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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3148-10T2

DELAGE LANDEN FINANCIAL
SERVICES, INC.,

Plaintiff-Appellant,

v.

LEIGHTON K. LEE LAW OFFICE
and LEIGHTON K. LEE,

Defendants-Respondents.

Submitted November 15, 2011 - Decided December 19, 2011

Before Judges Baxter and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-0158-10.

Cohen Fineman, L.L.C., attorneys for appellant (Samuel B. Fineman, on the briefs).

Leighton K. Lee Law Office and Leighton K. Lee, respondents pro se.

PER CURIAM

Plaintiff DeLage Landen Financial Services, Inc. (DLF) is the assignee of a contract for the lease of a photocopy machine, originally leased by plaintiff's assignor, Ricoh Business Solutions (Ricoh), to defendant Leighton K. Lee Law Office and

Leighton K. Lee, a Hawaii attorney. When defendant Lee defaulted on his monthly payments, plaintiff filed suit in the Law Division demanding judgment in the amount of $18,590, plus attorneys fees and costs. The judge granted defendants' motion to dismiss, based upon a lack of personal jurisdiction over defendants, both of whom are residents of Hawaii. In light of the provisions of the choice of law section of the lease agreement between the parties, we reverse.

I.

On December 17, 2008, defendants signed a contract with Ricoh to lease a photocopy machine, at the monthly rate of $360.53 for a period of sixty months. On January 25, 2011, Ricoh assigned its rights under the contract to DLF. On February 1, 2009, defendants defaulted on the lease by failing to make the required payments. Consequently, on January 15, 2010, DLF instituted suit against defendants in the Law Division for breach of contract, and on February 4, 2010 served defendants with the summons and complaint.

Defendants filed an answer to the complaint on March 12, 2010, raising, among other defenses, an assertion that plaintiff "cannot establish personal jurisdiction over defendants Lee." Defendants did not file a pretrial motion seeking dismissal of plaintiff's complaint on such grounds. After discovery was

completed, the matter proceeded to a bench trial in the Law Division. At the conclusion of the testimony, defendants moved for dismissal, arguing that because the Lee law firm did not do business in New Jersey, Lee and his law firm lacked the minimum contacts with the forum state necessary to subject them to personal jurisdiction in the courts of New Jersey. In opposing defendants' motion for dismissal based upon a lack of in personam jurisdiction, plaintiff pointed to the provisions of Article 19 of the lease agreement, which states that the courts of New Jersey shall enjoy "non-exclusive jurisdiction" over defendants in the event defendants defaulted on their obligations under the lease:

> CHOICE OF LAW. This Lease shall in all respects be interpreted and all rights and liabilities of the parties under this Lease shall be determined and governed as to validity, interpretation, enforcement and effect by the laws of the State of New Jersey except for local filing requirements. <u>You consent and agree that non-exclusive jurisdiction, personal or otherwise, over you and the Equipment shall be with any State or Federal Courts of the State of New Jersey having jurisdiction over the subject matter</u>. You also irrevocably waive your right to a trial by jury. By signing this lease: (I) you acknowledge that you have read and understand the terms and conditions of this lease; (II) you agree that this Lease is a net lease that you cannot terminate or cancel. You have an unconditional obligation to make all payments due under this Lease, and you

> cannot withhold, set off or reduce such payments for any reasons.
>
> [(Emphasis added).]

The judge rejected plaintiff's Article 19 argument, stating:

> Anyway, the way this contract is worded, the non-exclusivity case or wording of the contract, I'm going to dismiss the case without prejudice, Mr. Lee, without prejudice, which means that they can come to Hawaii and sue you if that's what you want, mainly because as notice and fairness and in the interest of justice[sic]. We have here Mr. Lee and his law firm renting, buying -- buying a copy machine, I don't know who made the copy machine but we have Ricoh who is Hawaii, we have Mr. Lee who is Hawaii and all these contracts or agreements were entered into in Hawaii so I think it's only fair that the courts of Hawaii interpret and enforce the terms and provisions of the contract.

On appeal, plaintiff argues: 1) by failing to move for dismissal of plaintiff's complaint within ninety days of service of their answer, as required by Rule 4:6-2(b) and 4:6-3, defendants waived the right to assert the defense of lack of personal jurisdiction; and 2) the judge's reasoning concerning Article 19 of the lease agreement was "inapposite to the facts presented in the instant case" and must be reversed.

II.

We begin with Point I, in which plaintiff argues that defendants waived the defense of lack of personal jurisdiction

by not moving to dismiss plaintiff's complaint on that ground within ninety days of filing their answer, as required by Rule 4:6-2(b) and 4:6-3. Relying on Rule 4:6-7, plaintiff maintains that the defense of lack of personal jurisdiction is consequently waived. We agree with plaintiff that the defense of lack of personal jurisdiction must be raised by motion within ninety days of the filing of an answer, Rule 4:6-2(b) and Rule 4:6-3, and if a defendant fails to do so, the defense of lack of personal jurisdiction is indeed waived, R. 4:6-7. Nonetheless, we agree with defendants that plaintiff should not be permitted to present this argument on appeal because plaintiff failed to raise this argument before the Law Division, having had ample opportunity to do so. As the Court observed in Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973), an appellate court will decline to consider on appeal an argument not raised in the trial court when the party in question had an opportunity to do so.

Plaintiff maintains that we should disregard the rule of Nieder because "if defendant Lee's arguments were taken to [their] conclusion, . . . then waiver, in effect, would only come into play if the opposing party raises it. Such is anathema to logic." We disagree. Nothing prevented plaintiff from arguing before the Law Division that defendants should be

precluded from relying on the defense of lack of personal jurisdiction because by failing to raise the issue by motion within ninety days of filing their answer, defendants had waived the defense. Despite having had the opportunity to advance that argument, plaintiff did not do so.

Plaintiff's second argument concerning Nieder is likewise unavailing. In particular, plaintiff maintains that Nieder should not apply to the instant matter, as the issue here goes to the jurisdiction of the trial court. See Nieder, supra, 62 N.J. at 234 (observing that an appellate court will decline to consider questions or issues not presented to the trial court when an opportunity to do so was available, unless the questions raised on appeal "go to the jurisdiction of the trial court or concern matters of great public interest"). We deem this argument unpersuasive, as the Court's concern in Nieder focused on arguments raised for the first time on appeal which, if successful, would result in a finding that the trial court lacked jurisdiction. Here, plaintiff is asserting the opposite claim, namely, that the trial court did have jurisdiction. Therefore, we deem the Nieder exception inapplicable. For these reasons, we reject the claim plaintiff advances in Point I.

III.

We do, however, agree with the Article 19 argument

plaintiff advances in Point II. A forum selection clause, such as the one contained in Article 19 of the lease, is enforceable unless it results from "fraud, undue influence, or overweening bargaining power," is "unreasonable" or "violates" a "strong public policy." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10-15, 92 S. Ct. 1907, 1913-16, 32 L. Ed. 2d 513, 520-23 (1972). Forum selection clauses "are prima facie valid and enforceable in New Jersey[,]" and only if the circumstances fall into one of the three M/S Bremen exceptions will a New Jersey court decline to enforce a forum selection clause. Caspi v. Microsoft Network, L.L.C., 323 N.J. Super. 118, 122-23 (App. Div.), certif. denied, 162 N.J. 199 (1999). Accord Wilfred MacDonald, Inc. v. Cushman, Inc., 256 N.J. Super. 58, 63-64 (App. Div.), certif. denied, 130 N.J. 17 (1992). The party seeking to defeat a forum selection clause bears the burden of establishing its invalidity. Wilfred MacDonald, supra, 256 N.J. Super. at 63-64.

In refusing to apply the Article 19 forum selection clause contained in the parties' lease, the judge relied upon our decisions in Bayway Refining Co. v. State Utilities, Inc., 333 N.J. Super. 420 (App. Div.), certif. denied, 165 N.J. 605 (2000), and Copelco Capital, Inc. v. Shapiro, 331 N.J. Super. 1 (App. Div. 2000). Such reliance was misplaced.

In Bayway, we held that the defendant corporation did not maintain sufficient minimum contacts with New Jersey to subject it to personal jurisdiction. Bayway, supra, 333 N.J. Super. at 425. Unlike the present appeal, the contracts between the parties in Bayway "did not contain a forum selection clause." Id. at 427. Upholding the dismissal of the plaintiff's complaint, we observed that although the contract between the parties specified that any disputes would be resolved in accordance with New Jersey law, "the choice of law [provision] is not forum selection and does not establish jurisdiction." Id. at 432. Because the defendants' fleeting contacts with New Jersey did not rise to the level of the constitutionally-mandated "minimum contacts," we upheld the dismissal of the plaintiff's complaint for lack of jurisdiction. Id. at 438.

As is evident, Bayway has no bearing on the dispute presented here, as Bayway was decided under an entirely different set of principles, namely, whether the defendants had sufficient minimum contacts with New Jersey to subject them to personal jurisdiction. See ibid. Bayway was not decided on grounds of a forum selection clause which, as we suggested in Bayway, id. at 432, would have produced an entirely different result. The judge's reliance on Bayway was error.

Copelco too is inapposite. Copelco, like the present appeal, involved a commercial lease for a photocopy machine delivered and used in a state other than New Jersey, namely, Missouri. Copelco, supra, 331 N.J. Super. at 3. The lessor assigned its rights to the plaintiff, a New Jersey corporation. Ibid. The plaintiff filed suit in New Jersey to recover the monies due after the defendant defaulted. Ibid. The plaintiff relied on the following clause that was written in capital letters on the second page of the lease agreement:

> Choice of Law: This rental and each schedule shall be governed by the internal laws for the state in which our or our assignee's principal corporate offices are located. You consent to the jurisdiction of any local, state, or federal court located within our or our assignee's state, and waive any objection relating to improper venue.
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> [Id. at 4.]

We observed, as we had in Bayway, that forum selection clauses will be enforced in New Jersey unless: they are the result of "fraud or coercive bargaining power"; enforcement of the clause would "be seriously inconvenient for the trial"; or enforcement would violate a "strong public policy" of our state. Id. at 4-5 (citations and internal quotation marks omitted). Forum selection clauses are enforceable because "the parties should be allowed to agree in advance to a mutually satisfactory

forum, thus insuring a predictable and neutral locus for the resolution of any dispute." Id. at 6. In Copelco, we refused to enforce the forum selection clause because it did not inform the defendant of the forum in which any litigation against the defendant would be instituted. Ibid. We reasoned that a floating forum selection clause was invalid because it could easily have resulted in the defendant being sued "anywhere in the entire country -- a forum that would not be identifiable until sometime after the agreement was entered into[.]" Ibid. We held that such lack of notice was a fatal defect that invalidated the parties' forum selection clause. Ibid.

Unlike the circumstances in Copelco, Article 19 afforded defendants clear and unambiguous notice of the forum in which any litigation would be instituted. While we recognize that Article 19 confers "non-exclusive" jurisdiction upon the courts of New Jersey, defendants were clearly on notice that they were subject to being sued here, thereby satisfying the notice requirements of Copelco. If plaintiff had instituted suit against defendants in a forum other than New Jersey or Hawaii, defendants could conceivably have been entitled to raise the claim that Article 19 contained the sort of "floating" forum selection clause that we invalidated in Copelco. But because defendant instituted suit in the very state that was named in

Article 19, namely, New Jersey, we perceive no defect in Article 19's forum selection clause.

Moreover, defendants do not assert that Article 19 suffers from any of the exceptions the United States Supreme Court identified in M/S Bremen, supra, 407 U.S. at 10-15, 92 S. Ct. at 1913-16, 32 L. Ed. 2d at 520-23. As the parties challenging the enforceability of a forum selection clause, defendants bear the burden of establishing a basis for disregarding the provisions of Article 19. They have failed to do so, instead confining their arguments to their lack of minimum contacts with New Jersey and the non-exclusive nature of the Article 19 forum selection clause.

We deem the Article 19 forum selection clause to be valid, and reverse the Law Division's order to the contrary. We remand for a judgment on the merits of plaintiff's cause of action.

Reversed and remanded.