NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1293-10T2

CAROLINE MCDONALD,

Plaintiff-Respondent,

v.

THE AMACORE GROUP, INC.,

Defendant-Appellant,

and

CLARK A. MARCUS, JERRY D.
KATZMAN and JAY SHAFER,

Defendants.

Argued October 4, 2011 - Decided June 20, 2012

Before Judges Carchman, Fisher and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-0790-09.

Angelina Whittington (South Law Group, P.A.) of the Florida bar, admitted pro hac vice, argued the cause for appellant (Angela J. Lack, and Ms. Whittington, attorneys; J. Michael Riordan, John D. Miller III, and Ms. Whittington, on the brief).

Gary E. Roth argued the cause for respondent (Javerbaum, Wurgaft, Hicks, Kahn, Wikstrom & Sinins, attorneys; Mr. Roth, of counsel and on the brief).

PER CURIAM

On leave granted, defendant The Amacore Group, Inc. (Amacore) appeals from the Law Division order denying its motion to dismiss plaintiff Caroline McDonald's complaint for lack of personal and subject matter jurisdiction, and from the order denying reconsideration of that motion.[1] Amacore based its motion to dismiss, in part, on a clause in its employment agreement with plaintiff; a clause that Amacore asserted was a forum selection clause vesting in Florida courts exclusive jurisdiction over the parties' disputes. In denying the motion, the trial court concluded that the clause was ambiguous and that its validity and enforceability could not be decided on a motion to dismiss the complaint. We disagree with the trial court's determination, and conclude that the clause is a valid and enforceable forum selection clause. Accordingly, we reverse.

I.

The events underlying the parties' dispute occurred in 2007. Plaintiff lived in Hoboken and worked in New York City for Hewlitt-Packard. Amacore, a Delaware corporation with its

[1] Defendants Marcus, Shafer, and Katzman also appealed from orders denying their dismissal motions, but they later resolved their disputes with plaintiff and their appeals were dismissed. McDonald v. The Amacore Group, Inc., Nos. A-1297-10, A-1298-10, A-1299-10 (App. Div. October 25, 2011).

principal place of business located in Florida, was in the business of selling health-related insurance products and discount benefit programs. Defendant Clark A. Marcus held the titles and offices of Chief Executive Officer and General Counsel; defendant Jay Shafer held the title and office of President; and defendant Jerry Katzman, M.D., held the title and office of Chief Medical Officer. Marcus had resided in Florida with his family for twenty years and Shafer had resided in Florida with his family for forty-nine years. Katzman resided in New Jersey.

In January 2007, a mutual friend of plaintiff and Marcus suggested that plaintiff would be suitable for an executive position with Amacore. As a result, Marcus and Katzman met with plaintiff in New York City on April 12 and 13, 2007. During the April 13 meeting, Marcus and Katzman introduced plaintiff to third-parties as Amacore's new chief operating officer. During the ensuing months, the parties negotiated plaintiff's employment contract with Amacore (the Agreement), which she and Marcus signed on May 21, 2007.

Before signing the Agreement, plaintiff flew to Amacore's Florida headquarters to meet with Amacore's employees. Except for the two meetings in New York and the third in Florida, the parties' negotiations took place by telephone, mail, and email.

The exchanges took place between Amacore's Florida headquarters, plaintiff's New Jersey home, and Katzman's New Jersey home. Plaintiff signed the Agreement while in her home and subsequently performed her job duties primarily from her home, for which she received a "home office adjustment."[2]

The terms of the Agreement, in pertinent part, required Amacore to employ plaintiff as its chief operating officer for a period of three years, subject to earlier termination for "cause," or other circumstances specified in the Agreement not relevant here. If her employment were terminated for cause, plaintiff was to be given two weeks notice identifying the cause and a thirty-day period to cure. Paragraph two of the Agreement also provided that plaintiff was to receive a sign-on bonus of 300,000 shares of Amacore stock. Paragraph nine of the Agreement, entitled "GOVERNING LAW," governed claims or disputes "arising from the subject matter" of the Agreement.

Amacore did not issue to plaintiff a sign-on bonus of 300,000 shares of stock when she commenced full-time employment. On July 25, 2007, two months after the parties signed the Agreement, Amacore terminated plaintiff's employment. Plaintiff

[2] The record includes evidence of Amacore's contacts with New Jersey which we need not recount in view of our conclusion that the Agreement contains a valid and enforceable forum selection clause.

claims that Amacore and the individual defendants terminated her employment in retaliation for her engaging in protected whistle-blowing activity. Defendants assert that, "[s]hortly after beginning her employment with Amacore, [p]laintiff engaged in certain actions that led to an immediate loss of confidence in her ability to perform the functions of an officer of Amacore."

On February 25, 2009, plaintiff filed a six-count complaint in the Superior Court of New Jersey, Union County, alleging in four counts that Amacore had breached the Agreement by refusing to issue the stock; breached the Agreement by terminating her without cause; breached the implied covenant of good faith and fair dealing; and wrongfully discharged her in violation of Florida's whistle-blower statute. In another count, plaintiff alleged that all four defendants had wrongfully discharged her under New Jersey common law. In the final count, plaintiff alleged that Amacore, Marcus, and Katzman had fraudulently induced her to "leave secure prior employment and accept employment with Amacore" based upon the terms of the Agreement, particularly, the provisions that stated that plaintiff would receive a sign-on bonus and that she would be compensated for the entire three-year term unless her employment were terminated for cause. Plaintiff asserted that defendants had no intention of honoring those promises and representations.

On April 6, 2009, defendants removed the case to the United States District Court for the District of New Jersey. On December 14, 2009, the District Court remanded the case sua sponte because defendant Katzman was a New Jersey resident.

Following remand, the trial court denied defendants' motions to dismiss in which defendants asserted, among other things, that the court did not have subject matter jurisdiction because the forum selection clause in the Agreement required the suit to be filed in Florida. Defendants also asserted that the court lacked personal jurisdiction over defendants Amacore, Marcus, and Shafer; and that plaintiff's tort claim for fraudulent inducement was barred by the economic loss doctrine.

The court denied defendants' motions on August 6, 2010, and thereafter, on October 5, 2010, denied their motions for reconsideration. We subsequently granted defendant Amacore's motion for leave to appeal.

II.

We address first Amacore's argument that paragraph nine of the Agreement constituted a valid forum selection clause that the trial judge erroneously refused to enforce. The trial court concluded that the clause was ambiguous and that no determination as to its validity and enforceability could be made "at this state of the litigation." Amacore contends that

the trial judge erred because the provision's reference to the State of Florida having exclusive jurisdiction is clear and unambiguous.

Plaintiff counters that the parties did not mutually agree to litigate all disputes concerning plaintiff's employment in Florida, and she understood the clause to mean that Florida law would apply to lawsuits even if the suits were venued in New Jersey. Plaintiff argues that the clause is not a forum selection clause, but rather a choice-of-law clause, as indicated by the paragraph heading, "Governing Law." Plaintiff insists that the contractual provision provides that Florida law shall have exclusive jurisdiction over claims or disputes arising from the Agreement, as distinguished from a forum selection clause that would provide that Florida courts are the only venue for litigating claims. Plaintiff further argues that the provision's phrase, "without regard to any conflict of laws provision," can only relate to choice of law, not forum.

Our review of a trial court's denial of a motion to dismiss a complaint for lack of jurisdiction is de novo. See Mastondrea v. Occidental Hotels Mgmt. S.A., 391 N.J. Super. 261, 268 (App. Div. 2007). We review questions of law de novo, see Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), and whether a term of a contract is clear or ambiguous

is a question of law. Estate of Cohen ex rel. Perelman v. Booth Computers, 421 N.J. Super. 134, 150 (App. Div.) (citing Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997)), certif. denied, 208 N.J. 370 (2011). See also Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 605 (App. Div. 2011) (noting that legal questions concerning the enforceability of a forum selection clause are examined de novo), certif. granted, 209 N.J. 231 (2012).

Subject matter jurisdiction is the "power of the court to hear and determine cases of the class to which the one to be adjudicated is relegated." Abbott v. Beth Israel Cemetery Ass'n of Woodbridge, 13 N.J. 528, 537 (1953). "The principle is well established that a court cannot hear a case as to which it lacks subject matter jurisdiction . . . ." Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 65 (1978). A corollary to that principle is that "[a] court lacks subject matter jurisdiction over a case if it is brought in an ineligible forum." Hoffman, supra, 419 N.J. Super. at 606. For that reason, "a plaintiff cannot file suit in a court if he or she has entered into an enforceable agreement to bring such claims in another forum." Ibid. (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-94, 111 S. Ct. 1522, 1527, 113 L. Ed. 2d 622, 632 (1991)).

A forum selection clause in a contract is enforceable unless: (1) it is a result of "fraud, undue influence, or overweening bargaining power"; (2) it violates "a strong public policy"; or (3) enforcement would be seriously inconvenient for the trial. Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc., 146 N.J. 176, 186-88 (1996) (citing 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)). See also Copelco Capital, Inc. v. Shapiro, 331 N.J. Super. 1, 4 (App. Div. 2000).

Paragraph nine of the Agreement provides:

> 9. GOVERNING LAW
>
> This Agreement shall be governed by the laws of the Sate [sic] of Florida, which shall have exclusive jurisdiction over any claims or disputes arising from the subject matter contained herein without regard to any conflict of laws provision.

The clause is a valid, enforceable choice-of-law and forum selection clause that is unambiguous.

> An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations. . . . To determine the meaning of the terms of an agreement by the objective manifestations of the parties' intent, the terms of the contract must be given their plain and ordinary meaning. A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together. A court should not torture the language of [a contract] to create ambiguity. In the quest

> for the common intention of the parties to a contract, the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain.
>
> [Nester, supra, 301 N.J. Super. at 210 (internal quotation marks and citations omitted).]

There is no ambiguity in the forum selection clause as to the term "exclusive jurisdiction." The term "exclusive" has a plain, longstanding and well-known meaning:

> The term "exclusive" is so plain that little additional light can be gained by resort to the lexicons. If we turn to the Century Dictionary we find it defined to mean "Appertaining to the subject alone; not including, admitting or pertaining to any other or others; undivided; sole; as, an exclusive right or privilege; exclusive jurisdiction."
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> [Mayor of Vicksburg v. Vicksburg Waterworks Co., 202 U.S. 453, 470-471, 26 S. Ct. 660, 666, 50 L. Ed. 1102, 1112 (1906).]

Jurisdiction is defined as "[a] court's power to decide a case or issue a decree." Black's Law Dictionary 927 (9th ed. 2009). See also Abbott, supra, 13 N.J. at 537. Thus, "exclusive jurisdiction" is "[a] court's power to adjudicate an action or class of actions to the exclusion of all other courts." Black's Law Dictionary, supra, at 929.

The omission of the word "court" from paragraph nine does not render the paragraph ambiguous. The term "exclusive

jurisdiction" is used in the context of the parties' legal disputes. In that context, the term "exclusive jurisdiction" can have but one meaning, and that meaning is the power of Florida courts, to the exclusion of other courts, to adjudicate the parties' disputes.

Plaintiff's argument, that paragraph nine of the Agreement is not a forum selection clause because its heading is "Governing Law," is unpersuasive. The heading is not a phrase that necessarily excludes a choice of forum. More significantly, the heading or title of a clause in a contract, though one factor to be considered in determining whether the clause is ambiguous, is not dispositive, and, in this instance, does not render ambiguous the plain language of the clause itself.

We also reject plaintiff's argument that "paragraph 9 provides that Florida law shall have exclusive jurisdiction over claims or disputes arising from the Agreement, not that Florida courts are the only venue where the parties must litigate." That argument is based on the faulty premise that the clause "which shall have exclusive jurisdiction over any claims or disputes" modifies the entire phrase "laws of the S[t]ate of Florida." Such a construction would require a tortured reading of the language to create an ambiguity that otherwise does not

exist. The qualifying clause modifies "Florida," and the meaning of the provision, when considered in context, is, unambiguously, that Florida courts have exclusive jurisdiction over disputes arising out of the Agreement.

Plaintiff argues that if the forum selection clause is valid, her wrongful discharge and fraudulent inducement claims would remain in New Jersey because of its strong interest in regulating employment conduct within its borders. We disagree.

Plaintiff cites no valid precedent for the implicit proposition that forum selection clauses are unenforceable in employment actions. Plaintiff erroneously relies upon Peikin v. Kimmell & Silverman, P.C., 576 F. Supp. 2d 654 (D.N.J. 2008) as authority for that proposition. Peikin did not involve the interpretation of a forum selection clause. Instead, Peikin involved a Pennsylvania resident who worked for a Pennsylvania professional corporation and who attempted to assert a claim under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49, in the United States District Court for the District of New Jersey. Peikin, supra, 576 F. Supp. 2d at 655-56. The court held that New Jersey's anti-discrimination laws do not protect a Pennsylvania resident employed by a Pennsylvania professional corporation from discriminatory acts allegedly undertaken in Pennsylvania even if, over the course of her

employment, the employee conducted business in New Jersey. Id. at 657.

We also disagree with plaintiff's contention that the forum selection clause does not apply to her fraudulent inducement claim because that claim occurred before the Agreement was executed, and is therefore extraneous to the Agreement. Plaintiff does not contend that the forum selection clause itself was the product of defendants' fraud. Absent even an argument that the clause itself was induced by fraud, the clause is enforceable if otherwise valid. Cf. Van Syoc v. Walter, 259 N.J. Super. 337, 338-39 (App. Div. 1992) (holding with respect to an arbitration clause that unless a claim of fraud is directed at the arbitration clause itself, a fraudulent inducement claim is a matter for arbitration), certif. denied, 133 N.J. 430 (1993).

Because we have determined that the forum selection clause in the parties' Agreement is unambiguous and enforceable, we need not address defendant's remaining arguments.

Reversed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION