STATE OF MICHIGAN

COURT OF APPEALS

SUMMIT DIAMOND BRIDGE LENDERS, LLC, Plaintiff-Appellant,	UNPUBLISHED December 22, 2016
v	No. 326679 Oakland Circuit Court
PHILIP R. SEAVER TITLE COMPANY, INC., also known as PRS ASSETS, INC., Defendant-Appellee.	LC No. 2014-143557-CK

Before: MURPHY, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) (agreement to litigate in a different forum) in this case involving an alleged breached of fiduciary duty. Plaintiff is a limited liability company located in Royal Oak, Michigan, and defendant is a corporation located in Bloomfield Hills, Michigan. We reverse and remand for the reasons stated in this opinion.

I. BACKGROUND FACTS

In 2010, Diamond Heroes of Southeastern Michigan, LLC sought funding to construct a park in Waterford, Michigan. Citywide Lending Group International, a California based entity, offered to provide Diamond Heroes a $12 million construction loan, but required Diamond Heroes to pay $676,000 as a "Collateral Commitment Deposit."[1] In June 2010, plaintiff was formed to provide a "bridge loan" to Diamond Heroes to pay the required collateral. In exchange, plaintiff sought security in the form of a "Stand-By Letter of Credit."

In order to effectuate the transaction, plaintiff, Diamond Heroes, Citywide, and defendant entered into an escrow agreement in which defendant was the escrow agent. According to plaintiff, the escrow agreement provided that plaintiff's funds were not to be disbursed until defendant received the "Stand-By Letter of Credit," and that each party was to indemnify the

[1] According to plaintiff, it "was eventually requested to raise $700,000.00 in funds, and Plaintiff's members did in fact raise the said funds."

others for any claims or damages arising out of or in connection with an instrument used in the transaction. The agreement also provided that "[a]ny dispute arising from or related to this Agreement, shall be governed by, and subject to, the laws of the State of California and shall be handled by the appropriate state or federal court located in California."

Defendant received a document purporting to be the letter of credit, but did not approve it because it believed the document to be a copy and not an original. According to plaintiff, the document was never verified and the letter of credit was never approved. Defendant disbursed plaintiff's $700,000 loan to Citywide and another party. Plaintiff brought this action in circuit court alleging defendant breached its fiduciary duty as escrow agent of the loan funds by dispersing the funds without an approved letter of credit.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8). Defendant argued that dismissal was appropriate because plaintiff failed to join Citywide as an essential party. Defendant also argued that the parties agreed to unambiguous choice-of-law and forum-selection clauses that the court should enforce. Plaintiff responded that while defendant sought to enforce the forum-selection clause, it failed to address the choice-of-law provision, which requires California law govern any disputes. Plaintiff argued that pursuant to the choice-of-law provision, California law governs the validity of the forum-selection clause, and California law requires that this case be brought in Michigan.

The trial court concluded that plaintiff's claim was actually one for breach of contract and that MCR 2.116(C)(7) was the controlling rule when seeking summary disposition based on "an agreement to . . . litigate in a different forum." In rejecting plaintiff's argument that defendant did not agree to submit to California jurisdiction, the court concluded that California "has a long history of enforcing contractual forum-selection clauses." The court also concluded that the exceptions set forth in MCL 600.745(3) did not apply, and declined to invoke the doctrine of forum non conveniens. Finally, the court noted that plaintiff failed to "include" Citywide, a California entity, as a party to this suit and that as a result, "it is disingenuous for Plaintiff to characterize this dispute as having no connection to California."

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's grant of summary disposition, as well as a trial court's jurisdictional rulings." *Turcheck v Amerifund Fin*, 272 Mich App 341, 344-345; 725 NW2d 684 (2006). "With regard to a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and 'accept[s] the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true.' " *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002), quoting *Novak v Nationwide Mut Ins, Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999) (alteration in *Young*).

The "legal effect of a contractual clause is a question of law that we [also] review de novo." *Turcheck*, 272 Mich App at 345.

III. ANALYSIS

A. PROPER FORUM

The overarching question in this case is whether the trial court properly enforced the forum-selection clause contained in the parties' escrow agreement. In Michigan, public policy favors the enforcement of such clauses and, absent certain exceptions[2], courts will do so. *Id*. at 345-346. Plaintiff claims, however, that the forum-selection clause's enforceability must be decided pursuant to California law and that a California court would refuse to hear the case. Defendant argues that the forum-selection clause is enforceable pursuant to the law of either jurisdiction, Michigan or California.

The question of which jurisdiction's law applies originates from the choice-of-law provision contained in the escrow agreement. That clause provides that California law governs any dispute arising from or related to the escrow agreement. The parties also designated the state of California in the agreement's forum-selection clause. In *Turcheck*, this Court considered the issue of whether the enforceability of a forum-selection clause should be determined by using the law of the jurisdiction selected in the choice-of-law provision or whether it should be determined pursuant to Michigan law. [3] However, the *Turcheck* Court never reached the issue, having determined that the forum-selection clause was enforceable under either jurisdiction involved. *Id.* at 348. The same is not true in the case at hand.

1. CALIFORNIA LAW

The Supreme Court of California has stated, "No satisfying reason of public policy has been suggested why enforcement should be denied a forum selection clause appearing in a contract entered into freely and voluntarily by parties who have negotiated at arm's length." *Smith, Valentino & Smith, Inc v Superior Court*, 17 Cal 3d 491, 495-496; 131 Cal Rptr 374; 551 P 2d 1206 (1976). Thus, in California, "forum selection clauses are valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of such a clause would be unreasonable." *Id*. at 496. A forum-selection clause is unreasonable if "the forum selected would be unavailable or unable to accomplish substantial justice." *CQL Original Prods, Inc v Nat'l Hockey League Players' Ass'n*, 39 Cal App 4th 1347, 1354; 46 Cal Rptr 2d 412 (1995). To be reasonable, "the choice of forum requirement must have some rational basis in light of the facts underlying the transaction." *Id.* But inconvenience must not factor into the reasonability determination, because it is assumed that the party considered this factor when it contracted. *Smith*, 17 Cal 3d at 496. However, "a forum selection clause will not be enforced if

---

[2] See MCL 600.745(3)(a)-(e).

[3] *Turcheck*, 272 Mich App at 346, n 2 quoting *Beilfuss v Huffy Corp*, 274 Wis 2d 500, 506-507; 685 NW2d 373 (2004) ("describing the decision whether to construe a contract's forum-selection clause and choice-of-law provision together or independently as 'the classic conundrum' ").

to do so will bring about a result contrary to the public policy of the forum." *CQL*, 39 Cal App 4th at 1354.

When the circumstances are reversed, i.e., when the parties have indicated California as their forum of choice in a forum-selection clause, California has a statute which applies. Cal Code Civ Proc § 410.40 provides, in relevant part, as follows:

> Any person may maintain an action or proceeding in a court of this state against a foreign corporation or nonresident person where the action or proceeding arises out of or relates to any contract, agreement, or undertaking for which a choice of California law has been made in whole or in part by the parties thereto and which (a) is a contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than one million dollars ($1,000,000), and (b) contains a provision or provisions under which the foreign corporation or nonresident agrees to submit to the jurisdiction of the courts of this state.

Under this provision, a plaintiff is precluded from bringing suit against a defendant who is a foreign corporation unless (1) the action involves an agreement "for which a choice of California law has been made," (2) the agreement relates to a transaction involving at least $1,000,000, and (3) the agreement contains a provision whereby the foreign corporation "agrees to submit to the jurisdiction of the courts of this state."

Here, there is no dispute that defendant is a Michigan corporation, and thus, as it relates to California law, a "foreign corporation." The cause of action here also involves an agreement "for which a choice of California law has been made." Specifically, the escrow agreement provided that "[a]ny dispute arising from or related to this Agreement, shall be governed by, and subject to, the laws of the State of California . . . ." However, the agreement does not relate to a transaction involving at least $1,000,000, because defendant only agreed to hold in escrow $700,000 of plaintiff's funds. Further, this Court cannot conclude that a California court would find that defendant agreed "to submit to the jurisdiction of" the California courts, because, as discussed below, California law is not settled on the subject.

Plaintiff argues that under California law, forum-selection is not the same as a consent to jurisdiction, and cites *Global Packaging, Inc v The Superior Court*, 196 Cal App 4th 1623, 1627; 127 Cal Rptr 3d 813 (2011), in support. In *Global*, the agreement provided, in relevant part, that "Any controversy or claims arising out of or relat[ ] to this Agreement shall be venued only in the state or federal court in and [ ] (a) Orange County, California." *Id.* (alteration in *Global Packaging*). A dispute arose between Global Packaging, located in Pennsylvania, and Epicor Software, a Delaware corporation with its principal place of business in California, regarding the payment of licensed software. *Id.* Suit was brought in California by Epicor. "Global Packaging moved to quash service of summons," arguing that California had no jurisdiction over it because the forum-selection clause did not constitute a consent to personal jurisdiction, and it did not otherwise submit to jurisdiction. *Id.* at 1627-1628. The trial court denied the motion and held that the clause "was an enforceable forum-selection clause that, by implication, included a consent to jurisdiction." *Id.* at 1628. The California Court of Appeal disagreed. The court found that in "the forum-selection-clause context, forum and jurisdiction are distinct concepts

with different legal implications." *Id.* at 1633. The appellate court held: "Given the crucial role played by limits on jurisdiction in the American legal system, and in particular their importance as a preserver of individual liberty, we cannot agree that consenting to a location in and of itself carries with it a consent to personal jurisdiction." *Id*. at 1632. Thus, it held that an agreement to litigate in a certain forum does not imply an agreement to submit to the jurisdiction of that forum when personal jurisdiction is otherwise absent. *Id.* at 1632.

In contrast to *Global*, defendant cites *Berard Constr Co v Muni Court*, 49 Cal App 3d 710, 713; 122 Cal Rptr 825 (1975). In *Berard*, there were two agreements. The first agreement with defendant Berard Construction Company provided in relevant part, "[t]his lease is executed in Los Angeles, California, and shall be construed under the laws of the State of California, And the parties hereto agree that any action relating to this lease shall be instituted and prosecuted in the courts in Los Angeles County and each party waives the right to change of venue." *Id*. at 720-721. The trial court found this clause to be "a venue provision, not a jurisdiction provision." *Id*. at 721. The California Court of Appeal disagreed, holding that "[t]he provision that 'any action relating to this lease shall be instituted and prosecuted in the courts in Los Angeles County' is an unequivocal consent to the jurisdiction of the California courts." *Id*. The second agreement with defendant Rene J. Berard, president of defendant Berard Construction Company, provided in part, "(t)his guaranty shall be governed by and construed in accordance with the laws of the State of California." *Id*. at 723. In this second instance, the California court of appeal agreed with the trial court and held "[t]his provision does not constitute a consent to jurisdiction." *Id*. Defendant argues that the language of the clause in the instant case is similar to the language in the agreement with defendant Berard Construction Company, such that a California court would hold that the instant clause was an agreement to submit to personal jurisdiction in California.

The forum-selection clause in the instant case, the *Global* case and the *Berard* case contain similar language. Each clause contains the all-inclusive term "any," *Title Ins & Trust Co v Co of Riverside*, 48 Cal 3d 84, 94; 767 P2d 1148 (1989), and the mandatory term "shall," *City & Co of San Francisco v Boyd*, 22 Cal 2d 685, 704; 140 P2d 666 (1943). Each clause also employs "arising from or related to" language and references the action, dispute or claim being instituted, handled, prosecuted or venued in a California court system.

The parties have correctly analyzed the effect of their cited case law on the case before this Court. We agree with plaintiff, that under *Global*, it is reasonable to assume that the instant forum-selection clause would not equate to an agreement to submit to personal jurisdiction. Under *Global*, the clause would only be an agreement to litigate in a certain forum. *Id.* at 1632. However, we also agree with defendant, that under *Berard*, it would be reasonable to assume that the instant clause would be an "unequivocal consent" to the jurisdiction of the California court system. 49 Cal App 3d at 723. Similar to *Berard*, the clause here provides that any dispute related to the agreement is subject to the laws of California and is to be handled by a California court.

The contradictory holdings in *Global* and *Berard* are able to coexist because "there is no horizontal stare decisis in the California Court of Appeal." *Sarti v Salt Creek Ltd*, 167 Cal App 4th 1187, 1193; 85 Cal Rptr 3d 506 (2008). "A decision of a court of appeal is not binding in the courts of appeal. One district or division may refuse to follow a prior decision of a different

district or division, for the same reasons that influence the federal Courts of Appeals of the various circuits to make independent decisions...." *McCallum v McCallum*, 190 Cal App 3d 308, 315 n 4; 235 Cal Rptr 396, 400 (1987) citing 9 Witkin Cal Procedure (3d ed 1985) Appeal, § 772, pp 740–741. Given the state of the law there, we question whether *Global* would have been decided differently had it been filed in the third division, instead of the fourth, and vice versa with *Berard*. In California, appellate cases may hold precedential value, "the only qualifications being that the relevant point in the appellate decision must not have been disapproved by the California Supreme Court and must not be in conflict with another appellate decision." *Sarti*, 167 Cal App 4th at 1193. *Global* and *Berard* however, clearly conflict. The *Global* court recognized this, noting that *Berard* existed and held the opposite. *Global*, 196 Cap App 4th at 1632, n 10. When appellate decisions conflict, "the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions." *Auto Equity Sales, Inc v Superior Court of Santa Clara Co*, 57 Cal 2d 450, 456; 369 P2d 937 (1962). Under this case law, we cannot predict how a California trial court would interpret the forum selection clause.

While the question of whether the instant clause here was a consent to personal jurisdiction remains unanswered, there is, in any event, an undisputed jurisdictional amount of one million dollars that has not been met. Accordingly, because the escrow agreement is not "relat[ed] to a transaction involving in the aggregate not less than one million dollars," the parties cannot maintain this action in California. Cal Code Civ Proc § 410.40. Because "the forum selected would be unavailable or unable to accomplish substantial justice," the forum-selection clause would be unreasonable and unenforceable. *CQL Original Prods*, 39 Cal App 4th at 1354.

2. MICHIGAN LAW

Michigan courts favor enforcement of contractual forum selection clauses with few exceptions. "The exceptions to this rule are stated in MCL 600.745(3)(a)-(e), and unless one of the statutory exceptions applies, Michigan courts will enforce a forum-selection clause as written." *Turcheck*, 272 Mich App at 348.

MCL 600.745(3) provides as follows:

> If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:
>
> (a) The court is required by statute to entertain the action.
>
> (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.
>
> (c) The other state would be a substantially less convenient place for the trial of the action than this state.

> (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> (e) It would for some other reason be unfair or unreasonable to enforce the agreement.

Plaintiff contends that the trial court should not have dismissed the action because the factors outlined in subdivisions (b), (c), (d), and (e) are all present in this case. Both parties argue that § 745(3)(b) applies in their favor. As noted above, plaintiff cannot secure effective relief in California because the parties' action fails to meet the threshold jurisdictional amount required to maintain an action against a foreign corporation in a California court. Further, whether the forum clause here is also an agreement to submit to the jurisdiction of the California courts is debatable, such that this Court cannot hold with certainty that plaintiff would secure effective relief there.

As to § 745(3)(c), plaintiff argues that litigating this case in California would be substantially less convenient than litigating it in a Michigan court, asserting that both parties to the suit, most witnesses, and all evidence are located in Michigan. This Court has held that

> inconvenience, insofar as it is within the contemplation of the parties at the time of contracting, should not render a forum-selection clause unenforceable. Where the inconvenience of litigating in another forum is apparent at the time of contracting, that inconvenience is part of the bargain negotiated by the parties. Allowing a party who is disadvantaged by a contractual choice of forum to escape the unfavorable forum-selection provision on the basis of concerns that were within the parties' original contemplations would unduly interfere with the parties' freedom to contract and should generally be avoided. [*Turcheck*, 272 Mich App at 350.]

Plaintiff makes a cogent argument that California would be a substantially less convenient place for trial than Michigan. However, the reasons cited are all things the parties would have been aware of at the time they entered into the escrow agreement. In other words, nothing happened after the parties entered into the agreement that would render California more inconvenient now than it was when the agreement was made.

As for § 745(3)(d), plaintiff argues that "Citywide was a completely phoney [sic] operation created and designed for the purpose of stealing money" and that the clause should not be enforced because at the time of contracting, the parties believed that all of the transacting entities were legitimate businesses. Plaintiff never argues, or even suggests, that the forum-selection clause itself (or, for that matter, escrow agreement) was entered into by means of fraud. Plaintiff cites no authority for the proposition that the alleged fraudulent nature of Citywide renders the negotiated agreement fraudulent. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims . . . .").

We conclude that the escrow agreement's forum-selection clause cannot be enforced because at least one of the statutory exceptions applies in MCL 600.745(3).

B. CITYWIDE

Although the question of whether Citywide was an essential party was not dispositive below, we provide the following direction for purposes of remand.

MCR 2.205(A) provides the pertinent law:

> Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

"The purpose of the rule is to prevent the splitting of causes of action and to ensure that all parties having a real interest in the litigation are present." *Mason Co v Dep't of Community Health*, 293 Mich App 462, 489; 820 NW2d 192 (2011). "[W]here a party's presence in the action is not essential to the court rendering complete relief, factors such as judicial economy or avoidance of multiple litigation are not enough to compel joinder." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 96; 535 NW2d 529 (1995).

Here, defendant contends that it has the right under the escrow agreement to seek indemnification from Citywide should defendant be found liable in this lawsuit. The determination of whether Citywide must indemnify defendant is not the same legal question as is raised in the instant cause of action, which is whether defendant breached its fiduciary duty owed to plaintiff. Citywide's legal status has nothing to do with answering this question. Thus, Citywide's "joinder is not essential to a determination of the rights and obligations between plaintiff[] and [defendant], nor to permit the court to render complete relief." *Id.* at 96-97.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens

STATE OF MICHIGAN

COURT OF APPEALS

SUMMIT DIAMOND BRIDGE LENDERS, LLC, Plaintiff-Appellant,	UNPUBLISHED December 22, 2016
v	No. 326679 Oakland Circuit Court
PHILIP R. SEAVER TITLE COMPANY, INC., also known as PRS ASSETS, INC., Defendant-Appellee.	LC No. 2014-143557-CK

Before: MURPHY, P.J., and STEPHENS and BOONSTRA, JJ.

BOONSTRA, J. (*dissenting*).

I respectfully dissent. In my view, the trial court properly enforced the freely-bargained-for forum-selection clause at issue in this case,[1] because both Michigan and California law support such enforcement. In concluding otherwise, the majority holds that a California court would not allow plaintiff to maintain this action in California because the monetary amount found in Cal Code Civ Proc § 410.40 has not been met. I believe that this conclusion is based on a misinterpretation of the California Code of Civil Procedure and the purpose behind Cal Code Civ Proc § 410.40. Further, I agree with the majority that the issue of whether a California court would find that it has personal jurisdiction over defendant is unclear (given that, as the majority acknowledges, there is no horizontal stare decisis within the California Court of Appeals), and I would hold that the trial court did not err by allowing a California court to make that determination.[2]

[1] The underlying escrow agreement provided, in pertinent part, that "[a]ny dispute arising from or related to this Agreement, shall be governed by, and subject to, the laws of the State of California and shall be handled by the appropriate state or federal court located in California."

[2] Were we to affirm the trial court (as I would do), its grant of summary disposition in favor of defendant should be without prejudice to the refiling of this action in Michigan in the event that a California court later were to determine that it lacked personal jurisdiction. This would guard against the parties potentially being left without a forum in which to litigate the dispute.

I. APPLICABILITY OF CAL CODE CIV PROC § 410.40

The majority begins by acknowledging, as the trial court did, that California generally enforces freely-bargained-for forum-selection clauses. See *Smith, Valentino & Smith, Inc v Superior Court*, 17 Cal 3d 491, 495-496; 131 Cal Rptr 374; 551 P 2d 1206 (1976); *CQL Original Prods, Inc v Nat'l Hockey League Players' Ass'n*, 39 Cal App 4th 1347, 1354; 46 Cal Rptr 2d 412 (1995). Nonetheless, the majority concludes that Cal Code Civ Proc § 410.40 bars the enforcement of the forum-selection clause in the instant case. Cal Code Civ Proc § 410.40 states in relevant part:

> Any person may maintain an action or proceeding in a court of this state against a foreign corporation or nonresident person where the action or proceeding arises out of or relates to any contract, agreement, or undertaking for which a choice of California law has been made in whole or in part by the parties thereto and which (a) is a contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than one million dollars ($1,000,000), and (b) contains a provision or provisions under which the foreign corporation or nonresident agrees to submit to the jurisdiction of the courts of this state.

Notwithstanding the permissive nature of the statute, the majority converts it into a statute of preclusion, stating its interpretation as follows:

> Under this provision, a plaintiff is precluded from bringing suit against a defendant who is a foreign corporation unless (1) the action involves an agreement "for which a choice of California law has been made," (2) the agreement relates to a transaction involving at least $1,000,000, and (3) the agreement contains a provision whereby the foreign corporation "agrees to submit to the jurisdiction of the courts of this state."

I find no support for this interpretation in California law. While I will discuss the issue of the parties' submission to the personal jurisdiction of California in a later section of this opinion, as the issue of personal jurisdiction is important regardless of the applicability of Cal Code Civ Proc § 410.40, I cannot conclude that the statute itself "precludes" a plaintiff from bringing a suit against a foreign corporate defendant unless its criteria are met.

Although the rule of statutory construction *expression unius est exclusio alterius* (the expression of one thing is the exclusion of another) arguably could, in a vacuum, be applied to the language of Cal Code Civ Proc § 410.40 to support the conclusion that the majority reaches (i.e., that by providing that a plaintiff may maintain an action against a foreign corporate defendant *only* if the criteria of Cal Code Civ Proc § 410.40 are met), that rule is merely a tool to be used, where necessary, to ascertain the intent of the legislature, and cannot be employed to contradict or vary a clear expression of legislative intent. See *Luttrell v Dep't of Corrections*, 421 Mich 93, 107; 365 NW2d 74 (1984); *Williams v Los Angeles Metropolitan Transit Auth*, 68 Cal 2d 599, 603-604;; 68 Cal Rptr 297; 440 P 2d 497 (1968). Put another way, such a rule of statutory construction simply does not apply in the face of a clear indication of legislative intent.

I find that to be the case with respect to Cal Code Civ Proc § 410.40. That is, as stated in *Credit Lyonnais Bank Nederland, NV v Manatt, Phelps, Rothenberg & Tunney*, 202 Cal App 3d 1424, 1433; 249 Cal Rptr 559 (1988), superseded in part by statute on other grounds as noted in *Beckman v Thompson*, 4 Cal App 4th 481; 6 Cal Rptr 2d 60 (1992), the statute appears designed not to *preclude* anything, but rather specifically to attract big-ticket litigation to California by expressly *allowing* parties to maintain actions against foreign corporations under forum-selection clauses if the dollar value and other criteria are met. The *Credit Lyonnais* court noted that the California Legislature modeled the bill that adopted Cal Code Civ Proc § 410.40 after a similar statute enacted in New York "for the purpose of fostering New York as an international commercial arbitration center." *Id*. at 1434 (citation omitted), and concluded that Cal Code Civ Proc § 410.40 operated to "limit the exercise of the inconvenient forum doctrine" by explicitly authorizing California as a forum for certain types of "large contract" cases. *Id*.

Several states have passed similar laws patterned after New York's statute, including, Florida, Delaware, Ohio, and Texas. See Honigsberg et al., *State Contract Law and Debt Contracts*, 57 J Law & Econ 1031, 1034-1035 and n 6 (2014). These statutes have been described by commentators as "allowing parties to litigate in their state courts providing that the contract exceeds a minimum dollar value (usually $1 million) and that the parties have selected the law of that state," *id*., or as a "statutory commitment to enforce forum-selection clauses" when a state's law has been chosen and the dispute exceeds a certain dollar value. See Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 Stanford J Complex Lit 51, 87-88 (2012). As a result of the passage of these statutes, "parties to substantial commercial contracts can now feel confident that their choice of law will be enforced." Honigsberg, 1035.

Thus, rather than conclude, as the majority does, that Cal Code Civ Proc § 410.40 precludes the enforcement of forum-selection clauses if its conditions are not met, I conclude, consistent with *Credit Lyonnaise*, 202 Cal App 3d at 1432, that the statute exists to encourage and facilitate the enforcement of these clauses specifically in big-ticket contract cases, and is simply inapplicable to cases that do not meet its criteria.[3] The statute thus does not preclude the exercise of jurisdiction over those smaller cases, but merely does not afford them the exemption to the inconvenient forum doctrine that is afforded to the bigger-ticket cases.

Indeed, I have found no California case invoking Cal Code Civ Proc § 410.40 in declining to enforce a forum-selection clause. Moreover, if the majority were correct that Cal

[3] In fact, if one reads Cal Code Civ Proc § 410.40 as a statute of preclusion, then it would preclude *any* California court from ever taking jurisdiction over a foreign corporation that did not meet the statute's criteria, regardless of the corporation's contacts with California, thus operating as at least a partial abrogation of California's long-arm statute, Cal Code Civ Proc § 410.10. No California court has so interpreted Cal Code Civ Proc § 410.40. See *XL Specialty Ins Co v Bullocks Exp Transp, Inc*, unpublished opinion of the California Court of Appeal, Second District, Division 2, decided April 4, 2002 (Docket No. B151799) (concluding that Cal Code Civ Proc § 410.40 did not apply to the instant case due to the lack of forum-selection clause, but nonetheless concluding that the trial court could take personal jurisdiction over the defendant foreign corporation based on minimum contacts).

Code Civ Proc § 410.40 operates to preclude actions against foreign corporations that do not meet its criteria, then no such actions under a million dollars could be maintained in California, regardless of the parties' choice of California law and explicit submission to the personal jurisdiction of California. Yet, I have found no California cases employing such a rationale. I therefore disagree with the majority's reliance on Cal Code Civ Proc § 410.40 to find that the California courts would refuse to allow plaintiff to maintain this action in California.

II. PERSONAL JURISDICTION

The majority states that the question of whether California courts would find that plaintiff had consented to personal jurisdiction in California is unanswered. I agree that the question has been answered differently by different panels of the California Court of Appeals, none of which are binding on the other. But I fail to see how the trial court erred by deciding that a California court should answer the question in the first instance; indeed, to me, the unsettled nature of the caselaw in California counsels toward deferring to a California court to determine the enforceability of a California choice of forum clause under California law. Reading (as I do) Cal Code Civ Proc § 410.40 to encourage "big ticket" cases rather than to preclude smaller ones (and therefore not holding plaintiff's case to be barred by a monetary requirement), I would hold that the trial court did not err by enforcing the forum-selection clause at issue. Although the majority acknowledges the lack of horizontal stare decisis within the California Court of Appeals and the resulting non-binding nature of *Global Packaging, Inc v The Superior Court*, 196 Cal App 4th 1623, 1627; 127 Cal Rptr 3d 813 (2011), it does not go so far as to decide (apart from the issue of the supposed monetary requirement of Cal Code Civ Proc § 410.40) whether the trial court was correct in enforcing the forum-selection clause. I would do so, and would conclude that given the uncertainties of California law, plaintiff has failed to carry its burden of showing that the mandatory forum-selection clause is unreasonable. Specifically, plaintiff has failed to show that the selected forum is "unavailable or unable to accomplish" substantial justice, see *Smith, Valentino & Smith, Inc,* 17 Cal 3d at 495–496. I would therefore hold that the trial court did not err by granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7).

Plaintiff's argument in essence is that *Global Packaging* would compel a California court to find that the forum-selection clause at issue here was not an agreement by the parties to submit to the personal jurisdiction of California. I disagree with that assertion in several respects. At the outset, I note that plaintiff argues that *Global Packaging* is "binding" precedent establishing a "clear rule" that "must be applied" and that "will require a California court to dismiss the present dispute." This, however, is incorrect. As the majority acknowledges, *Global Packaging* is not binding on future California courts (as are published appellate decisions after 1990 in Michigan; see MCR 7.215(J)), and there is no horizontal stare decisis within the California Courts of Appeal; "[o]ne district or division may refuse to follow a prior decision of a district or division." See, e.g., *McCallum v McCallum*, 190 Cal App 3d 308, 315 n 4; 235 Cal Rptr 396 (Cal App 1987). Nor is a superior court bound to follow an appellate opinion even from its own district where contrary appellate authority exists. See *id*.; see also *Auto Equity Sales, Inc v Superior Court of Santa Clara Co*, 57 Cal 2d 450, 456; 20 Cal Rptr 321; 359 P2d 937 (1962) (wherein the California Supreme Court states that where appellate decisions are in conflict, "the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions.")

I also note that plaintiff's reliance on the reasoning of *Global Packaging* may be suspect in light not only of California's policy of enforcing freely-bargained-for forum-selection clauses, but the United States Supreme Court's holding in *The Bremen v Zapata Off–Shore Co*, 407 US 1, 18; 92 S Ct 1907, 1913; 32 L Ed 2d 513 (1972). Plaintiff in fact argues that the court in *Global Packaging* "[r]eject[ed] the reasoning of the holding" in *The Bremen*, because there "the United States Supreme Court improperly conflated forum selection with jurisdiction." I do not, however, read *Global Packaging* as "explicitly reject[ing]" the United States Supreme Court's holding in *The Bremen*," as plaintiff contends (emphasis in original). To the contrary, *Global Packaging* described *The Bremen* as "the case that gave the official imprimatur to forum selection clauses as embodying the modern and cosmopolitan approach to commercial disputes." (Footnote omitted).

Global Packaging may indeed, however, have implicitly rejected the United States Supreme Court's holding in *The Bremen*. While holding that "an agreement to litigate in a certain forum" does not "necessarily imply an additional, separate agreement to submit to the jurisdiction of that forum," *Global Packaging*, 196 Cal App at 1632, the court did not address the United States Supreme Court's observation that " 'it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court' " through "arms-length negotiation" for "[t]he choice of that forum."[4] *The Bremen*, 407 US at 11, quoting *National Equipment Rental, Ltd v Szukhent*, 375 US 311, 315-316, 84 S Ct 411, 11 L Ed 2d 354 (1964). Nor did it address the Supreme Court's holding that such clauses are enforceable absent a showing that "trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court." *Id*. at 18. Rather, the *Global Packaging* court appears to have determined that parties to contracts that select a forum for the resolution of disputes require additional due process protections that the United States Supreme Court has not deemed necessary.[5] Regardless, it appears to me at best far from certain that another California Court of Appeal, or the California Supreme Court, or for that matter a California Superior Court, would embrace plaintiff's position that it should cavalierly reject, either explicitly or implicitly, a holding of the United States Supreme Court.

Further, although *Global Packaging* concluded that an agreement to litigate disputes in a certain venue or forum does not imply an agreement to submit to personal jurisdiction, the opposite conclusion was reached in *Berard Construction Co v Municipal Court*, 49 Cal App 3d 710, 722; 122 Cal Rptr 825 (1975), wherein the court held that a clause that provided that a lease was to be construed under the laws of California and that actions under the lease should be

---

[4] I note that the clause at issue in *The Bremen* stated merely that "[a]ny dispute arising must be treated before the London Court of Justice" and did not contain the sort of additional explicit consent to jurisdiction that the court in *Global Packaging* found necessary. *The Bremen*, 407 US at 2.

[5] I note that California, like Michigan, nonetheless considers the due process protections of its state constitution to be essentially co-extensive with the protections provided by the federal constitution. See *Today's Fresh Start, Inc v Los Angeles County Office of Ed*, 57 Cal 4th 197, 212; 303 P 3d 1140; 159 Cal Rptr 3d 358 (2013).

brought in Los Angeles County constituted the consent of the parties to California's jurisdiction. Thus, a California trial court or appellate court faced with this issue in the future would have contradictory appellate authorities from which to choose. As an example, in *Paul Ryan Associates v Hawaiiana Painting & Maintenance, Inc*, unpublished opinion of the California Court of Appeal, First District, Division 5, issued April 30, 2013 (Docket No. A136052), the court faced the issue of whether the defendant had consented to personal jurisdiction when it entered into a subcontract that incorporated a term from another contract stating that disputes would be litigated in San Francisco. *Id*., unpub op at 1. The court thus considered whether to apply *Global Packaging* or *Berard*. *Id*. at 6 ("The language in Paragraph 24.3.3 of the General Contract does not state that anyone is submitting to personal jurisdiction in California; it merely specifies that arbitration or litigation will take place in San Francisco, California. The question therefore arises whether a forum-selection clause alone is sufficient to confer personal jurisdiction over a defendant. Relevant to this question are two California decisions—*Global Packaging, Inc v Superior Court* (2011) 196 Cal. App. 4th 1623 (*Global Packaging*) and *Berard Construction Co v Municipal Court (*1975) 49 Cal App 3d 710 (*Berard*)."). Although that particular court ultimately chose to follow *Global Packaging*, a future court would be not required to do so.[6]

Indeed, several California courts have, post-*Global Packaging*, enforced forum-selection clauses with language very similar to the clause at issue here, and that lack an explicit reference to submission to a particular jurisdiction apart from a statement that disputes will be resolved in a particular forum. See *Karnazes v Expedia, Inc*, unpublished opinion of the California Court of Appeal, issued November 26, 2014 (Docket No. B250142); *Madick Ins Serv v 3 Mark Fin, Inc*, unpublished opinion of the California Court of Appeal, issued March 5, 2014 (Docket No. B249500); *Schine v Prop Sols, Int'l, Inc*, unpublished opinion of the California Court of Appeal, issued January 27, 2014 (Docket No. B240853); *Anosike v Covenant Transp, Inc*, unpublished opinion of the California Court of Appeal, issued May 24, 2013 (Docket No. B238684).

Thus, as the majority acknowledges, a California court could decline to adopt the reasoning of *Global Packaging* in determining whether the parties to the escrow agreement had consented to the jurisdiction of California, just as the *Global Packaging* court declined to adopt the reasoning of *Berard*. *Global Packaging, Inc*, 196 Cal App 4th at 1633 n 10. This conclusion is strengthened by the fact that *Berard* relied on a California Supreme Court case, *Frey & Hogan Corp v Superior Court*, 5 Cal 2d 401; 55 P2d 203 (1936), in holding that agreement to litigate in a particular forum constituted implied consent to the jurisdiction of that forum. Although the *Global Packaging* court appears to give short shrift to cases such as *Frey* (albeit without naming

[6] I note that the court in *Paul Ryan* also decided that the subcontract did not incorporate the forum-selection clause of the general contract. Additionally, the court found it relevant that the defendant did not negotiate the forum-selection clause and that no authority had been presented "for the proposition that consent to personal jurisdiction may be established solely by incorporating a forum selection clause from another contract between a different set of parties." In this case, of course, we have at issue a forum-selection clause as part of a negotiated agreement between the parties to the case at hand, not an incorporation from another contract to which defendant was not a party.

Frey), stating in a footnote that "cases pertaining to jurisdiction in arbitrations are inapposite" in light of Cal Civ Proc § 1293,[7] *Global Packaging, Inc*, 196 Cal App 4th at 1633 n 10, I believe that a California court could find substantial support in *Frey* for enforcing the forum-selection clause at issue here.

In *Frey*, 5 Cal 2d at 402-403, the petitioner sought to have the California Supreme Court overturn the Superior Court's denial of its motion to quash service of process related to an arbitration to take place in California under the laws of California, on the ground that the California Court lacked personal jurisdiction over it to compel the arbitration. The California Supreme Court declined, stating that the contract at issue contained a clause selecting a California forum and California law for arbitration, and that "[t]herefore it was an agreement to submit to the jurisdiction within which the arbitration must operate in order to give it the effect contemplated by the contract and by the law." *Id*. at 404-405. This holding with regard to arbitrations was later codified in Cal Civ Proc § 1293. See *Atkins, Kroll & Co v Broadway Lumber Co*, 222 Cal App 2d 646, 651; 35 Cal Rptr 385 (1963). Although there are obvious differences between suits pending in arbitration and in court, here, as in *Frey* and *Berard*, the parties to the agreement agreed to a California forum and California law; a California Court could therefore conclude that the parties had necessarily consented to the personal jurisdiction of a California court.

Additionally, I find *Global Packaging* to be distinguishable from the instant case in several respects. The court in *Global Packaging* was faced with a much more poorly-drafted clause that, among other things, violated California law concerning the selection of venue. *Global Packaging, Inc*, 196 Cal App at 1627, 1628. The court's frustration with the poor drafting at issue was evident:

> A court should not be called upon to function as a backstop for sloppy contract drafting. A judge should not have to spend court time sorting out the meanings and applications of common legal terms—"venue," "forum," and "jurisdiction." Failing to pay attention does and should have consequences. As the court stated, with obvious exasperation, in *General Motors Acceptance Corp v Codiga* (1923) 62 Cal. App. 117, 120, 216 P. 383, "[C]ourts are not inclined to go out of their way, when confronted with an invalid covenant, to search for ways and means of saving perchance something from the wreck and thus placing an interpretation on the contract which the parties never wrote therein."
>
> The trial court took a clause referring to "venue," translated "venue" into "forum," and then extended "forum" to include personal jurisdiction. This stretches paragraph 11 beyond what its actual words can bear and pulls Epicor out

[7] Cal Civ Proc § 1293 states that "[t]he making of an agreement in this State providing for arbitration to be had within this State shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such agreement by the making of any orders provided for in this title and by entering of judgment on an award under the agreement."

> of a pit of its own digging. Global Packaging cannot be haled into a California court on that basis. [*Id*. at 1634-18355.]

Thus, the court in *Global Packaging* was faced with a clause that was only a forum-selection clause by implication, and it declined to further rehabilitate the poor drafting so as to imply consent to jurisdiction. *Global Packaging, Inc*, 196 Cal App 4th at 1633 n 10 (stating that it disagreed that "a consent to venue in one county constitutes a consent to personal jurisdiction in California.") Here, by contrast, we have a clear, unambiguous forum-selection clause of the type that, as I have noted, has been enforced both pre- and post-*Global Packaging* in California. Further, we have consent, not to a specific venue in a specific county, but to "the appropriate state or federal court located in California." There is no doubt that the clause at issue here refers to the selection of a forum, not a venue. Finally, unlike the clause in *Global Packaging*, which contained a choice of jurisdictions based on who was suing whom[8] and "the jurisdiction in which the Software is located," here we have a straightforward agreement to resolve all disputes arising from the escrow agreement in the courts (federal or state) of a single state. Thus, many of the problems identified by the court in *Global Packaging* are simply not present with respect to the clause at issue here. For all of these reasons, I believe that a California court could well determine that, despite *Global Packaging*, it possessed jurisdiction over the parties to the escrow agreement by virtue of the forum-selection clause.

Because I would find that neither Cal Code Civ Proc § 410.40 nor *Global Packaging*, together or individually, support finding that a California court necessarily would find that it lacks personal jurisdiction over defendant, I would hold that plaintiff had failed to carry its burden of showing that the selected forum is "unavailable or unable to accomplish" substantial justice, see *Smith, Valentino & Smith, Inc*, 17 Cal 3d at 495–496, and would affirm the trial court on that basis.[9]

III. MICHIGAN LAW

In finding that Michigan law also supports reversal of the trial court, the majority essentially relies on its finding that a California court would not allow plaintiff to maintain this action. Specifically, the majority holds that MCL 600.745(3)(b) (plaintiff cannot secure effective relief) and (e) (unfair or unreasonable to enforce forum-selection clause for some other reason) favor reversal of the trial court because a California court would lack of personal jurisdiction over defendant. As stated above, I disagree with that conclusion. In the absence of

---

[8] The clause provided in part, "Such venue shall be determined by the choice of the plaintiff bringing the action." *Global Packaging*, 196 Cal App at 1627.

[9] I note that the clause at issue selects the forum as being "the appropriate state or federal court located in California." Federal law governs a federal district court's decision whether to give effect to a parties' forum-selection clause. *Stewart Org, Inc v Ricoh Corp*, 487 US 22, 32; 108 S Ct 2239; 101 L Ed 2d 22 (1988); see also 28 USC 1404. And a federal court (assuming subject matter jurisdiction) would most likely uphold the forum-selection clause as valid under the rule of *The Bremen*, 407 US 1 at18, as I have discussed.

that conclusion, I agree with the majority that there is no reason why Michigan law would not favor the enforcement of the forum-selection clause at issue. Michigan courts "generally enforce contractual forum-selection clauses" assuming that certain conditions, enumerated in MCL 600.745(3)(a)-(e), are not present. *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 348; 725 NW2d 684 (2006). In particular, while I agree with the majority that plaintiff has not demonstrated that MCL 600.745(3)(c) applies to the instant action, I would clarify that the majority does not hold, nor did *Turcheck* hold, that MCL 600.745(3)(c) can *never* be applicable in cases involving forum-selection clauses. Rather, as *Turcheck* states, and as the majority references ("nothing happened after the parties entered into the agreement that would render California more inconvenient now than it was when the agreement was made"), the question becomes whether the inconvenience was "within the contemplation of the parties at the time of contracting." *Turcheck*, 272 Mich App at 350. Here, plaintiff's claim that the witnesses and evidence in the instant case are located in California is unavailing, because that is the type of inconvenience that was easily contemplatable at the time the parties entered into the escrow agreement; indeed, it is precisely the type of claim of inconvenience this Court found unavailing in *Turcheck*. *Id*. at 349-350.

For all of these reasons, I would refrain from attempting to divine what a California court would conclude with respect to its own jurisdiction, and would instead affirm the trial court's enforcement of the parties' contractual forum-selection clause, and its order granting defendant's motion for summary disposition.[10]

/s/ Mark T. Boonstra

[10] In both its brief on appeal and at oral argument, defendant has stated its intent to add Citywide Lending Group International (a California entity and a party to the underlying escrow agreement) as a party to this action, at least if further proceedings take place in Michigan. While I, like the majority, find a statement of a possible future action by a party to be an insufficient basis to make an appellate ruling, I also would not go as far as does the majority opinion to make a determination whether Citywide is a necessary party under MCR 2.205(A). Although the trial court mentioned in passing that Citywide was an "apparently necessary California entity," that statement, in context, was not a basis for the trial court's holding. I would thus leave for a later time the issue of if, and how, the addition of Citywide as a party (should it occur) might affect the jurisdictional analysis in this case.