IN THE COURT OF APPEALS OF IOWA

No. 0-932 / 09-1632
Filed April 13, 2011

RUSS HOTCHKISS, et al.,
Plaintiffs-Appellees,

vs.

INTERNATIONAL PROFIT ASSOCIATES, INC., an Illinois Corporation,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Richard D. Stochl, Judge.

A defendant appeals the district court's denial of its motion to dismiss based upon forum selection language contained within a contract between the parties. **AFFIRMED AND REMANDED.**

James R. Hellman and Erin P. Lyons of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellant.

Susan M. Hess of Hammer, Simon & Jensen, Dubuque, for appellees.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

VAITHESWARAN, P.J.

We must decide whether the district court erred in declining to enforce a contractual forum selection clause, which specified that Illinois, rather than Iowa, had exclusive jurisdiction over matters arising from the contract.

I. Background Facts and Proceedings

Russ Hotchkiss, president and CEO of an Iowa corporation doing business as Proshield Fire Protection, contracted to receive business consulting services from International Profit Associates, Inc. (IPA). The contract contained a forum selection clause conferring exclusive jurisdiction of court disputes on the "Nineteenth Judicial District of Lake County, Illinois."

Hotchkiss[1] sued IPA in Iowa district court for breach of contract, breach of warranty, negligent misrepresentation, and equitable fraud. IPA responded with a pre-answer motion to dismiss, claiming the forum selection clause precluded suit in Iowa. Hotchkiss, in turn, resisted the motion and filed an affidavit attesting that the contract was signed in connection with a "high pressure sales pitch." IPA moved to strike the affidavit on the ground that matters outside the pleadings could not be considered on a motion to dismiss. The district court did not explicitly deny the motion to strike but relied on the contents of the affidavit in ruling on the motion to dismiss. In particular, the court accepted Hotchkiss's attestations about the circumstances surrounding the execution of the contract and, based on those attestations, determined that the contract was one of adhesion. The court held the forum selection clause invalid and denied IPA's

[1] The plaintiffs in this suit are actually Russ Hotchkiss and Daruss Enterprises, Inc., which does business as Proshield Fire Protection. For the purposes of this appeal, the plaintiffs will collectively be referred to as "Hotchkiss."

motion to dismiss. IPA applied for interlocutory review. The Iowa Supreme Court granted the application and transferred the case to this court for disposition.

II. Record on Review and Standards of Review

As a preliminary matter, IPA asserts that the district court invalidated the forum selection clause based on "matters outside the pleadings." IPA asserts this was impermissible.

IPA is correct that, when reviewing rulings on motions to dismiss for failure to state a claim upon which relief can be granted, we are limited to the well-pleaded facts in the petition and we take those facts to be true. *See U.S. Bank v. Barbour*, 770 N.W.2d 350, 353–54 (Iowa 2009). However, that standard does not apply to a review of dismissal rulings premised on jurisdictional issues such as the validity of a forum selection clause. *See EFCO Corp. v. Norman Highway Constructors, Inc*., 606 N.W.2d 297, 300 n.1 (Iowa 2000). These types of motions need not be decided solely on the pleadings. *See id.* ("This motion to dismiss was pursuant to Iowa Rule of Civil Procedure [1.435(1)] and, as such, is factually tried in the same manner as was the now-abolished special appearance.")); *Moyer v. City of Des Moines*, 505 N.W.2d 191, 193 n.3 (Iowa 1993) ("Prior to 1987, subject matter jurisdiction could be raised in advance of filing an answer by special appearance. Affidavits and other evidentiary showings could be used in support of and resistance to a special appearance. Now that preanswer jurisdictional challenges are embraced by rule [1.435(1)], we assume that the same opportunity to present evidence exists."); *accord Citizens for Responsible Choices v. City of Shenendoah*, 686 N.W.2d 470, 473 (Iowa

2004) (quoting *Moyer*, 505 N.W.2d at 193 n.3). *But see Pennsylvania Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 813–14 (Iowa 2002) (applying "well-pleaded facts" standard to review of ruling on motion to dismiss on jurisdictional grounds). Because IPA's motion raised a jurisdictional issue, we conclude the district court was not limited to the well-pleaded facts in the petition and did not err in considering Hotchkiss's affidavit.

We turn to the question of how to review the district court's statements concerning the affidavit. As noted, the court used the affidavit to make a fact-finding that the contract was one of adhesion. This was permissible. *See EFCO*, 606 N.W.2d at 300 (stating an assertion that a forum selection clause is invalid because the agreement was a contract of adhesion is an issue of fact for the district court to resolve in ruling on the motion to dismiss). *But see Simoni*, 641 N.W.2d at 813–14 (concluding on review of dismissal ruling that issue of adhesion could not be resolved on the pleadings and factual record needed to be developed). "The district court's finding of fact in such matters has the effect of a jury verdict." *EFCO*, 606 N.W.2d at 300 n.1. The finding may not be successfully challenged "if supported by any substantial evidence." *Johnson v. Aeroil Prods. Co.*, 255 Iowa 931, 933, 124 N.W.2d 425, 426 (1963).

III. Analysis

The district court found that "the contract presented by Defendant was presented on a 'take it or leave it basis' and therefore was one of adhesion." This finding was based on Russ Hotchkiss's affidavit, which stated:

> I was presented with their form printed documents and they were not explained to me. I initialed and signed the contract where IPA directed me and retained their services. I did not understand all of

> the terms of the contract, and I did not have an opportunity to consult my wife or my attorney to go over the terms of the contract.

The affidavit amounts to substantial evidence in support of the district court's finding that the contract was one of adhesion. *Cf. Simoni*, 641 N.W.2d at 813–14 ("We have before us nothing more than speculation as to whether the agreements between Penn Life and the defendants qualify as adhesion contracts. There is nothing in the pleadings that indicates who drafted the contracts or the circumstances under which they were signed.").

Based on the finding of adhesion, the court concluded that the forum selection clause, like the arbitration clause with which it shares a paragraph, was "invalid." The court premised its conclusion on Iowa's arbitration statute, which invalidates arbitration clauses contained in contracts of adhesion. *See* Iowa Code § 679A.1(2)(a) (2009). The court then stated, "The forum selection clause is integrated into the arbitration clause and cannot be severed. For that reason, it too is invalid." In our view, the arbitration and forum selection clauses were not so intertwined that an invalidation of the arbitration clause necessarily required invalidation of the forum selection clause.

The contested paragraph in the contract stated:

> At Client's election, Advisors agree that all disputes of any kind between the parties arising out of or in connection with these respective agreements shall be submitted to binding arbitration which would be administered by the American Arbitration Association or National Arbitration and Mediation. With regard to all other matters, exclusive jurisdiction and venue shall vest in the Nineteenth Judicial District of Lake County, Illinois, Illinois law applying.

The paragraph is not a model of clarity. As a result we must resort to rules of interpretation and, particularly, the rule requiring us to read the paragraph as a

whole, rendering no part superfluous. *See Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). Read in this fashion, we interpret the paragraph as affording Hotchkiss a choice of proceeding to arbitration or litigating the contested matter in the Illinois courts. Simply stated, the two clauses authorize two separate forums to resolve their dispute, at Hotchkiss's election. Neither clause is dependent on the other. Accordingly, the forum selection clause must stand or fall on its own.

We believe the record is inadequate to decide whether the forum selection clause is valid and enforceable. That is because our State does not void most contractual provisions simply based on a finding that the contract was one of adhesion. *But see* Iowa Code § 679A.1(2)(a). Instead, our courts recognize that specified clauses in adhesive contracts may be subject to invalidation if it is proven that they are unconscionable, do not meet the reasonable expectations of the parties, or are otherwise legally indefensible. *See C & J Fertilizer, Inc. v. Allied Mut. Ins. Co*., 227 N.W.2d 169, 176–81 (Iowa 1975). The district court did not and could not make findings on these types of issues based on the record before it. Additionally, it is unclear whether IPA was sufficiently apprised prior to the hearing that the court would receive and consider evidence outside the pleadings. For these reasons, we affirm the denial of IPA's motion to dismiss and remand for further development of a factual record on the validity and enforceability of the forum selection clause. We find it unnecessary to address the remaining issues raised by the parties.

AFFIRMED AND REMANDED.