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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MICHAEL COHN, Plaintiff and Appellant, v. TRUEBEGINNINGS, LLC et al., Defendants and Respondents.	B190423 (Los Angeles County Super. Ct. No. BC344082)

APPEAL from an order of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Reversed and remanded.

The Fava Law Firm and Alfred G. Rava for Plaintiff and Appellant.

Payne & Fears, Daniel L. Rasmussen and Julie J. Bisceglia for Defendants and Respondents.

Michael Cohn appeals from an order dismissing his gender discrimination action based on forum non conveniens. We find the trial court applied the wrong standard in granting the motion and remand the cause for reconsideration.

FACTUAL AND PROCEDURAL SUMMARY

In December 2005, appellant Michael Cohn, "individually and on behalf of the general public," brought this action against TrueBeginnings, LLC, dba True.com, an Internet matchmaking Web site, and related entities. Cohn alleged that True.com discriminated against him and other males by offering women a free lifetime or longtime subscription to the Web site for email, chat, and "wink"[1] services, while providing only a one or two week free trial subscription to males who signed up during that same period of time. This, he alleged, constituted gender discrimination in violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and an unfair business practice in violation of Business and Professions Code section 17200 et seq.

Respondents moved to dismiss on the ground of inconvenient forum. They asserted that in order to obtain the benefits of the True.com Web site, individuals are required to complete an online membership application, and to agree to True.com's "Terms of Use." Under the "Terms of Use," a person signing up for True.com agrees that any dispute involving the Web site or the service "will be governed by the laws of the State of Texas without regard to its conflict of law provisions. You agree to personal jurisdiction by and venue in the State of Texas and the U.S. District Court for the Northern District of Texas." On the bottom of the first screen for a new member to sign up is the following provision: "I am 18-years-old and I have read and agree to the TRUE Terms of Use and Code of Ethics." The potential member must indicate acceptance of the terms of use by clicking on the word "CONTINUE" just to the right of this provision. Based on appellant's acceptance of the "Terms of Use," respondents claimed that

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[1] According to respondent, "A 'wink' is an electronic message designed to indicate that another member is interested in communication."

appellant agreed to litigate disputes with regard to the Web site and its services in Texas under Texas law. They sought to enforce this forum selection clause.

Appellant opposed the motion, claiming the True.com Web site did not require him to link to, review, or agree to any terms of use in order to register for his free trial membership, and thus he did not agree to litigate disputes with the Web site in Texas. He also asserted that even if he had agreed to a forum selection clause, its enforcement was contrary to California public policy against gender discrimination; the selected forum, the United States District Court for the Northern District of Texas, is an unsuitable forum because it lacks subject matter jurisdiction since the amount in controversy "is much less than the $75,000 required for diversity jurisdiction" in federal court; and the private interest of the litigants and the public require that the claims be tried in California.

After hearing argument, the trial court granted the motion and dismissed the case. Appellant filed a timely appeal from the order of dismissal.

DISCUSSION

I

Appellant claims he did not agree to a forum selection clause when he registered on the True.com Web site. The trial court found otherwise, and the evidence supports that conclusion.

Respondents submitted two declarations by Ruben Buell, president of TrueBeginnings. In his initial declaration, Mr. Buell stated: "To obtain dating services from True.com, a person must sign up on the website. For example, a potential member may click on the 'Sign up FREE' portion of the True.com home page. This brings up the 'New Member Sign-Up' page, into which the potential member makes some initial entries and chooses a screen name. The page also provides, at the bottom, 'I am at least 18 years old, and I have read and agree to the TRUE Terms of Use and Code of Ethics.' 'Terms of Use' is linked to a pop-up, which displays the agreement under which the potential member is permitted to use the dating services." According to Mr. Buell, "To proceed with the sign-up, the potential member must click on the 'Continue' symbol

below the sentence 'I am at least 18 years old, and I have read and agree to the TRUE Terms of Use and Code of Ethics.' Clicking on 'Continue' brings up additional screens to complete the subscription process."

Attached to the declaration as exhibit A was a copy of the "Terms of Use" agreement in effect in the spring of 2005. The first paragraph provides: "As you sign up, please read this Agreement carefully. You can complete your sign-up and become a member by following the steps below. Once you click on the "Continue' button at the end of this sign-up form, you are agreeing to be bound by the Terms of this Agreement."

Paragraph 13 of the "Terms of Use" agreement provides: "Disputes. I agree that if there is any dispute about or involving the Web site and/or the Service, by using the Web site, the dispute will be governed by the laws of the State of Texas without regard to its conflict of law provisions. You agree to personal jurisdiction by and venue in the State of Texas and the U.S. District Court for the Northern District of Texas."

At the end of the agreement is the following language: "I HAVE READ THIS AGREEMENT AND AGREE TO ALL OF THE PROVISIONS CONTAINED ABOVE. I AGREE TO THE CHARGES FOR THE SERVICES."

Appellant sought to refute this evidence, stating in his declaration: "The True.com web site did not require me to link to, review, or agree to any Terms of Use in order for me to register for my free trial membership; therefore, I did not link to, review, or agree to any Terms of Use in registering for my free trial membership. I did not have to click on any 'I agree' icon or button to register for my trial membership. Nor did I agree to any Terms of Use that included a choice of law clause or a forum selection clause."

Respondents submitted a supplemental declaration by Mr. Buell, who stated that the sign-up procedure he described in his initial declaration governed trial memberships as well as regular subscriptions to True.com. He explained that an individual would not be able to obtain "services or a trial membership without agreeing to the 'Terms of Use' on the sign-up page." This procedure was in place at the time appellant signed up for a trial membership in True.com in May 2005.

In his supplemental declaration, Mr. Buell explained that he was attaching a "copy of the sign-up screen seen by plaintiff on May 10, 2005. Everyone, without exception, who obtains access to True.com's dating services must click 'continue' on this or a similar screen." Exhibit D, the "New Member Sign Up" screen, required a prospective member to fill in basic information including birthdate, screen name, email address and password. At the bottom of the screen, it stated: "I am 18-years-old and I have read and agree to the TRUE Terms of Use and Code of Ethics."

Mr. Buell also attached a copy of the profile appellant entered on the True.com Web site. According to Mr. Buell, "Cohn would not have been able to post this information on the True.com website without clicking on 'continue' in the sign-up screen."

Respondents presented substantial evidence that appellant had to click on the "continue" button in order to register for his trial membership on the Web site, and that doing so constituted an agreement to the "Terms of Use" on the Web site. Appellant may not have read the "Terms of Use," but they were readily available to him on the True.com Web site if he clicked on the "Terms of Use" link near the "Continue" button. Under these circumstances, where appellant obviously had access to the Internet and was entering into a contract on the Internet, there was nothing inherently unfair in requiring him to access contractual terms via hyperlink, which is a common practice in Internet businesses. (See *Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, 588; see also *Schlessinger v. Holland America* (2004) 120 Cal.App.4th 552, 559.) The trial court did not abuse its discretion in finding that appellant agreed to the forum selection clause contained in the "Terms of Use."

II

Appellant next claims the clause was merely a venue selection clause, not a forum selection clause. In *Alexander v. Superior Court* (2003) 114 Cal.App.4th 723, the court addressed the difference between a venue selection clause and a forum selection clause: "The cases sometimes do not distinguish between the two types of clauses, perhaps because they both relate in some way to the geographical location in which trial will be

held. But the terms have different meanings. Forum means '[a] court or other judicial body; a place of jurisdiction.' (Black's Law Dict. (7th ed. 1999) p. 664, col. 2.) Venue is '[t]he county or other territory' in which a case may be heard, i.e., the place from which the jury will be selected. (Black's Law Dict., *supra*, p. 1553, col. 2; and see *Milliken v. Gray* (1969) 276 Cal.App.2d 595, 600 [81 Cal.Rptr.525].) Under state law, therefore, a venue selection clause is purely an intrastate issue involving the selection of a county in which to hold the trial. By contrast, a forum selection clause usually chooses a court from among different states or nations." (*Alexander, supra*, 114 Cal.App.4th at pp. 726-727.) The court explained in a footnote: "In the federal system, venue refers to the federal district court in which the suit may be brought. (28 U.S.C. § 1391.)" (114 Cal.App.4th at p. 727, fn. 4.)

The clause at issue in *Alexander* provided: "'The construction, interpretation, and performance of this Agreement shall be governed by the laws of the State of California and each party specifically stipulates to venue in Santa Clara County, California.'" (*Alexander, supra*, 114 Cal.App.4th at p. 726.) The court found this to be a venue selection clause, not a forum selection clause.

In contrast, the clause on the True.com Web site is not limited to venue and choice of law. The registrant agreed that the laws of Texas ("without regard to its conflict of law provisions") would apply to any dispute, and agreed "to personal jurisdiction by and venue in the State of Texas and the U.S. District Court for the Northern District of Texas." With this provision, the parties agreed to submit to the jurisdiction of the Texas courts and the federal district court in the northern district of Texas. While the provision addresses a choice of venue, we conclude it also provides for selection of a judicial forum for resolution of disputes.[2]

The more significant question is whether this is a mandatory or permissive forum selection clause. "[A] distinction has been drawn between a mandatory and a permissive forum selection clause for purposes of analyzing whether the clause should be enforced.

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[2] It also purports to select venue and choice of law.

A mandatory clause will ordinarily be given effect without any analysis of convenience; the only question is whether enforcement of the clause would be unreasonable. On the other hand, when the clause merely provides for submission to jurisdiction and does not expressly mandate litigation exclusively in a particular forum, then the traditional forum non conveniens analysis applies. (*Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 358-360 [71 Cal.Rptr.2d 523].)" (*Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 196.) As with any other interpretation of a contract based solely on the terms of the written instrument, we consider de novo whether the forum selection clause at issue is mandatory or permissive. (*Ibid*.)

As we have stated, the clause in this case provides: "I agree that if there is any dispute about or involving the Web site and/or the Service, by using the Web site, the dispute will be governed by the laws of the State of Texas without regard to its conflict of law provisions. You agree to personal jurisdiction by and venue in the State of Texas and the U.S. District Court for the Northern District of Texas." A party agreeing to this provision consents to jurisdiction and venue in Texas; he or she cannot object to litigation in Texas on the ground that the court there lacks personal jurisdiction. However, there is nothing in the clause designating Texas as the exclusive forum for resolving disputes. This is a permissive, rather than mandatory forum selection provision, and respondents' motion was thus subject to traditional forum non conveniens analysis. (*Intershop Communications AG v. Superior Court, supra,* 104 Cal.App.4th at p. 196.)

III

The doctrine of forum non conveniens, codified in Code of Civil Procedure section 410.30, authorizes a trial court to stay or dismiss an action if it finds "that in the interest of substantial justice an action should be heard in a forum outside this state . . . ." The court must first determine whether the alternate forum is a suitable place for trial. (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.) "A forum is suitable if there is jurisdiction and no statute of limitations bar to hearing the case on the merits." (*Chong v.*

Superior Court (1997) 58 Cal.App.4th 1032, 1036-1037.) A forum is suitable if the action can be brought there, even if it cannot necessarily be won there. (*Ibid.*)

Once the court determines that an alternate forum is suitable, "the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation." (*Stangvik v. Shiley Inc., supra,* 54 Cal.3d at p. 751.)

In this case, appellant agreed to "personal jurisdiction by and venue in the State of Texas and the U.S. District Court for the Northern District of Texas." He argues that the agreed-upon forum is not suitable because the amount in controversy is below the $75,000 jurisdictional threshold for diversity jurisdiction in federal district court. (See 28 U.S.C. § 1332.) He reads the forum selection clause too narrowly. By agreeing to jurisdiction in the State of Texas *and* the United States District Court, appellant agreed to jurisdiction in both state and federal court in Texas. Nothing in the record indicates a lack of jurisdiction in Texas state court. Nor is there any claim that the action would be barred by the statute of limitations. For purposes of forum non conveniens analysis, we conclude that Texas is a suitable alternate forum.

IV

It is at this juncture that this appeal becomes problematic. Respondents' motion was premised on the existence of a mandatory forum selection clause, and that enforcement of the clause would not be unreasonable. Appellant did not specifically argue that the clause was permissive, rather than mandatory, but he asserted that the motion should be analyzed under the traditional forum selection factors set out in

Stangvik v. Shiley Inc., supra, 54 Cal.3d at page 751. Under our de novo review, we have concluded that this is a permissive forum selection clause. Hence, the factors urged by appellant—whether the private interests of the litigants and the interests of the public in retaining the action in California outweighed respondents' interest in litigating the action in Texas—should have been applied. (See *Berg v. MTC Electronics Technologies Co., supra*, 61 Cal.App.4th at p. 359; *Stangvik v. Shiley Inc., supra*, 54 Cal.3d at p. 751.) The permissive forum selection clause is entitled to substantial weight, but "is only one factor in the forum non conveniens mix." *(Berg v. MTC Electronics Technologies Co., supra*, 61 Cal.App.4th at p. 359.) Respondents, as the moving parties, bore the burden of proof. (*Intershop Communications AG v. Superior Court, supra*, 104 Cal.App.4th at p. 198.)

While we review the suitability of an alternate forum de novo (see *Roulier v. Cannondale* (2002) 101 Cal.App.4th 1180, 1186), the more complex weighing of public and private interests requires the exercise of discretion. The grant or denial of a motion for forum non conveniens is within the trial court's discretion, and "substantial deference is accorded its determination in this regard." (*Stangvik v. Shiley Inc, supra*, 54 Cal.3d 744, 751.) There is no indication on this record that the court evaluated the motion under the appropriate factors or the proper burden of proof before exercising its discretion. When the motion was heard, the court's focus was on whether appellant agreed to the forum selection clause, and whether it provided for jurisdiction in both state and federal court in Texas. The court took the matter under submission, and its minute stated only that the motion was granted and the case ordered dismissed.

"In exercising discretion, the trial court is required to make a reasoned judgment which complies with applicable legal principles and policies. [Citations.] 'Discretion will thus be deemed to have been abused if the trial court fails to exercise discretion where such exercise is required. [Citation.]' [Citations]." (*In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556, 561.) For this reason, we remand the cause so the trial court can exercise its discretion in light of the traditional forum non conveniens factors. At oral argument, counsel for respondents acknowledged that in the event the court grants the motion, it would be appropriate for the court to stay rather than dismiss

the action in California. (See *Chong v. Superior Court, supra*, 58 Cal.App.4th at pp. 1039-1040.)

DISPOSITION

The order of dismissal is reversed and the cause is remanded for further proceedings consistent with the views expressed in this opinion. Appellant is to have his costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.