

Enforcing Forum Selection Clauses: NJ Court Weighs In

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As 2022 ended, it took much of the uncertainty surrounding how a New Jersey court should address a forum selection clause when faced with a claim that the contract, as a whole, was obtained through fraud. Publishing its decision in *Largoza v. FKM Real Estate Holdings*, the Appellate Division followed the approach taken by the majority of states. In so doing, the Appellate Division drew on previously established analyses applied to arbitration clauses—a court will only negate the clause if the challenging party argues that the clause, itself, was procured by fraud. See *Largoza v. FKM Real Estate Holdings*, __ N.J. Super. __, 2022 N.J. Super. LEXIS 137 *14-16, 20 (App. Div. 2022) (citing *Prima Paint v. Flood & Conklin Manufacturing*, 388 U.S. 395 (1967); *Rent-A-Center, W. v. Jackson*, 561 U.S. 63 (2010); and *Goffe v. Foulke Management*, 238 N.J. 191 (2019)). Asserting that

the agreement, as a whole, was procured by fraud, and is therefore void, will not suffice to invalidate a forum selection clause.

Factual Background

In March 2018, plaintiffs, Drs. Daro and Maria Largoza (the Largozas), entered into a \$2,500,000 contract for the purchase of real estate and a \$150,000 asset purchase agreement for a residential healthcare facility (the real estate, together with the facility, are referred to as the property). The Largozas were to purchase the property from defendants, FKM Real Estate Holdings, and its principal owner, FE M. Caliolio (Caliolio).

The plaintiffs applied for a \$2,150,000 small business administrative loan from defendant, Celtic Bank to finance the transaction. Their loan application, and ultimately financing, was facilitated by defendants, Rolando David (David) and Paul Messina. As part of the approval process, Celtic Bank retained defendant, Cushman & Wakefield (Cushman) to conduct an independent



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appraisal of the property. Cushman was allegedly instructed by Celtic Bank to appraise the property as an assisted living facility rather than a residential health care facility.

To substantiate the property's value, Caliolio and David are alleged to have provided false or fictitious information to Celtic Bank and to Cushman. The property appraised for \$2,700,000. Relying on that appraisal, Celtic Bank issued a conditional commitment letter to the plaintiffs in August 2018. The plaintiffs proceeded to execute a business loan agreement and a mortgage with Celtic Bank. Both the business loan agreement and the mortgage (collectively, the loan agreement) contained a forum selection clause

designating the courts of Salt Lake County, Utah as the jurisdiction of choice.

The transaction closed on Nov. 30, 2018. In November 2019, the Largozas believed that they discovered that Caliolio and David fraudulently entered into additional promissory notes and mortgages and made misrepresentations to induce them into purchasing the property. The operative pleading, the plaintiffs' verified third amended complaint, was filed on Nov. 2, 2021. It pleaded, in relevant part, fraud in the inducement, equitable fraud, negligent misrepresentation, fraudulent misrepresentation, violation of the Consumer Fraud Act, theft by deception, and that all documents between the plaintiffs and Celtic Bank were void ab initio and voidable. The pleading, however, did not make any reference to a forum selection clause, let alone allegations that the clause, itself, was obtained by fraud.

Celtic Bank filed a motion to dismiss. Relying on the loan agreement's forum selection clause, the lower court granted the motion, but did so without prejudice to the Largozas' rights to pursue claims in Utah. The Largozas filed a motion for reconsideration, which was denied. An interlocutory appeal of both orders followed.

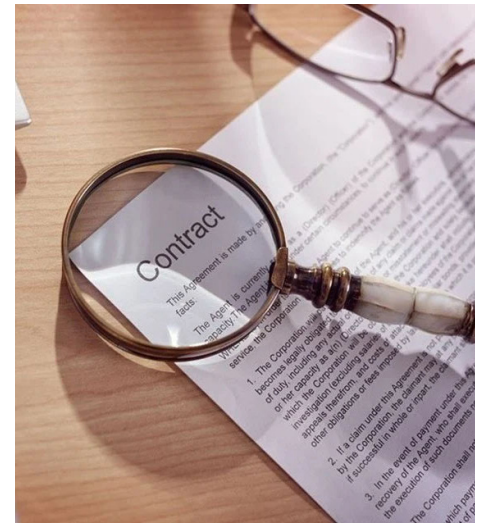
On appeal, the Largozas argued: it was an error to enforce the

forum selection clause because they properly pleaded fraudulent inducement against Celtic Bank, rendering the agreement void ab initio and the clause inoperative; enforcing the clause would be contrary to public policy, as expressed by the entire controversy doctrine; requiring them to litigate against Celtic Bank in Utah and against the other defendants in New Jersey would be unduly expensive and inconvenient; and Celtic Bank waived its rights to enforce the forum selection clause, and consented to the jurisdiction in New Jersey, by filing its motion to dismiss based upon New Jersey law.

If You're Going To Argue, You Have To Be Specific

General allegations of fraud, or claims of illegality, are not enough to invalidate an agreement's forum selection clause. Instead, the allegations must pertain specifically to the individual clause, as is required with allegedly fraudulent arbitration clauses.

The Appellate Division rejected the plaintiffs' first argument—that the forum selection clause is unenforceable by virtue of its inclusion in a void or voidable contract. In so rejecting, the court analyzed the issue in the same way the arbitration clauses had been analyzed in the decisions of *Prima Paint*, *Rent-A-Center* and *Goffe* (citing *Prima Paint*, 388 U.S. at 403-04;



Rent-A-Center, W., 561 U.S. at 72; and *Goffe*, 238 N.J. at 195-96 (looking to *Prima Paint* and *Rent-A-Center* to render its decision)). In each of those cases, the agreement was challenged as unenforceable in its entirety and, therefore, the arbitration clause was challenged as unenforceable. However, those courts ultimately required that the arbitration clauses, themselves, be challenged—they held that it was not sufficient to assert that the agreement, in general, had been procured by fraud. The relevant injury was whether the arbitration provision, in particular, had been procured by fraud. Using that same logic, the *Largoza* court concluded that “general fraud allegations and claims of illegality, even if true, cannot alone serve to invalidate the parties’ forum selection clause.” Like an arbitration clause, if the forum selection clause is challenged, the plaintiffs must allege that the forum selection clause, itself, was procured by fraud.

The Appellate Division in *Largoza* went on to reject the plaintiffs' second argument, finding that enforcing the forum selection clause would not "violate the strong public policy interest of the entire controversy doctrine." While it noted that a "forum selection clause 'must give way' to the entire controversy doctrine" in certain situations (quoting *McNeill v. Zoref*, 297 N.J. Super. 213, 223 (App. Div. 1997)), it need not do so when the allegations are "sufficiently distinct" from the claims against the other defendants. In this case, the allegations against Celtic Bank were deemed "sufficiently distinct" from the allegations against the other defendants, leading the court to conclude that the plaintiffs would "not be prejudiced or precluded from adjudicating their claims against the remaining defendants" and that "nullification of the forum selection clause" was not required. The Appellate Division also explained that, on the record before it, enforcing the clause would not be unfair because doing so would "adhere to the legitimate expectations of the parties as manifested in their negotiated agreement."

The plaintiffs' third argument against enforcement, based upon cost and inconvenience, was also rejected. For a forum selection clause to be invalidated under the "inconvenience exception," the challenging party must show that being forced to try the case in the designated forum "will be so gravely difficult and inconvenient that [the party] will for all practical purposes be deprived [their] day in court." (quoting *Wilfred MacDonald v. Cushman*, 256 N.J. Super. 58, 65 (App. Div. 1992) (quoting *M/S Bremen v. Zapata Off-Shore*, 407 U.S. 1, 18 (1972))). Difficulty presented by geographical distance is insufficient.

The fourth issue, Celtic Bank's alleged waiver of enforcement of the forum selection clause in this case, was remanded to the trial court for further proceedings.

What This Means to You

The Appellate Division's decision in *Largoza* firmly moves New Jersey into agreement with the majority of jurisdictions—holding that a party challenging a forum selection clause in an agreement must do more than claim that the contract, in general, was procured by fraud. To invalidate a forum selection clause, by a claim of

fraud or fraudulent inducement, the challenging party bears the burden to demonstrate:

the clause is a result of fraud or overweening bargaining power, or the enforcement in a foreign forum would violate strong public policy of the local forum, or enforcement would be seriously inconvenient for the trial." (citing *McNeill*, 297 N.J. Super. at 219 (quoting *Wilfred MacDonald*, 256 N.J. Super. at *63-64.

Forum selection clauses are prima facie valid and enforceable, giving effect to the parties' expectations, (citing *Caspi v. The Microsoft Network*, 323 N.J. Super. 118, 122 (App. Div. 1999) (quotation omitted) and *Paradise Enterprises v. Sapir*, 356 N.J. Super. 96, 104 (App. Div. 2002) (quoting *M/S Bremen*, 407 U.S. at 12). Such clauses will be enforced unless and until a challenging party separately, and specifically, establishes a fraud in connection with that specific clause of the agreement.

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