FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-601

MONARCH CLAIMS CONSULTANTS, INC.,

Appellant,

v.

CLIFF FLEMING and JANE K. FLEMING, UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY, a domestic insurance corporation,

Appellees.

On appeal from the Circuit Court for Bay County.
William S. Henry, Judge.

September 6, 2023

NORDBY, J.

Cliff and Jane Fleming hired a public adjuster to handle their insurance claim after their house was damaged in a hurricane. The Flemings eventually sued that adjuster, who then moved to transfer venue based on their contract's venue selection clause. The trial court denied the motion after determining that a separate provision of the contract violated Florida law and rendered the entire agreement, including the venue selection clause, unenforceable. The public adjuster appealed, arguing that the trial

court could not look beyond the venue selection clause and that the contract complied with Florida law.[1] We affirm.

I.

In 2018 the governor declared a state of emergency in response to the damage caused by Hurricane Michael. Among the damaged properties was a house in Bay County owned by Cliff and Jane Fleming. The Flemings filed a claim with their insurance company and then hired Monarch Claims Consultants, Inc. to act as their public adjuster. The parties entered into a Service Agreement providing that Monarch would act as the Flemings' public adjuster in exchange for ten percent of any insurance recovery. The Service Agreement further provided that if the loss went to appraisal, the Flemings would appoint Monarch as the appraiser. At that point, Monarch would act solely as the appraiser, not as a public adjuster, and would be entitled to another ten percent of the insurance recovery.

A year later, the Flemings terminated the Service Agreement because Monarch had made no progress on their insurance claim. The Flemings later reached a settlement with their insurance company, and Monarch claimed that it was entitled to a percentage of the settlement under the Service Agreement. The Flemings responded by filing a complaint for declaratory relief in Bay County.

The complaint alleged that the Service Agreement was invalid because it violated the statutory limit on public adjuster fees in section 626.854, Florida Statutes. It sought declaratory relief on whether the Service Agreement was valid and whether the Flemings owed Monarch a fee under the Service Agreement. Monarch moved to dismiss the complaint for improper venue, or in the alternative, to transfer the case to Miami-Dade County under the Service Agreement's venue selection clause. The Service Agreement states, "In the event a dispute between the parties arises and suit is filed, the venue of such suit shall be in the Miami-

[1] We have jurisdiction to review the trial court's nonfinal order because it concerns venue. Fla. R. App. P. 9.130(a)(3)(A).

Dade County, Florida where PUBLIC ADJUSTER's above address is located."

The Flemings responded by arguing that venue was proper in Bay County because the venue selection clause was unenforceable. They argued that the Service Agreement's appraisal provision, which required the Flemings to appoint Monarch as the appraiser if the loss went to appraisal, violated section 626.854, Florida Statutes, by exceeding the statutory limit on public adjuster fees. They argued that this rendered the entire Service Agreement invalid, which necessarily made the venue selection clause unenforceable. The Flemings later filed a supplemental response arguing that the venue selection clause was also unenforceable because the parties had unequal bargaining power, the clause was included merely to inconvenience the parties, and the clause was buried in the seventh sentence of the seventh paragraph among innocuous, unrelated provisions.

The trial court held an evidentiary hearing to determine whether the Service Agreement was enforceable, and if so, whether to grant Monarch's motion to dismiss or transfer venue. After the hearing, the trial court first found that "[a]ssuming the [service] agreement is enforceable, the Court has no reason not to enforce the venue selection clause based on the arguments presented." It then found that the Service Agreement violated section 626.854(10)(b), Florida Statutes, by allowing Monarch to receive payment more than the statutory limit if the claim went to appraisal. It also determined that the appraisal provision could not be severed from the contract and that the contract's saving clause did not apply. Finally, the trial court concluded that because the entire Service Agreement was unenforceable, the venue selection clause was also unenforceable. It denied Monarch's motion to dismiss or transfer venue.

II.

We review the trial court's order denying a motion to dismiss or transfer venue based on a venue selection clause de novo. *Ill. Union Ins. Co. v. Co-Free, Inc.*, 128 So. 3d 820, 822 (Fla. 1st DCA 2013).

Contracting parties have the right to select the venue for their disputes. *Baker v. Econ. Rsch. Servs., Inc.*, 242 So. 3d 450, 452 (Fla. 1st DCA 2018). When parties include a venue selection clause in their contract, that clause is considered mandatory when its plain language conveys the exclusivity of the chosen venue. *Signtronix, Inc. v. Annabelle's Interiors, Inc.*, 260 So. 3d 1186, 1186 (Fla. 1st DCA 2018). The Service Agreement states that venue for any suit "shall" be in Miami-Dade County, so the plain language shows that it is a mandatory clause. *See Mgmt. Comput. Controls, Inc. v. Charles Perry Const., Inc.*, 743 So. 2d 627, 631 (Fla. 1st DCA 1999) (venue selection clause with the word "shall" was mandatory); *Am. Boxing & Athletic Ass'n, Inc. v. Young*, 911 So. 2d 862, 865 (Fla. 2d DCA 2005) ("Forum selection clauses stating that litigation 'must' or 'shall' be initiated in a particular forum are generally considered to be mandatory.").

When a contract includes a mandatory venue clause, a trial court is bound to honor it unless there is "a showing that the clause is unjust or unreasonable." *Travel Country RV Ctr., Inc. v. Baxter*, 932 So. 2d 547, 548 (Fla. 1st DCA 2006). And in determining whether a forum selection clause is unjust or unreasonable, the Court applies a three-part test requiring that: (1) the chosen forum not stem from unequal bargaining power by one of the parties; (2) enforcement of the agreement would not "contravene strong public policy enunciated by statute or judicial fiat in the forum where the litigation is required to be pursued or in the excluded forum"; and (3) "the clause does not transfer an essentially local dispute into a foreign forum." *Land O'Sun Mgmt. Corp. v. Com. & Indus. Ins. Co.*, 961 So. 2d 1078, 1080 (Fla. 1st DCA 2007); *see also Manrique v. Fabbri*, 493 So. 2d 437 (Fla. 1986). Courts will also decline to enforce a forum selection clause when the clause results from fraud or is not sufficiently conspicuous in the contract. *See Golden Palm Hosp., Inc. v. Stearns Bank Nat'l Ass'n*, 874 So. 2d 1231, 1235 (Fla. 5th DCA 2004); *Norwegian Cruise Line, Ltd. v. Clark*, 841 So. 2d 547, 550 (Fla. 2d DCA 2003).

Along with their argument that the venue selection clause was unenforceable because the Service Agreement was void, the Flemings argued in the trial court that the clause was unenforceable because the parties had unequal bargaining power, the clause caused inconvenience, and the clause was hidden in the

middle of an unrelated paragraph. But the trial court rejected those arguments when it found that if the Service Agreement was valid, then "the Court has no reason not to enforce the venue selection clause based on the arguments presented." Because the Flemings did not appeal the trial court's ruling on these issues, we do not address them now. The issue we do address is the trial court's conclusion that the venue selection clause was unenforceable because the entire Service Agreement was void.

A.

We first address Monarch's claim that the trial court could not look at other parts of the Service Agreement when determining the enforceability of the venue selection clause. We reject this argument because the trial court cannot enforce a venue selection clause when there was never a valid contract to begin with.

In *Cintas Corporation No. 2 v. Schwalier*, the trial court denied the defendant's motion to compel arbitration under the contract's arbitration clause. 901 So. 2d 307, 308 (Fla. 1st DCA 2005). The plaintiff had argued that the arbitration clause was unenforceable because the entire contract was invalid for lack of consideration. *Id.* at 308–09. On appeal, we said that "the order at issue turns on the validity of a contract." *Id.* at 309. We then undertook an analysis of the contract's validity and determined that the arbitration clause was enforceable because the contract was valid. *Id.* Just as with the arbitration clause in *Schwalier*, the enforceability of a venue selection clause requires a valid contract. *See Baker*, 242 So. 3d at 453 n.2 ("Courts have often compared forum selection clauses to arbitration clauses and have applied a similar enforceability analysis to both." (quoting *Carnival Corp. v. Booth*, 946 So. 2d 1112, 1115 (Fla. 3d DCA 2006)); *see also Interactive Retail Mgmt., Inc. v. Microsoft Online, L.P.*, 988 So. 2d 717, 721 (Fla. 2d DCA 2008) (reversing a dismissal for improper venue based on a forum selection clause because there were disputed facts about the existence of a valid contract).

The trial court here determined that the Service Agreement was unenforceable because it violated Florida law. Its decision not to enforce the venue selection clause on that basis adheres to our

Supreme Court's statement that a party cannot use the courts to enforce a provision of a void contract:

> [A]n agreement that is violative of a provision of a constitution or a valid statute, or an agreement which cannot be performed without violating such a constitutional or statutory provision, is illegal and void. Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14, 69 A.L.R. 689. And when a contract or agreement, express or implied, is tainted with the vice of such illegality, no alleged right founded upon the contract or agreement can be enforced in a court of justice.

Loc. No. 234 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Idus. of U.S. & Can. v. Henley & Beckwith, Inc., 66 So. 2d 818, 821 (Fla. 1953). Accordingly, if there was never a valid contract, then there was never an enforceable venue selection clause.[2]

B.

We next address whether the trial court correctly determined that the Service Agreement violated Florida law. Section 626.854, Florida Statutes, sets express limits on a public adjuster's recovery flowing from events that trigger a declared state of emergency:

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[2] We note that a forum selection clause may still be enforced even after a contract has been terminated. *See Baker*, 242 So. 3d at 453–54 (explaining that a forum selection clause can survive the termination of a contract based on the parties' intent because "[u]nlike the substantive rights and obligations in a contract, a forum-selection clause is a structural provision that addresses the procedural requirements for dispute resolution"); *DVDPlay, Inc. v. DVD 123 LLC*, 930 So. 2d 816, 819–20 (Fla. 3d DCA 2006) (holding that a forum selection clause survived the contract's termination based on the parties' intent). But this case differs from those instances asit does not involve a contract that was terminated; the trial court found that there was never a valid contract in the first place.

> A public adjuster may not charge, agree to, or accept from any source compensation, payment, commission, fee, or any other thing of value in excess of:
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> 1. Ten percent of the amount of insurance claim payments or settlements, exclusive of attorney fees and costs, paid to the insured by the insurer for claims based on events that are the subject of a declaration of a state of emergency by the Governor. This provision applies to claims made during the year after the declaration of emergency. After that year, the limitations in subparagraph 2. apply.
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> 2. Twenty percent of the amount of insurance claim payments or settlements, exclusive of attorney fees and costs, paid to the insured by the insurer for claims that are not based on events that are the subject of a declaration of a state of emergency by the Governor.

§ 626.854(10)(b), Fla. Stat. It is undisputed that subparagraph 1. applies to the Flemings because their claim was based on an event that was the subject of a declared state of emergency. Under subparagraph 1., Monarch was limited to a fee of ten percent of the insurance claim payment or settlement.

The Service Agreement provides that Monarch's fee is ten percent of the insurance recovery — the maximum fee allowed by section 626.854(10)(b)1. But the Service Agreement also says that if the loss goes to appraisal, then the Flemings must appoint Monarch as their appraiser and that Monarch would function solely as the appraiser, not their public adjuster, during the appraisal. The appraisal cost would be another ten percent of the insurance recovery. The Flemings argued, and the trial court agreed, that this appraisal provision allowed for Monarch to be compensated more than ten percent of the insurance recovery in violation of section 626.854(10)(b)1.

Monarch argues that the trial court erred because it failed to recognize the difference between a public adjuster and an appraiser. It argues that the Service Agreement is a "potentially two purpose contract" that gave the Flemings discretion to

determine whether Monarch would be a public adjuster or an appraiser depending on whether the claim went to appraisal. Monarch points out that section 626.854 applies only to public adjuster fees, not appraiser fees. But Monarch's argument fails to give full effect to the text of the statute.

In *Gables Insurance Recovery, Inc. v. Citizens Property Insurance Corporation*, a homeowner hired Gables as her public adjuster to assist with an insurance claim. 261 So. 3d 613, 617 (Fla. 3d DCA 2018). The contract said that Gables would be paid twenty percent of the insurance recovery, the maximum fee allowed by statute.[3] *Id.* The homeowner eventually executed another contract in which she assigned the entire insurance claim to Gables and engaged Gables to pursue the assigned claim on her behalf. *Id.* The assignment contract said that Gables would receive twenty percent of the insurance recovery plus any prevailing party attorney's fees and costs. *Id.* In a lawsuit against the insurance company, the trial court ruled that the assignment contract violated the cap on public adjuster fees in section 626.854, Florida Statutes. *Id.*

On appeal, Gables argued (1) that section 626.854 did not apply after the assignment because Gables was no longer acting as a public adjuster, and (2) the contract complied with section 626.854. *Id.* at 619. The Third District rejected the first argument when it found that Gables still met the statutory definition of a public adjuster. *Id.* at 620–21. The court then found that the assignment contract violated the fee cap in section 626.854 because it allowed Gables to collect twenty percent of the recovery plus attorney's fees and costs. *Id.* at 622. The court explained that the attorney's fees and costs were a "thing of value" in excess of the twenty percent cap, which violated the statute. *Id.* The court also explained that it did not matter whether Gables ever actually received any attorney's fees. *Id.* at 624. Section 626.854 says that a public adjuster may not even "agree to" compensation in excess of the twenty percent cap. *Id.* Accordingly, the mere fact that

[3] The insurance claim was unrelated to a state of emergency, so section 626.854(10)(b)2. allowed a maximum fee of twenty percent of the insurance claim payment or settlement.

Gables agreed to the payment of attorney's fees in the contract violated the statute whether or not Gables ever received them. *Id.* The court concluded that the assignment contract was void because it violated section 626.854, Florida Statutes. *Id.* at 626–27.

This case presents essentially the same issue. The Flemings hired Monarch as their public adjuster. In exchange for Monarch's services as a public adjuster, the contract entitled Monarch to two things: (1) ten percent of the insurance recovery, and (2) a promise that the Flemings would appoint Monarch as their appraiser in the event of an appraisal, entitling Monarch to another ten percent of the recovery. Even if the added ten percent fee counts as an "appraiser fee" instead of a "public adjuster fee" as Monarch suggests, the contract would still violate the statute. The Flemings' promise to appoint Monarch as their appraiser, on its own, is a "thing of value" that exceeds the ten percent cap. *See Schwalier*, 901 So. 2d at 309 ("A promise, no matter how slight, qualifies as consideration if the promisor agrees to do something that he or she is not already obligated to do.").

As explained in *Gables Insurance*, the fact that the appraisal scenario never came to pass is irrelevant. Public adjusters violate section 626.854(10)(b) when they "agree to" be compensated with any "thing of value" in excess of the fee cap. *See* § 626.854(10)(b), Fla. Stat. ("A public adjuster may not charge, *agree to*, or accept from any source compensation, payment, commission, fee, or any other thing of value in excess of . . . [t]en percent of the amount of insurance claim payments or settlements . . . .") (emphasis added). This violation of a valid Florida statute rendered the entire Service Agreement unenforceable. *See Gables Insurance*, 261 So. 3d at 626 (holding that an agreement that violated section 626.854 is unenforceable); *Loc. No. 234*, 66 So. 2d at 821 (stating that an agreement that violates a valid statute is illegal and void).

Finally, the trial court determined that the Service Agreement's saving clause did not apply to the appraisal provision and that the appraisal provision could not be severed from the Service Agreement. Monarch does not challenge these findings on appeal, so we accept the trial court's conclusions.

III.

Because the Service Agreement is void for violating Florida law, there is no enforceable venue selection clause. We affirm the trial court's order denying the motion to dismiss or transfer venue.

AFFIRMED.

OSTERHAUS, C.J., and BILBREY, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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