

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMERICA FIRST FEDERAL CREDIT UNION, A FEDERALLY CHARTERED CREDIT UNION,

Appellant,

vs.

FRANCO SORO, AN INDIVIDUAL;
MYRA TAIGMAN-FARRELL, AN INDIVIDUAL; ISAAC FARRELL, AN INDIVIDUAL; KATHY ARRINGTON, AN INDIVIDUAL; AND AUDIE EMBESTRO, AN INDIVIDUAL,
Respondents.

No. 64130

FILED

SEP 24 2015

FRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
CHIEF DEPUTY CLERK

Appeal from a district court order dismissing a deficiency judgment action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Reversed and remanded.

Ballard Spahr, LLP, and Stanley W. Parry, Timothy R. Mulliner, and Matthew D. Lamb, Las Vegas,
for Appellant.

Bogatz Law Group and I. Scott Bogatz and Charles M. Vlastic III, Las Vegas,
for Respondents.

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

In this opinion, we must determine whether a contract clause stating that the parties "submit themselves to the jurisdiction of" another

state results in a mandatory forum selection clause requiring dismissal of the Nevada action. We hold that such a clause consenting to jurisdiction is permissive and therefore reverse the district court's order granting a motion to dismiss based on lack of subject matter jurisdiction in Nevada.

FACTS AND PROCEDURAL HISTORY

In 2002, appellant America First Federal Credit Union (the credit union) loaned \$2.9 million, secured by real property in Mesquite, Nevada, to respondents (borrowers)¹ for the purchase of a liquor/mini-mart. The borrowers defaulted, and the credit union held a trustee's sale, resulting in a deficiency on the loan balance of approximately \$2.4 million. The Utah-based credit union sued the borrowers in Clark County to recover the deficiency.

The borrowers moved to dismiss the action under NRCP 12(b)(1), arguing that the credit union could not sue to recover the deficiency in Nevada and citing several clauses in the "Commercial Promissory Note" and "Business Loan Agreement" to support their argument. An "Applicable Law" clause in the loan agreement stated that "[t]his Agreement (and all loan documents in connection with this transaction) shall be governed by and construed in accordance with the laws of the State of Utah." The loan agreement also contained the following: "Jurisdiction. The parties agree and submit themselves to the jurisdiction of the courts of the State of Utah with regard to the subject matter of this agreement." A clause in the note stated: "If there is a

¹While eight individuals signed the note and loan agreement, the only borrowers in the instant action are Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro.

lawsuit, Borrower(s) agrees to submit to the jurisdiction of the court in the county in which Lender is located.”

The district court agreed with the borrowers and granted the motion to dismiss. The district court found that the note and loan agreement “contain language which clearly expresses the parties’ intent to submit litigation relating to the Agreement and the Note, to the jurisdiction of the State of Utah. . . . [T]he language clearly enough identifies Utah as the forum[,] which they selected for purposes of subject matter jurisdiction.” This appeal followed.

DISCUSSION

On appeal, the credit union argues that the district court erred in enforcing the clauses in question to preclude its complaint for a deficiency action.² More specifically, the credit union argues that the jurisdiction clauses here were permissive, and while the complaint could have been brought in Utah, the clauses do not mandate that Utah was the exclusive forum. In response, the borrowers contend that whether a forum selection clause is mandatory or permissive is a matter of contract interpretation, and therefore, the clauses are ambiguous and must be construed against the credit union as the contract drafter. Whether forum selection clauses may be mandatory or permissive is an issue of first impression for this court.

²Additionally, the credit union argues that Nevada’s six-month statute of limitations for recovery of deficiency judgments applies to the action, not Utah’s three-month statute of limitations. However, because the district court did not decide this issue, we do not address it here.

Standard of review

This court reviews a district court's decision regarding subject matter jurisdiction de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). Additionally, "[c]ontract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Redrock Valley Ranch, LLC v. Washoe Cnty.*, 127 Nev., Adv. Op. 38, 254 P.3d 641, 647-48 (2011). The objective of interpreting contracts "is to discern the intent of the contracting parties. Traditional rules of contract interpretation are employed to accomplish that result." *Davis v. Beling*, 128 Nev., Adv. Op. 28, 278 P.3d 501, 515 (2012) (citation and internal quotation marks omitted). This court initially determines whether the "language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Id.* An ambiguous contract is susceptible to more than one reasonable interpretation, and "[a]ny ambiguity, moreover, should be construed against the drafter." *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215-16, 163 P.3d 405, 407 (2007).

The district court erred when it dismissed the case based on the forum selection clauses

The credit union argues that the clauses do not contain any mandatory language and, therefore, all of the forum selection clauses are merely permissive. We agree.

We have not yet distinguished between mandatory and permissive forum selection clauses. In *Tuxedo International, Inc. v. Rosenberg*, 127 Nev. 11, 251 P.3d 690 (2011), we reversed a district court's grant of a motion to dismiss based on the defendants' argument that any litigation must be brought in Peru. *Id.* at 14, 24-25, 251 P.3d at 692, 699.

There, we remanded the case to the district court to determine which of three separate forum selection clauses potentially controlled the dispute. *Id.* at 26, 251 P.3d at 699-700. In analyzing the clauses, we noted that one of the clauses contained both a consent to jurisdiction in Peru and a Peruvian choice-of-law provision. *Id.* at 22-23, 251 P.3d at 697. We then stated:

It can be argued, however, that there is no requirement contained in this clause that Peru is the *exclusive* forum for jurisdiction over any dispute between the parties. *See, e.g., Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76-77 (9th Cir. 1987) (distinguishing between exclusive and nonexclusive forum selection clauses). If it is determined that the parties did not intend for the clause to act as an *exclusive* forum selection clause, then arguably, there is no contractual bar to [plaintiff] bringing its tort claims in the Nevada district court.

Id. at 23-24, 251 P.3d at 698 (second emphasis added). We also noted that another clause “resemble[d] a traditional exclusive forum selection clause,” containing language that “any action . . . must be brought in a court in the Country of Peru.” *Id.* at 24, 251 P.3d at 698. Thus, *Tuxedo International* observed the distinctions between mandatory and permissive forum selection clauses, but the facts of the case did not provide an opportunity for us to affirmatively adopt a rule. *See id.* at 26 n.5, 251 P.3d at 700 n.5.

Other state courts have distinguished between mandatory and permissive forum selection clauses. *See, e.g., Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So. 2d 273, 274 (Fla. 1987) (recognizing that a mandatory jurisdiction clause requires “a particular forum be the exclusive jurisdiction for litigation,” while permissive

jurisdiction is merely a consent to jurisdiction in a venue (internal quotation marks omitted)); *Polk Cnty. Recreational Ass'n v. Susquehanna Patriot Commercial Leasing Co.*, 734 N.W.2d 750, 758-59 (Neb. 2007) (distinguishing a mandatory forum selection clause based on the words “shall be brought only in” a particular jurisdiction from a permissive forum selection clause where parties only “consent and submit to the jurisdiction” of other courts); *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 338-39 (W. Va. 2009) (“[T]o be enforced as mandatory, a forum-selection clause must do more than simply mention or list a jurisdiction; in addition, it must either specify venue in mandatory language, or contain other language demonstrating the parties’ intent to make jurisdiction exclusive.”). For example, the Wisconsin Court of Appeals stated:

Clauses in which a party agrees to submit to jurisdiction are not necessarily mandatory. Such language means that the party agrees to be subject to that forum’s jurisdiction *if sued there*. It does not prevent the party from bringing suit in another forum. The language of a mandatory clause shows more than that jurisdiction is *appropriate* in a designated forum; it unequivocally mandates *exclusive* jurisdiction. Absent specific language of exclusion, an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere.

Converting/Biophile Labs., Inc. v. Ludlow Composites Corp., 722 N.W.2d 633, 640-41 (Wis. Ct. App. 2006) (citations and internal quotation marks omitted).

Similarly, federal circuit courts generally agree that where venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause

will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.

Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir. 1992); see *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997) (describing the "mandatory/permissive dichotomy" and concluding that the clause, "jurisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado," was mandatory (internal quotation marks omitted)); *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc.*, 22 F.3d 51, 52-53 (2d Cir. 1994) (holding the forum selection clause, "[a]ny dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts," as permissive (internal quotation marks omitted)); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76-78 (9th Cir. 1987) (holding the forum selection clause, "[t]he courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract," as permissive, and noting that to be considered mandatory, a forum selection clause must clearly require that a particular court is the only one that has jurisdiction (internal quotation marks omitted)); *Keaty v. Freeport Indon., Inc.*, 503 F.2d 955, 956-57 (5th Cir. 1974) (holding the forum selection clause, "[t]his agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York," as permissive (internal quotation marks omitted)).

We agree with the distinctions made by other state and federal courts regarding mandatory and permissive forum selection clauses described above. Here, there are two jurisdictional clauses at

issue. First, the loan agreement contains a clause entitled “Jurisdiction,” which provides that “[t]he parties agree and submit themselves to the jurisdiction of the courts of the State of Utah with regard to the subject matter of this agreement.” We conclude that this language is permissive as there is no language within the clause containing words of exclusivity. Absent such language, we deem the clause permissive.

Second, a clause in the note stated: “If there is a lawsuit, Borrower(s) agrees to submit to the jurisdiction of the court in the county in which Lender is located.” This language is also permissive as there is no language within the clause containing words of exclusivity. *See Golden Palm Hospitality, Inc. v. Stearns Bank Nat’l Ass’n*, 874 So. 2d 1231, 1233-37 (Fla. Dist. Ct. App. 2004) (concluding that the language, “[i]f there is a lawsuit, Borrower agrees upon Lender’s request to submit to the jurisdiction of the courts of STEARNS County, the State of Minnesota” as permissive, and thus permitted, but did not require, that the action be brought in Minnesota (internal quotation marks omitted)). Thus, the case may be heard in another appropriate venue besides the courts in Utah.

Without articulating why, the borrowers argue that the forum selection clauses are ambiguous and therefore must be construed against the credit union. We conclude that this argument is without merit as the clauses are clear and unambiguous and this court need not interpret the contract any differently from the contract’s plain meaning. *See, e.g., Hunt Wesson Foods*, 817 F.2d at 77 (“A primary rule of interpretation is that ‘[t]he common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it.’” (quoting 4 Samuel Williston & Walter H. E. Jaeger, *A Treatise on the Law of Contracts* § 618 (3d ed. 1961)). The

clauses provide no words of exclusivity and to interpret the clauses as mandatory forum selection clauses would read language into the contract that is not there.

CONCLUSION

In this case, none of the clauses contain exclusive language. Accordingly, all clauses are permissive forum selection clauses, and the district court erred when it found Utah was the sole forum for any controversy and dismissed the case for lack of subject matter jurisdiction. We therefore reverse the district court's order dismissing the case and remand this matter to the district court for further proceedings.

CT

We concur: Hardesty, C.J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

Pickering, J.
Pickering