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Am. First Fed. Credit Union v. Soro, 131 Nev. Adv. Op. 73 (Sep. 24, 2014)

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CONTRACT LAW: FORUM SELECTION CLAUSES

Summary

The Court determined that a contract clause in which the parties “submit themselves to the jurisdiction of” another state, without more exclusive language, is permissive and does not result in a mandatory forum selection clause.

Background

In 2002, America First Federal Credit Union issued a loan to borrowers for the purchase of a store. The borrowers defaulted and the Utah-based credit union sued in Clark County, Nevada to recover. The borrowers moved to dismiss the case, arguing that certain clauses in the loan agreement mandated that litigation and/or arbitration proceed within the jurisdiction of Utah. The district court granted the motion to dismiss, ruling that the clauses clearly indicated both parties’ intent to submit litigation to Utah. America First Federal Credit Union appealed.

Discussion

The district court erred when it dismissed the case based on the forum selection clauses

Although the Court has previously discussed the distinction between mandatory and permissive forum selection clauses, no prior case has provided opportunity to set a rule. In the past, the Court has acknowledged that if it is not clear from the language of the clause that the parties’ intended to exclusively litigate in one jurisdiction, then presumably the clause does not bar the parties from bringing claims in other appropriate jurisdictions.²

As opposed to mandatory jurisdiction clauses where the parties *must* litigate in the stated jurisdiction, permissive clauses indicate that the parties *may* do so.³ Language such as “any action . . . must,”⁴ “shall be brought only in,”⁵ and “jurisdiction shall be in”⁶ are examples of what indicates a mandatory, rather than permissive, forum selection clause. This exclusive language is necessary for determining the parties’ intent behind the clause.⁷

Here, neither clause at issue contained exclusive language similar to that described above. The Court determined that the language in the first clause, “the parties agree and submit” as well as the language in the second clause, “Borrower(s) agrees to submit” were examples of permissive forum selection clauses. Additionally, the Court dismissed any argument that the clauses were ambiguous. Rather, because the forum selection clauses lacked exclusive language, they were both unambiguously permissive.

¹ By Katherine Maher.

² *Tuxedo Int’l, Inc. v. Rosenberg*, 121 Nev. 11, 22-23, 251 P.3d 690, 698 (2011).

³ *See, e.g., Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So. 2d 273, 274 (Fla. 1987).

⁴ *Tuxedo Int’l*, 121 Nev. at 24.

⁵ *Polk Cnty. Recreational Ass’n v. Susquehanna Patriot Commercial Leasing Co.*, 734 N.W.2d 750, 758-59 (Neb. 2007).

⁶ *See Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997).

⁷ *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992).

Conclusion

Because none of the disputed clauses within the loan agreement contained exclusive language mandating a particular jurisdiction, the Court determined that all clauses were permissive and thus allowed America First Federal Credit Union to properly bringing an action within Nevada. The Court reversed the ruling of the district court and remanded the case for further proceedings.