DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

TARA EZER, on a derivative basis as a member of
HOLLYWOOD STATION CONDOMINIUM ASSOCIATION, INC.,
a Florida not-for-profit corporation,
Appellant,

v.

JACQUELINE HOLDACK, DAN TUBRIDY, VICTOR ROCHA, PATRICIA GUTIERREZ, MARIA PAULA DIAZ, FRANK COLON, and
HOLLYWOOD STATION CONDOMINIUM ASSOCIATION,
a Florida not-for-profit corporation,
Appellees.

No. 4D21-3528

[March 1, 2023]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jack B. Tuter, Judge; L.T. Case No. CACE20-16861(07).

Gregory R. Elder and Beverly D. Eisenstadt of the Law Offices of Gregory R. Elder, PLLC, Boca Raton, for appellant.

Therese A. Savona of Cole, Scott & Kissane, P.A., Orlando, for appellees.

WARNER, J.

Appellant Tara Ezer appeals the final dismissal with prejudice of her derivative lawsuit against Hollywood Station Condominium Association (the "Association"), and six of the board of directors. Appellant claimed that the directors had violated the Association by-laws by taking out unapproved loans to fund the Association's improvements. The court dismissed the action pursuant to section 617.07401(3)(b), Florida Statutes (2020), because an independent investigation determined that pursuit of the derivative claim was not in the Association's best interests. While appellant challenges the independence of the committee appointed to investigate, the trial court concluded that the committee was appropriately appointed, independent, and conducted a good faith investigation. We agree and affirm.

Appellant's derivative claims accuse the director defendants of violating three of the Association's bylaws. She alleged that, at the director defendants' direction, the Association made material alterations to the common elements; took out an unapproved loan to fund the improvements and alterations; executed an unapproved contract to make the improvements and alterations; and, misrepresented how the Association would pay for the project. Appellant requested equitable relief by way of a declaratory judgment, an injunction, and appointment of a receiver. On the association's behalf, she also sought damages from defendant directors for breach of fiduciary duties, civil conspiracy and aiding and abetting fraud.

In September 2020, appellant served the association board of directors with a written letter summarizing her claims and demanding that the board, on the Association's behalf, sue the directors. Although section 617.07401(2) provides that a member must give a board of directors ninety days' notice prior to the filing of a derivative claim, appellant filed her first complaint in October. She claimed the Association would suffer irreparable damage without action within ninety days. *See* § 617.07401(2), Fla. Stat. (2020) (stating that an association member may not bring a derivative complaint unless a demand made to obtain action by the board was refused or ignored for ninety days, "unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period").

In accordance with section 617.07401(3), the Association commenced an investigation into the allegations of the complaint. That section provides:

> (3) The court may dismiss a derivative proceeding if, on motion by the corporation, the court finds that one of the groups specified in paragraphs (a)-(c) has made a good faith determination after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation. The corporation has the burden of proving the independence and good faith of the group making the determination and the reasonableness of the investigation. The determination shall be made by:
>
> . . . .
>
> (b) A majority vote of a committee consisting of two or more independent directors appointed by a majority vote of

> independent directors present at a meeting of the board of directors, whether or not such independent directors constitute a quorum[.]

§ 617.07401(3)(b).

In December, the majority of Association's board members who were not named defendants in the complaint voted to appoint two directors, also not defendants, to the committee pursuant to section 617.07401(3)(b). Both committee members filed sworn declarations with the trial court as to their noninvolvement in any of the conduct described in the complaint.

The investigation continued, and the committee issued a report which was circulated to all Association members together with a notice of a special meeting to be held telephonically. The notice informed the Association members that the meeting's purpose was to vote on whether maintaining appellant's derivative lawsuit was in the Association's best interest. At that meeting, the members overwhelmingly approved the report which concluded that continuing the derivative lawsuit was not in the Association's best interest.

In the meantime, appellant sought to amend her complaint to add the two directors appointed to the investigation committee. In the proposed amendment, she alleged that they were on the board when some of the loan draws which she contested were made. The trial court granted appellant's motion to amend her complaint, but provided that service on the two directors would be abated pending resolution of any challenges to the newly amended complaint.

The Association filed a motion to dismiss the derivative action, arguing that the committee was independent and that its report was reasonably investigated and done in good faith. The Association also argued that dismissal was warranted due to an overwhelming majority vote to abandon appellant's lawsuit. Appellant filed a response in opposition, contending that the committee was not independent, and its report was neither reasonable nor made in good faith.

The trial court dismissed the derivative action with prejudice. The court determined it was not required to evaluate whether the committee's recommendation was reasonable, but instead whether the committee was independent, acted in good faith, and conducted a reasonable investigation.

The court found the committee was appropriately appointed pursuant to section 617.07401(3)(b). The committee was at all times independent. The committee members were not defendants and had not been served as defendants until after appellant amended her complaint. The court further found that the committee's investigation was reasonable, and that the report's in-depth event timeline was specific and narrowly tailored to appellant's allegations, demonstrating that the committee had carefully reviewed the relevant documents. The court also noted that the majority of the association members voted in line with the committee report's recommendation that continuation of the derivative lawsuit was not in the Association's best interest. Based upon all of the circumstances, the court found the decision to abandon appellant's derivative action was made in good faith. Appellant then filed this appeal.

A mixed standard of review applies to the court's determination to dismiss a derivative lawsuit against a corporation. "'[M]ixed questions of law and fact . . . require us to employ a mixed standard of review: we defer to the trial court's factual findings (to the extent they are supported by competent, substantial evidence), but we review the trial court's legal conclusions de novo.'" *Batur v. Signature Props. of N.W. Fla., Inc.*, 903 So. 2d 985, 995 (Fla. 1st DCA 2005) (alteration in original) (quoting *Dillbeck v. State*, 882 So. 2d 969, 972–73 (Fla. 2004)).

A trial court "may dismiss a derivative proceeding" if the court finds "[a] majority vote of a committee consisting of two or more independent directors appointed by a majority vote of independent directors present at a meeting of the board of directors" have "made a good faith determination after conducting a reasonable investigation upon which its conclusions are based" that to maintain the derivative suit is not in the corporation's best interests. § 617.07401(3)(b), Fla. Stat. (2020).

The corporation has the burden of proving the committee is independent, acted in good faith, and has a reasonable and objective basis for its report. § 617.07401(3), Fla. Stat. (2020); *see also De Moya v. Fernandez*, 559 So. 2d 644, 645 (Fla. 4th DCA 1990) ("[A] trial court must make a determination that the committee recommending dismissal is independent, acting in good faith and has a reasonable and objective basis for its report.") (citing *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981)). However, section 617.07401 does not define what makes a director "independent," and neither does the general chapter's "definitions" statute.

Where Florida law has not spoken as to a corporate term or statute, courts often look to Delaware law. *See Williams v. Stanford*, 977 So. 2d 722, 727 (Fla. 1st DCA 2008) ("To date, no Florida court has had occasion

to interpret the governing provisions of section 607.1302 in its 2003 form. As is often true, however, Delaware case law provides guidance to our construction of the statute[.]"); *Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1459 n.22 (11th Cir. 1989) ("We rely with confidence upon Delaware law to construe Florida corporate law. The Florida courts have relied upon Delaware corporate law to establish their own corporate doctrines[.]"); *Boettcher v. IMC Mortg. Co.*, 871 So. 2d 1047, 1052 n.5 (Fla. 2d DCA 2004) (observing that Florida courts routinely consult Delaware case law when construing Florida statutory law governing corporations).

In determining the independence of an investigative committee which recommended dismissal of a shareholder derivative suit, the Delaware supreme court has stated:

> [Director's] presence on the Board does not establish a lack of independence on the part of the Committee. The mere fact that a director was on the Board at the time of the acts alleged in the complaint does not make that director interested or dependent so as to infringe on his ability to exercise his independent business judgment of whether to proceed with the litigation. *Even a director's approval of the transaction in question does not establish a lack of independence*.

Kaplan v. Wyatt, 499 A.2d 1184, 1189 (Del. 1985) (emphasis added) (citations omitted).

Applying *Kaplan*, the trial court's determination that the committee was composed of independent board members is supported by competent substantial evidence. The two members were not on the board when the transactions in question in the original complaint were approved. They also filed affidavits to attest to their lack of involvement in the transactions and their independence. Moreover, appellant's amended complaint only alleges their limited involvement. One of the two members signed off on the unapproved contract as the board's treasurer, and both members were on the board when it approved material alterations to the common elements and some draws from the improper line of credit. Therefore, the two members' involvement was at most approval, and as in *Kaplan*, even a director's approval of a transaction may not necessarily show a lack of independence. *Id.* Through their affidavits, the committee members showed that they had been appointed to the board after the majority of the events upon which the complaint was based. Nothing in the record showed any relationship between the committee members and the named defendants to suggest control over the committee members. Nor did the court find that appellant's attempt to amend her complaint to add them

as defendants impacted their independence. The trial court did not err in concluding that the investigative committee was independent.

Appellant also claims the court erred in determining that the investigation was reasonable and made in good faith. She maintains that the court was required to address the accuracy of the report's substantive findings. We disagree that the court must independently assess the validity of the report's conclusions.

Section 617.07401(3) permits the court to dismiss a derivative lawsuit when the investigative committee "has made a good faith determination after conducting a reasonable investigation upon which its conclusions are based that the maintenance of the derivative suit is not in the best interests of the corporation." Section 617.07401(3)(b)'s plain language does not require courts to question a special committee's recommendation as long as the court found the committee was independent and conducted its investigation reasonably and in good faith. *Atkins v. Topp Comm, Inc.*, 874 So. 2d 626, 627 (Fla. 4th DCA 2004)[1] ("We conclude that trial courts in this state are not required to evaluate the reasonableness of an independent investigator's final recommendation[.]"); *see also Cornfeld v. Plaza of the Ams. Club, Inc.*, 273 So. 3d 1096, 1099–1100 (Fla. 3d DCA 2019) ("[T]he independent investigator in this case . . . examined the merits of the proposed claims and concluded that the derivative suit was not in the corporation's best interest. . . . The trial court did not abuse its discretion by adopting [the investigator's] factual findings and legal conclusions, and finding that the report was reasonable and conducted in good faith[.]"). The court is not required to apply its own business judgment to assess the merits of the committee's conclusions.

The trial court thoroughly evaluated how the investigative committee conducted its review of the allegations and the steps it took to ascertain whether the derivative suit was in the Association's best interest. The court found that the investigation was thorough and conducted in good faith. The court complied with the statutory directive.

For the foregoing reasons, we affirm the dismissal of the derivative suit pursuant to section 617.07401(3), Florida Statutes.

Affirmed.

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[1] *Atkins* concerned section 607.07401(3)(b), Florida Statutes (2004), but section 617.07401(3)(b), Florida Statutes, contains identical language except that the statute applies to "members" of a non-profit corporation instead of "shareholders" of a business corporation.

CIKLIN and FORST, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

HERC RENTALS, INC.,

Appellant,

v.

Case No. 5D22-1241
LT Case No. 2020-CA-000645

SUPERIOR SITE SERVICES, INC. AND CHAD D. LEE,

Appellees.
_____/

Opinion filed March 3, 2023

Appeal from the Circuit Court
for Seminole County,
Nancy F. Alley, Senior Judge.

Heather A. DeGrave and Andrew W. Peeler, of Walters Levine & DeGrave, Tampa, for Appellant.

Eric W. Ludwig, of Law Office of Eric W. Ludwig, Altamonte Springs, for Appellees.

LAMBERT, C.J.

The primary issue in this appeal concerns a continuing personal guaranty executed by Chad D. Lee, one of the appellees, in favor of the appellant, HERC Rentals, Inc. ("HERC"), regarding any amounts owed to HERC by his business, Superior Site Services. The trial court entered final judgment in favor of HERC after a nonjury trial, awarding it damages against the co-appellee, Superior Site Services, Inc., in the sum of $42,618.16, for monies owed to HERC on certain leased construction equipment.[1] The court, however, adjudged that HERC take nothing on its guaranty claim against Lee, individually, finding that the guaranty was "expired and of no force and effect."

We affirm the judgment entered against Superior Site Services, Inc., without further discussion. As we explain, the judgment in favor of Lee is reversed; and we remand to the trial court with directions for it to amend the final judgment to show that Superior Site Services, Inc., and Lee are jointly liable to HERC for the above awarded damages.[2]

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[1] Superior Site Services, Inc., has not challenged this judgment.

[2] In addition to HERC's argument that the trial court erred in finding that the guaranty had expired, HERC raises two other issues for reversal. We affirm on these claims. *See Hammond v. State*, 34 So. 3d 58, 59 (Fla. 4th DCA 2010) (citing *Doorbal v. State*, 983 So. 2d 464, 482–83 (Fla. 2008); *Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999)).

BACKGROUND—

In 2003, Lee registered the fictitious name of Superior Site Services with the State of Florida. In these documents filed with the State, Lee listed himself as the sole owner of Superior Site Services.

In 2006, Lee, on behalf of Superior Site Services, sought to rent construction equipment from HERC for use in Superior Site Services's grading and sitework business. As a condition for renting this equipment, HERC required Lee to execute a credit application, which he did. This document contained a continuing unconditional guaranty in which Lee personally promised to pay to HERC all amounts that were either currently owing or "which may hereinafter become owing." Lee also agreed to promptly notify HERC in writing of any change in Superior Site Services's ownership, form, or structure, acknowledging that if he failed to notify HERC of any such change, he "expressly assumes full responsibility for all charges and/or credit extensions made on this account subsequent to such change."

HERC approved Superior Site Services's credit application. It set up an account under which Superior Site Services began leasing equipment from HERC. Superior Site Services would thereafter receive invoices under this account name and number for the monies that it owed to HERC.

In 2007, Lee changed the registration of the name Superior Site Services with the State of Florida to show that his corporation, C. Lee, Inc., and not him personally, had become the sole owner of this fictitious name. Prior to that, Lee had also incorporated the co-appellee, Superior Site Services, Inc., of which he was both the sole owner and sole member of its board of directors. Lee would later testify at trial that during this time, he simultaneously used the fictitious name Superior Site Services for both C. Lee, Inc., and Superior Site Services, Inc., in order to make the Superior Site Services "entity" look "bigger."

C. Lee, Inc., was administratively dissolved by the State of Florida in 2011. Thereafter, in 2016, Lee and HERC were in contact regarding Superior Site Services's rental of construction equipment for use in its business. Lee never advised HERC that Superior Site Services had changed ownership or form, nor did he advise HERC, consistently with his later defense at trial, that Superior Site Services was ostensibly different than Superior Site Services, Inc. Resultingly, HERC relied on the business relationship that it had developed with Lee and Superior Site Services and did not require that Lee execute a new credit application or a new guaranty, which it would have otherwise required had Superior Site Services, Inc., been a new customer. Superior Site Services, Inc., proceeded to rent

equipment from HERC under the same account number that the fictitious name, Superior Site Services, had used since 2006. Email exchanges between HERC and Superior Site Services, Inc., used the same email address previously used by the fictitious name first owned by Lee and then owned by the since-dissolved C. Lee, Inc.

The relationship between the parties continued until approximately 2017, when Superior Site Services, Inc., did not pay for monies it owed to HERC for its rental of two track loaders and one trailer. HERC's branch manager contacted Lee about the outstanding balances owed, reminding him of his personal guaranty to HERC to pay these debts. Lee did not question or dispute the existence or the applicability of his prior guaranty, nor did he indicate to HERC that he would not be liable under the guaranty for these unpaid obligations because Superior Site Services, Inc., was an entity separate and apart from Superior Site Services.

HERC eventually sued Superior Site Services, Inc., in 2020 for, among other things, breach of contract. Lee was sued in the same complaint for breach of the guaranty agreement. As previously mentioned, at the conclusion of the bench trial, the trial court found that Lee's personal guaranty was "expired and of no force and effect"; thus, Lee was found to not be personally liable to HERC for the damages determined by the trial

court to be owed to it by Superior Site Services, Inc. HERC argues on appeal that the trial court erred in finding that Lee's continuing guaranty expired.

ANALYSIS—

There is no dispute that Lee signed a continuing guaranty with HERC and that, as established by his trial testimony, Lee never notified HERC of any revocation of his personal guaranty. "The rule is that a continuing guaranty remains in effect until revoked." *Causeway Lumber Co. v. King*, 502 So. 2d 80, 81 (Fla. 4th DCA 1987) (citing *Brann v. Flagship Bank of Pinellas, N.A.*, 450 So. 2d 237, 239 (Fla. 2d DCA 1984)). Nevertheless, Lee's successful argument at trial was that once his corporation, C. Lee, Inc., was administratively dissolved by the State of Florida long before the equipment rental transactions with HERC at issue, he was released from the personal guaranty or, at the very least, the guaranty was no longer in effect.

In *Sheth v. C.C. Altamonte Joint Venture*, 976 So. 2d 85 (Fla. 5th DCA 2008), this court listed the following four factors to consider as to whether a guarantor should be released from a guaranty:

1. "the obligee's lack of knowledge of a change in the obligor's business";

2. "the nature of the change of the obligor business";

3. "whether the guarantor participated in the change in the obligor business"; and

4. "whether the guarantor sought to revoke the guaranty."

Id. at 88–89.

Applying these factors to the undisputed evidence at trial, Lee testified that he never sought to revoke the guaranty prior to the suit being filed. Moreover, HERC lacked knowledge that the ownership or structure of Superior Site Services changed. Additionally, Lee was the person who owned and operated Superior Site Services first in his individual name, and who later participated in this name being used by his two corporations, C. Lee, Inc., and Superior Site Services, Inc. As previously mentioned, Lee's trial testimony showed that he simultaneously used the name Superior Site Services for both C. Lee, Inc., and Superior Site Services, Inc., in order to portray Superior Site Services as a "bigger entity." Lastly, C. Lee, Inc., and Superior Site Services, Inc., both performed grading and sitework under the name Superior Site Services.

Under these specific circumstances, we find that the trial court reversibly erred when it concluded that Lee's continuing personal guaranty with HERC had "expired." Accordingly, we reverse that part of the final judgment holding that HERC take nothing on its action against Lee. We remand with directions to the trial court that it amend its final judgment to

show that Lee is jointly liable with the co-appellee, Superior Site Services, Inc., for the $42,816.68 in damages awarded to HERC.

AFFIRMED, in part; REVERSED, in part; REMANDED, with directions. MAKAR and HARRIS, JJ., concur.

Third District Court of Appeal

State of Florida

Opinion filed March 8, 2023.
Not final until disposition of timely filed motion for rehearing.

No. 3D22-579
Lower Tribunal No. 19-37303

Total Quality Logistics, LLC,
Appellant,

vs.

Trade Link Capital, Inc., et al.,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Baker Donelson Bearman Caldwell & Berkowitz, PC, and Eve A. Cann (Fort Lauderdale) and Marisa R. Dorough (Orlando), for appellant.

Spector Rubin, P.A., and Andrew R. Spector and Marc A. Rubin, for appellees.

Before EMAS, LINDSEY and GORDO, JJ.

EMAS, J.

INTRODUCTION

Total Quality Logistics, LLC, defendant below, appeals a nonfinal order denying its motion to dismiss the amended complaint filed by Trade Link Capital, Inc. and Taste Trackers, Inc., plaintiffs below. Total Quality Logistics sought dismissal based on improper venue, contending that a mandatory forum selection clause in the written agreements between the parties required that Clermont County, Ohio serve as the exclusive venue for any dispute arising in connection with any transaction between the parties.

Because the forum selection clause was presumptively valid and enforceable, and because Plaintiffs failed to meet their burden below—to show that this presumptively valid and enforceable forum selection clause was unjust, unreasonable, or otherwise unenforceable—we reverse and remand with directions to dismiss the amended complaint against Total Quality Logistics.

FACTUAL BACKGROUND

Trade Link Capital and Taste Trackers (together, Plaintiffs) entered into a business relationship with Total Quality Logistics, whereby Total Quality Logistics would arrange transportation of cargo for Plaintiffs. At the inception of the relationship, Trade Link Capital and Taste Trackers each signed a written agreement with Total Quality Logistics. Each agreement

contained an identical forum selection clause providing that Clermont County, Ohio "shall be the exclusive venue with respect to any claim, counterclaim or dispute arising in connection with any transactions, loads, or other business between Total Quality Logistics and applicant." In August 2019, one such cargo shipment was lost and/or stolen in transit to its destination.

Plaintiffs contend that, before requesting transport of the subject cargo, they procured insurance from Total Quality Logistics to protect themselves in the event the cargo was lost or stolen. When Total Quality Logistics refused to pay Plaintiffs for the lost cargo shipment, Plaintiffs sued Total Quality Logistics in an eight-count complaint alleging various state law claims (e.g., breach of agreement to insure, fraudulent misrepresentation) and also seeking damages under the federal Carmack Amendment.[1]

[1] The Revised Interstate Commerce Act, 49 U.S.C. § 14706 et seq., known as the "Carmack Amendment," is a federal statutory scheme that governs interstate cargo claims. For our purposes, the Carmack Amendment provides special venue provisions for filing a civil action against a carrier alleged to have caused the loss of or damage to cargo of a shipper. See id. § 14706(d). Such an action may be brought "in the judicial district in which such loss or damage is alleged to have occurred," see id. § 14706(d)(2). Importantly here, the applicability of the Carmack Amendment turns on whether Total Quality Logistics is a carrier or merely a broker. If the Carmack Amendment applies, its special venue provision preempts the contractual forum selection clause in this case, at least as to the single Carmack claim pleaded by Plaintiffs in the operative complaint. Compare Mgmt. Computer Controls, Inc. v. Charles Perry Const., Inc., 743 So. 2d 627, 633 (Fla. 1st

Total Quality Logistics moved to dismiss the complaint, relying on the mandatory forum selection clause contained in the parties' written agreements. Total Quality Logistics also contended that Plaintiffs could not state a valid claim under the federal Carmack Amendment because Total Quality Logistics is a broker, not a carrier, and the Carmack Amendment imposes liability only upon carriers. See Nat'l Union Fire Ins. Co. of Pittsburgh v. All Am. Freight, Inc., No. 14-CIV-62262, 2016 WL 633710, at *7 (S.D. Fla. Feb. 17, 2016) ("In general, the Carmack Amendment governs interstate cargo claims, controls and limits the liability of common carriers for in-transit cargo, and preempts common or state law remedies that increase a common carrier's liability beyond the actual loss or injury to the property.") In further support of its motion to dismiss, Total Quality Logistics filed an affidavit from its risk manager, setting forth the business relationship between the parties and attaching and authenticating the parties' signed, written agreements which included the mandatory forum selection clause

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DCA 1999) (citing First Pacific Corp. v. Sociedade de Empreendimentos e Construcoes, Ltd., 566 So. 2d 3 (Fla. 3d DCA 1990)) (holding that a forum selection clause was inapplicable to FDUPTA claim—i.e., it was severable from the other claims—requiring it to be litigated separately) with Fairbanks Contracting & Remodeling, Inc. v. Hopcroft, 169 So. 3d 282, 283 (Fla. 4th DCA 2015) ("Whether a forum selection provision in a contract applies to an FDUTPA claim depends on the circumstances, including the language employed in the clause.")

providing that Clermont County, Ohio "shall be the exclusive venue with respect to any. . . dispute arising in connection with any transactions, loads, or other business" between Plaintiffs and Total Quality Logistics.

Plaintiffs filed a memorandum in response to Total Quality Logistics' motion to dismiss, but provided no sworn proof or evidence to support its position.[2] Plaintiffs contended that the forum selection clause (1) was unenforceable under the Carmack Amendment because that federal law contains its own special venue provision, see 49 U.S.C. § 14706(d); and (2) was invalid as contrary to public policy because Total Quality Logistics' alleged conduct amounted to the unlicensed sale of insurance in violation of state law.

The trial court held a hearing on the motion to dismiss, at which no live testimony was presented and no depositions were offered or introduced. At the conclusion of the hearing, the trial court announced its ruling denying the

[2] Plaintiffs' response noted "the protracted discovery" in this case, quoted from communications between the parties, and cited to several deposition transcripts purportedly showing conflicting statements made by Total Quality Logistics officials. However, no such communications or deposition transcripts were submitted by Plaintiffs in opposition to the motion to dismiss. Nor was the trial court requested to take judicial notice of such deposition excerpts at the hearing on the motion to dismiss. During oral argument, counsel for Plaintiffs acknowledged that, if the depositions were not in the record or considered by the trial court at the time of the hearing, this court could not affirm the lower court's ruling.

motion to dismiss, and later entered an order denying the motion "for the reasons set forth in the record." A review of the transcript, however, shows the trial court provided no reasons for its ruling, and made no findings regarding (1) whether Total Quality Logistics was a motor carrier or broker (central to the applicability of the federal Carmack Amendment claim); (2) whether (and why) the forum selection clause was unenforceable as to the state law claims; or (3) whether application of the forum selection clause violated public policy. This appeal follows.[3]

ANALYSIS AND DISCUSSION

The forum selection clause contained in the written agreement between Total Quality Logistics and Plaintiffs provides:

> The state courts located in Clermont County, Ohio shall have exclusive and irrevocable jurisdiction and shall be the exclusive venue with respect to any claim, counterclaim, or dispute arising in connection with any transactions, loads, or other business between Total Quality Logistics and [Plaintiff].

Plaintiffs do not dispute that they each signed an agreement containing this provision. On its face, this is a valid, enforceable, and mandatory forum selection provision.[4] Moreover, "[b]ecause Florida law presumes that forum

[3] We have jurisdiction. See Fla. R. App. P. 9.130(a)(3)(A) (providing for appellate review of nonfinal orders that concern venue).

[4] As the Florida Supreme Court recognized in Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A., 509 So. 2d 273 (Fla.1987), mandatory forum selection clauses provide "for a mandatory and exclusive place for

selection clauses are valid and enforceable, the party seeking to avoid enforcement of such a clause must establish that enforcement would be unjust or unreasonable." Espresso Disposition Corp. 1 v. Santana Sales & Mktg. Grp., Inc., 105 So. 3d 592, 594-95 (Fla. 3d DCA 2013) (quotation omitted). See also Steiner Transocean Ltd. v. Efremova, 109 So. 3d 871, 873 (Fla. 3d DCA 2013) ("[I]n Florida, forum selection clauses are presumptively valid and it is the burden of the party seeking to avoid that contractual agreement to establish 'that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court'") (quoting Corsec, S.L. v. VMC Intern. Franchising, LLC, 909 So. 2d 945, 947 (Fla. 3d DCA 2005)) (additional citations omitted); Norwegian Cruise Line, Ltd. v. Clark, 841 So. 2d 547, 549-50 (Fla. 2d DCA 2003) ("The United States Supreme Court has held that forum selection clauses are prima facie valid even though they have not been historically favored 'given controlling weight in all but the most

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future litigation," whereas permissive forum selection clauses "constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum." Id. at 274-75. See also Michaluk v. Credorax (USA), Inc., 164 So. 3d 719, 722 (Fla. 3d DCA 2015) ("A forum selection clause will be deemed mandatory where, by its terms, suit may be filed only in the forum named in the clause, whereas 'permissive forum selection clauses are essentially a 'consent' to jurisdiction or venue in the named forum and do not exclude jurisdiction or venue in another forum.'") (additional citations omitted).

exceptional cases.'") (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988)) (Kennedy, J., concurring)).

To establish the "unjust or unreasonable" nature of a forum selection clause, the party seeking avoidance must show that enforcement of the clause would result in "no forum at all." Espresso Disposition, 105 So. 3d at 595; Est. of Stern v. Oppenheimer Tr. Co., 134 So. 3d 566, 568 (Fla. 3d DCA 2014) ("A party seeking to avoid enforcement of a mandatory forum selection clause bears a heavy burden of establishing that the enforcement is unjust or unreasonable and must demonstrate that the contractually designated forum essentially amounts to 'no forum at all,' thereby depriving the party of its day in court.")

Once Total Quality Logistics submitted the affidavit and the written agreements containing the presumptively valid and enforceable forum selection clause agreed to by the parties, the burden shifted to Plaintiffs to show that the forum selection clause was "unjust or unreasonable"—in essence, that Clermont, Ohio amounts to "no forum at all." Further, and as to the claim filed pursuant to the Carmack Amendment, Plaintiffs would have had to provide evidence to establish (or at least create a disputed issue of fact whether) the Carmack Amendment (49 U.S.C. §14706) is applicable to the cargo shipment at issue and renders the contractual forum selection

clause unenforceable. However, Plaintiffs failed to meet its burden[5] to overcome the presumptively valid and enforceable mandatory forum selection clause.[6]

Moreover, at the conclusion of the hearing, the trial court did not make any findings on the record regarding the unjust or unreasonable nature of the agreement's forum selection clause, nor any findings whether (or why) the Carmack Amendment (and its special venue provision) would apply to the instant lawsuit. Notwithstanding the absence of any such oral findings, the subsequent written order provided only that the motion to dismiss was denied "for the reasons set forth in the record."[7]

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[5] There are exceptions to the general rule that a trial court considering a motion to dismiss is limited to the "four corners" of the complaint and any attachments. One of those exceptions permits a court to consider evidence outside the four corners of the complaint where the motion to dismiss is based upon improper venue. See Steiner Transocean Ltd. v. Efremova, 109 So. 3d 871 (Fla. 3d DCA 2013).

[6] On appeal, Plaintiffs attempt to rely on the content of unfiled depositions to argue that Total Quality Logistics acted as more than a mere broker. But again, such evidence was not filed with the court, nor was judicial notice sought or taken. As explained above, the only evidence submitted was Total Quality Logistics' affidavit and the parties' written agreements, which expressly provide that Total Quality Logistics "is a transportation broker only who arranges the transportation of freight by an independent third party motor carrier."

[7] During oral argument, Plaintiffs conceded that the trial court did not "explicitly" find the forum selection clause was unreasonable or make any findings pertaining to applicability of the Carmack Amendment.

CONCLUSION

Because Plaintiffs failed to meet their burden to establishing that the presumptively valid and enforceable mandatory forum selection clause was unjust, unreasonable, or otherwise unenforceable in the instant lawsuit, the trial court erred in denying Total Quality Logistics' motion to dismiss for improper venue. We reverse and remand with directions to dismiss the amended complaint against Total Quality Logistics and for further proceedings consistent with this opinion.