.

[4] The amended complaint alleged that Pacific violated the WFIL in two ways: (1) by not providing Midwest with a copy of the franchise offering circular as required by WIS. STAT. § 553.27, and (2) by making untrue statements of material facts and omissions of material facts in violation of WIS. STAT. § 553.41(3).

The amended complaint also alleged alternative claims under the California Franchise Investment Law and the Wisconsin Fair Dealership Law, WIS. STAT. §§ 135.01 – 135.07, which are not at issue in the present appeal.

Pacific moved to dismiss the action, arguing that a Wisconsin court was an improper venue for the action in light of the forum selection clauses contained in the agreements. Midwest responded that the forum selection clauses should be deemed unenforceable because WFIL embodies strong public policy designed to protect Wisconsin franchises, and enforcing the clauses would contravene that legislatively declared policy.

¶4 The circuit court concluded as a matter of law that the fact that the Sublicense Agreement contained a California forum selection provision while the Contribution Agreement contained an Alaska forum selection provision created an inconsistency or ambiguity in the contracts. The court expressed concern that the parties couldn't "be in California and … be in Alaska for the same cause of action at the same time." The court also ruled that the forum selection clauses violated important public policies embodied in the WFIL. Accordingly, the court denied Pacific's motion to dismiss. We granted Pacific's interlocutory petition for leave to appeal.

DISCUSSION

STANDARD OF REVIEW

¶5 When reviewing a motion to dismiss, we ordinarily look only to the complaint, summarizing its allegations and taking them as true for purposes of the appeal. ***Converting/Biophile Labs., Inc. v. Ludlow Composites Corp.,*** 2006 WI App 187, ¶2, 296 Wis. 2d 273, 722 N.W.2d 633. Here, however, Pacific moved for dismissal based on the forum selection clauses in the contracts, a matter not addressed in the amended complaint. When a motion to dismiss incorporates matters outside the pleadings, the motion is treated as one for summary judgment. ***Id.*** "Summary judgment is appropriate if the pleadings and evidentiary

submissions of the parties 'show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" ***Young v. West Bend Mut. Ins. Co.,*** 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196, *review denied*, 2009 WI 5, 315 Wis. 2d 58, 759 N.W.2d 773 (citing WIS. STAT. § 802.08(2)). We review summary judgments de novo. ***Id.***

ENFORCEABILITY OF FORUM SELECTION CLAUSES

¶6 Because "[o]ur common law obligates parties to a contract to perform their duties under the contract," forum selection clauses are presumptively valid in Wisconsin. ***Converting/Biophile Labs., Inc.***, 296 Wis. 2d 273, ¶22. "Therefore, when parties have previously agreed that litigation should be conducted in a particular forum, there is a strong presumption favoring venue in that forum, unless enforcement is shown to be unreasonable under the circumstances." ***Id.*** However, in cases where a forum selection clause is deemed to be unconscionable or a violation of public policy, we have declared the clause unreasonable and have declined to enforce it. ***Id.***

¶7 Midwest does not contend that the forum selection clauses here at issue are unconscionable, but instead argues that the clauses violate public policy underlying the WFIL. In addition, Midwest argues that the clauses should not be enforced because they are ambiguous. We address each argument in turn.

Wisconsin Fair Dealership Law

¶8 Midwest's primary argument is that the relationship between it and Pacific is that of franchisee to franchisor and their agreements are therefore controlled by the provisions of the WFIL. It asserts that the two agreements constitute "an opaque arrangement constituting a disguised franchise," and that

forum selection clauses in the agreements contravene "Wisconsin's strong public policy protecting Wisconsin franchisees." Thus, it contends, the clauses should be declared unenforceable. Midwest's argument requires that we determine whether the WFIL has any application with respect to the forum selection clauses. The application of a statute to a particular set of facts is a question of law which we review de novo. ***Johnson v. Berge,*** 2003 WI App 51, ¶4, 260 Wis. 2d 758, 659 N.W.2d 418. As the party seeking the benefit of the WFIL, Midwest has the burden of proving its application. *See* ***Barry v. Maple Bluff Country Club***, 221 Wis. 2d 707, 722, 586 N.W.2d 182 (Ct. App. 1998).

¶9 Midwest acknowledges that no Wisconsin appellate court has previously held that a forum selection clause in a franchise agreement constitutes a per se violation of the WFIL. Instead, Midwest analogizes the WFIL to the Wisconsin Fair Dealership Law, which at least under the facts of one Wisconsin appellate case, was held to implicate public policy considerations sufficient to justify voiding a choice of law clause (as opposed to a forum selection clause) in the context of a Wisconsin dealership. *See, e.g.,* ***Bush v. National School Studios, Inc.,*** 139 Wis. 2d 635, 641-58, 407 N.W.2d 883 (1987). According to Midwest, the forum selection clauses in the present case should not be enforced because they would transfer venue to a state other than Wisconsin and thus would at least arguably serve to deprive Midwest, as a franchisee, the benefit of Wisconsin law with regard to the various protections set forth in the WFIL.

¶10 Pacific responds that the Sublicense Agreement and the Contribution Agreement do not create a franchise and are instead a licensing agreement and an agreement for the sale of stock, respectively. Thus, it argues that the WFIL has no application to this matter. Pacific argues further that even assuming for the sake of argument that the WFIL does apply here, nothing in the WFIL forbids forum

selection clauses in franchise agreements. Pacific points out that although the franchise laws of many states expressly prohibit any type of forum selection clauses in franchise agreements, Wisconsin's franchise law does not.

¶11 We first consider whether the agreements create a franchise, thus implicating the WFIL and its attendant public policy considerations. WIS. STAT. § 553.03(4)(a) defines a franchise as follows:

> **(4)**(a) "Franchise" means a contract or agreement, either express or implied, whether oral or written, between 2 or more persons by which:
>
> 1. A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed or suggested in substantial part by a franchisor; and
>
> 2. The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's business and trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and
>
> 3. The franchisee is required to pay, directly or indirectly, a franchise fee.

¶12 Both before the circuit court and on appeal, Midwest has offered little, if any, substantive argument as to how the provisions of the agreements meet either the first or the second of the three factors set forth in WIS. STAT. § 553.03(4)(a). The only reference to the first factor appears in footnote three of Midwest's brief, which states as follows: "The Sublicense Agreement also includes at least four of the five indicia in Wis. Admin. Code DFI-Sec 31.01(4), pertaining to the determination of when a marketing plan or system is a franchise." WISCONSIN ADMIN. CODE § DFI-Sec 31.01(4) in turn sets out five factors which are to be considered when determining "whether a marketing plan or system is deemed to be 'prescribed in a substantial part by a franchisor' within the meaning

of s. 553.03(4)(a)1."[5] However, Midwest does not indicate which of those factors applies, nor does it address how they apply. In addition, Midwest makes no reference to the second factor.

[5] WISCONSIN ADMIN. CODE § DFI-Sec 31.01(4) provides as follows:

> **(4)** The division shall, in any determination he or she shall make as to whether a marketing plan or system is deemed to be "prescribed in a substantial part by a franchisor," within the meaning of s. 553.03(4)(a)1., Stats., include, but not be limited to, consideration of the following factors:
>
> (a) Whether the representations made by the offeror or seller in connection with the offer to sell or sale of a franchise suggest or any agreement executed in connection with the offer to sell or sale of a franchise requires that the distributor or licensee operate a business which can purchase a substantial portion of its goods solely from sources designated or approved by the licensor.
>
> (b) Whether the representations made by the offeror or seller in connection with the offer to sell or sale of a franchise suggest or any agreement executed in connection with the offer to sell or sale of a franchise requires that such distributor or licensee follow an operating plan, standard procedure, or training manual or its substantial equivalent promulgated by the licensor in the operation of the licensed business, violations of which may, under the terms of the agreement, permit the licensor to terminate the agreement.
>
> (c) Whether the representations made by the offeror or seller in connection with the offer to sell or sale of a franchise suggest or any agreement executed in connection with the offer to sell or sale of a franchise requires that the distributor or licensee be limited as to the type, quantity and/or quality of any product or service the distributor or licensee may sell or limits the distributor or licensee as to the persons or accounts to which the person may sell the licensor's product or service.
>
> (d) Whether the provisions of the agreement permitting the licensor to terminate the agreement, to buy back the distributor or license rights assigned by the agreement, or to refuse to renew the grant of such distributor or license rights are such as to operate or be exercisable substantially at the will of the licensor, or

(continued)

¶13 Midwest's sole argument with respect to WIS. STAT. § 553.03(4)(a) relates to whether a payment which Midwest made to Pacific constituted a franchise fee. This argument goes only to the third of the three factors. Pacific responds that the payment was a part of the consideration Midwest gave in exchange for an ownership interest in Pacific and did not constitute a franchise fee. However, even assuming without deciding that the payment was a franchise fee and that Midwest has thus demonstrated compliance with the third factor under § 553.03(4)(a), Midwest has failed to prove compliance with the remaining requirements of the statute.[6] Accordingly, we conclude that Midwest has not carried its burden of demonstrating that it is entitled to whatever protection it might be afforded as a franchisee under the WFIL because it has not proven as a matter of law that the Sublicense Agreement and the Contribution Agreement create a franchise under § 553.03(4)(a). Thus, Pacific is entitled to summary judgment on the issue of the application of the WFIL as it relates to the forum selection clauses in the two agreements.

> (e) Whether the representations made by the offeror or seller in connection with the offer to sell or sale of a franchise suggest or any agreement executed in connection with the offer to sell or sale of a franchise requires that the licensor aid or assist the distributor or licensee in training, obtaining locations or facilities for operation of the franchisee's business or in marketing the franchisor's product or service.

[6] In addition, Midwest does not argue that the forum selection language in either agreement is permissive, as opposed to mandatory. *See, e.g.*, ***Converting/Biophile Labs, Inc. v. Ludlow Composites Corp.,*** 2006 WI App 187, ¶¶25-32, 296 Wis. 2d 273, 722 N.W.2d 633. Although Pacific refers to them as mandatory, it likewise does not develop this argument.

Ambiguity

¶14 Midwest's remaining argument is that the forum selection clauses are ambiguous and thus should not be enforced because they place venue in two different forums. In cases involving contract claims, such as the present matter, summary judgment will not be granted "when the contract is ambiguous and the intent of the parties to the contract is in dispute." ***Energy Complexes, Inc. v. Eau Claire County,*** 152 Wis. 2d 453, 466-67, 449 N.W.2d 35 (1989). Whether a contract is ambiguous is a question of law which this court decides independently of the circuit court's decision. ***Id***. "A document is ambiguous if it is reasonably susceptible to more than one meaning." ***Id.*** (citation omitted).

¶15 We are not convinced on the record before us that the fact that the two agreements call for different venues renders each of them ambiguous. At least on their face, there is no apparent reason why disputes related to the Sublicense Agreement cannot be litigated in California, as that agreement plainly requires, and similarly, there is no apparent reason why disputes related to the Contribution Agreement cannot be litigated in Alaska, as that agreement plainly provides. Beyond that, Midwest offers no substantive argument as to why these two straightforward provisions create ambiguity when read together, and we therefore decline to address the matter further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review arguments supported by only general statements). Accordingly, we conclude that Midwest has not demonstrated that simply because one clause provides for a California forum and the other provides for an Alaska forum, the clauses are ambiguous, which renders summary judgment inappropriate. Pacific is therefore entitled to summary judgment with respect to this issue.

CONCLUSION

¶16 In sum, we conclude that Midwest has not met its burden of proving that it is entitled to have the forum selection clauses contained in the Sublicense Agreement and the Contribution Agreement set aside as unenforceable for public policy reasons embodied in the WFIL, nor has it demonstrated that the forum selection provisions are ambiguous. We therefore conclude that summary judgment in favor of Pacific is appropriate. *See* ***Energy Complexes, Inc.***, 152 Wis. 2d at 466. We therefore reverse the circuit court's order denying Pacific's motion to dismiss and remand the matter to the circuit court to enter judgment in favor of Pacific on these two issues and for proceedings consistent with this opinion.

¶17 For the reasons discussed above, the order of the circuit court is reversed.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.