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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SURIYA SYSTEMS, INC. et al., Plaintiffs and Appellants, v. QUADRANT 4 SYSTEM CORPORATION et al., Defendants and Respondents.	H042023 (Santa Clara County Super. Ct. No. 1-14 CV265265)

Plaintiffs Suriya Systems, Inc. and Kaizen Tech Services, LLC sued defendants Quadrant 4 Systems Corporation (Q4) and Quadrant 4 Cloud, Inc. (Q4 Cloud) (collectively, the Q4 defendants) for breach of contract and related causes of action. The trial court upheld the New Jersey forum selection clauses in plaintiffs' contracts with the Q4 defendants, dismissed plaintiffs' first amended complaint without prejudice, and denied their motion for reconsideration. We affirm.

I. Background

Suriya and Kaizen are temporary help firms that specialize in providing information technology (IT) personnel and services. In 2010 and 2011, each signed a contract with Teledata Technology Solutions (Teledata) to provide such services to

Teledata and/or its client Cisco Systems. The Teledata contracts contained identical choice of law/forum selection clauses requiring litigation of disputes in California in accordance with California law. Each Teledata contract further provided that the choice of law/forum selection clauses "shall survive the expiration or earlier termination of this Agreement."

In February 2013, plaintiffs entered into separate contracts with Q4 Cloud to provide IT personnel and services to Q4 Cloud and/or its client Cisco Systems. The Q4 Cloud contracts contained identical choice of law/forum selection clauses requiring disputes to be litigated in New Jersey in accordance with New Jersey law.

In May 2014, plaintiffs and three other entities[1] sued Teledata and the Q4 defendants in Santa Clara County Superior Court. The complaint alleged breach of oral and written contracts and related causes of action arising out of an alleged failure to pay for services rendered. The Q4 defendants demurred to the original complaint, and plaintiffs elected to file a first amended complaint instead of an opposition. The first amended complaint alleged that Teledata and the Q4 defendants had refused to pay plaintiffs for IT services rendered. Like their original complaint, plaintiffs' first amended complaint variously referred to the plural "'contracts at issue'" and to the singular "'Contract.'" It did not specify which plaintiffs had a contract or contracts with which defendants, nor did it state whether the contract or contracts were written or oral. The contract or contracts were not attached as exhibits to either complaint.

The Q4 defendants demurred to the first amended complaint and concurrently filed a "Motion to Change Venue" pursuant to Code of Civil Procedure section 410.30.[2]

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[1] The other three plaintiffs (Confab Systems, Inc., Proteam L.L.C., and Grace Information Technology, Inc.) are not parties to this appeal. They remain parties to the underlying action, which has been stayed pending disposition of this appeal.

[2] Subsequent statutory references are to the Code of Civil Procedure unless otherwise noted.

In support of their motion, defendants submitted the declaration of their director of human resources Falguni Bhatt. Bhatt's declaration attached copies of the Q4 contracts. Defendants' incorrectly styled "Motion to Change Venue" was in essence a motion to enforce the identical contractual forum selection clauses in the Q4 Cloud contracts. The parties and the trial court treated the motion as such.

Plaintiffs opposed the motion on four grounds. The first was founded on their assertion that Teledata "merged" with Q4 Cloud in March 2013 and thus became Q4 Cloud's "predecessor-in-interest." Plaintiffs claimed that Q4 and Q4 Cloud "stepped into [Teledata's] shoes" and "thereby assumed liability for all of [Teledata's] obligations under its contracts with Suriya and Kaizen," including Teledata's obligation to litigate contract disputes in California.

Plaintiffs' second argument was that the Q4 defendants "consented to the jurisdiction of California" by improperly "conducting intrastate commerce" in California without registering with the California Secretary of State. Their third argument was that enforcement of the New Jersey forum selection clauses would be "unreasonable and prejudicial" because the work was performed in California and key witnesses were allegedly located there. Plaintiffs' fourth argument was that enforcement of the New Jersey forum selection clauses would violate public policy by rewarding the Q4 defendants for "egregiously violat[ing] Corporations Code § 2203," which sets penalties for foreign corporations transacting unauthorized intrastate business in California.

In reply, the Q4 defendants argued that there had been no merger and that plaintiffs were "well aware of this fact," which a simple check of the California and Delaware Secretary of State Web sites established. Had there been a merger, Teledata would be listed on both Web sites as "merged out." (See generally http://www.sos.ca.gov/business-programs/business-entities/cbs-field-status-definitions/, which defines a "merged out" entry to mean that "[t]he business entity merged out of existence in California into another business entity. . . .") A merger would also be

reflected in the regular filings that publicly-traded companies like the Q4 defendants are required by law to make. The Q4 defendants asked the court to take judicial notice of printouts from the California and Delaware Secretary of State Web sites and of a copy of Q4's March 1, 2013 form 8-K. Neither Web site listed Teledata as "merged out." The form 8-K reported that Q4 "completed the acquisition of assets being sold by three separate technology companies" (one of which was Teledata) on February 26, 2013. Defendants argued that plaintiffs had "no basis to assert that there was a merger which would subject Q4 or Q4 Cloud to any [Teledata] agreement."

Responding to plaintiffs' other contentions, defendants argued that their doing business in California did not override the New Jersey forum selection clauses. They emphasized that plaintiffs had the burden of proving that enforcement of the forum selection clauses would be unreasonable. Plaintiffs "completely failed to address" that issue. Plaintiffs' only argument was that defendants had no ties to New Jersey. That argument ignored Bhatt's declaration that the contracts were issued in New Jersey and that she had been working from there since 2009. Defendants argued that plaintiffs' public policy argument was meritless because both the United States and California Supreme Courts have upheld the use of forum selection clauses as valid and enforceable in the absence of a showing that enforcement would be unreasonable.

The trial court conducted a hearing. On November 6, 2014, the court issued a written order granting defendants' request for judicial notice and granting their motion to enforce the forum selection clauses. The court rejected every argument advanced by plaintiffs. The court noted in particular that "[p]laintiffs now apparently concede that there was no merger" and "now claim that 'the outcome of the Motion turns on . . . the misleading representations that [defendants] made to [plaintiffs] *regarding the proposed merger.*'" (Underscoring omitted.) However, plaintiffs provided "neither admissible evidence nor law to support their position that statements about a proposed merger invalidate a forum selection clause." Plaintiffs also failed to establish that enforcement of

the forum selection clauses would be unreasonable. Although they asserted that "none" of the key witnesses worked in New Jersey, "[p]laintiffs presented no record evidence of the current residences of any witnesses" to contradict affirmative evidence that Bhatt was based there. The court concluded that "[p]laintiffs have not met their burden to show that enforcement of the forum selection clause would be unreasonable." The court dismissed plaintiffs' causes of action against the Q4 defendants without prejudice.[3]

Plaintiffs moved for reconsideration. In their papers, they argued for the first time that requiring them to litigate their claims in New Jersey would violate public policy because New Jersey law precluded them from bringing or maintaining a lawsuit for fees there. Plaintiffs stated that the motion was "based on their discovery of 'different' law pursuant to CCP §1008." In a supporting declaration, their counsel Gautam Dutta stated that "[a]fter the Court had entered its Order, I discovered that an unusual provision of New Jersey law would *summarily bar* Suriya and Kaizen from litigating their causes of action in New Jersey." "Specifically—and unlike California law—New Jersey law (*codified at* the Private Employment Agency Act) bars temporary help service firms like Suriya and Kaizen from litigating *any* of their causes of action in New Jersey, unless they registered as temporary help service firms in New Jersey '*at the time* [their] alleged causes of action *arose.*'" Dutta cited the New Jersey statute (which was enacted in 1989) and a 2001 case from the appellate division of the Superior Court of New Jersey. He declared that "[a]s a lawyer licensed to practice only in California, I do not have [a] detailed knowledge of New Jersey law."

Suriya vice president Devasena Duraipandi and Kaizen director Dinesh Khurana also submitted supporting declarations. Duraipandi declared that Suriya "has never sent any employee or consultant to a client site in New Jersey" and for that reason, "has never

[3] Defendants subsequently took their demurrer to plaintiffs' first amended complaint off calendar.

registered as a temporary help service firm in New Jersey." Khurana similarly declared that because Kaizen has never sent any employee to a client site in New Jersey, it has never registered as a temporary help service firm there.

The Q4 defendants opposed the motion, arguing among other things that plaintiffs had not satisfied the procedural requirements of section 1008 and had not made a proper showing that the action would be barred under New Jersey law. Plaintiffs filed a reply in which they argued (1) that they had "exposed" defendants "for misrepresenting New Jersey law to the Court," (2) that defendants had "fail[ed] to refute" that New Jersey law barred plaintiffs from bringing their causes of actions in New Jersey, and (3) that defendants had likewise "fail[ed] to refute that [plaintiffs] have properly brought this Motion for Reconsideration." The hearing on the fully briefed motion was continued for several weeks. Three days before the continued hearing on the motion, plaintiffs filed the declaration of Kishore Akkina to support their newly raised assertion that defendants and their California counsel had allegedly misled the trial court.

The trial court conducted a hearing and issued a written order denying reconsideration. The order explained that plaintiffs provided "[n]o excuse . . . for [the] tardy presentation" of the Akkina declaration, which "existed when Plaintiffs opposed Defendants' motion, and . . . as a matter of due process should have been presented with the moving papers." The court concluded that "even if the [d]eclaration were considered, Plaintiffs have not established 'new law' or an adequate justification for not presenting information in connection with Defendants' motion."

Plaintiffs filed a timely notice of appeal. The parties stipulated to a stay of proceedings in the trial court pending resolution of this appeal.[4]

[4] This court granted plaintiffs' request to take judicial notice of the stipulation and of their fourth amended complaint.

II. Discussion

A. Waiver

Defendants argue that plaintiffs "*waived* whatever arguments they may have had" with respect to the trial court's November 6, 2014 order granting defendants' motion to enforce the forum selection clauses. We agree.

A fundamental rule of appellate review is that "'[a] judgment or order of the lower court is *presumed correct*'" and "'error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The appellant has the burden of overcoming the presumption of correctness. "It is the duty of counsel by argument and the citation of authorities to show that the claimed error exists." (*In re Estate of Randall* (1924) 194 Cal. 725, 728 (*Randall*).) An appellate brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." (Cal. Rules of Court, rule 8.204(a)(1)(B).) "Appellate courts cannot be expected to assume the task of searching the record for the purpose of discovering errors not pointed out by counsel." (*Randall*, at p. 728.) "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*).)

The party asserting error must also "*designate an adequate record.*" (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 858, fn. 13, italics added.) "[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn. 9; *Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 356.)

Here as defendants correctly point out, "the argument portion of [plaintiffs' opening] brief contains *no* argument whatsoever about whether the [t]rial [c]ourt properly ruled that [they] failed to meet their burden of showing, in response to [defendants']

motion, that enforcement of the forum selection clause would be unreasonable." "Instead, the entirety of their argument [on appeal]. . . focuses either on arguments made in [their] motion for reconsideration or on arguments raised after all papers were due . . . ." Plaintiffs' reply brief on appeal contains the same flaw. In addition, plaintiffs elected not to designate the reporters' transcripts of the hearings on defendants' motion to enforce the forum selection clauses and on their own motion for reconsideration. Plaintiffs have waived any challenge they could have made to the trial court's November 6, 2014 order.[5] (*Badie, supra*, 67 Cal.App.4th at pp. 784-785.)

B. Denial of Reconsideration

Plaintiffs argue that enforcement of the forum selection clauses would violate California public policy because their failure to comply with New Jersey's registration requirements for temporary help service firms bars them from bringing or maintaining a collection action there. They raised this argument for the first time in their motion for reconsideration. The threshold issue on appeal, which plaintiffs only tangentially reference, is whether the trial court abused its discretion in denying their motion for reconsideration. We conclude that it did not.

"When an application for an order has been made to a judge, or to a court, and . . . granted . . . any party affected by the order may, within 10 days after service . . . of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge . . . to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed

[5] Accordingly, we need not address plaintiffs' argument about what standard of review applies on appeal from the granting of a motion to enforce a forum selection clause.

to be shown." (§ 1008, subd. (a).) "Courts have construed section 1008 to require a party filing an application for reconsideration . . . to show diligence with a satisfactory explanation for not having presented the new or different information earlier." (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 839.) "[T]he procedural prerequisites . . . for reconsideration of orders . . . are jurisdictional as applied to the actions of parties to civil litigation." (*Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 391; § 1008, subd. (e) ["No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section."].) However, the statute does not deprive a trial court of jurisdiction to reconsider its own interim orders sua sponte. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1103, 1107.) "A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.)

Here, plaintiffs summarily assert in the "Statement of Facts and Background" section of their opening brief that the trial court "overlooked" the fact that they brought their motion for reconsideration "by invoking 'different' law, *not* 'new' law." They do not address this issue further. Defendants argue that the issue has been waived. We agree. (*Badie, supra,* 67 Cal.App.4th at pp. 784-785.)

In any event, the distinction that plaintiffs rely on does not help them. The dispositive issue here is not whether the New Jersey law they proffered on reconsideration was "new" or "different" but instead whether they provided a satisfactory explanation for not bringing that law to the trial court's attention earlier. We agree with the trial court that plaintiffs failed to provide a satisfactory explanation.

The defendants in *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192 (*Baldwin*) moved for reconsideration based on "'different law'" after the trial court granted their opponents' motion to recover attorney's fees and costs. (*Id.* at p. 1197.) The supporting declaration of their trial counsel stated that "'[i]n considering further

options following the initial hearing,'" he had found "'a case not considered at the initial hearing.'" (*Id.* at p. 1196.) The Court of Appeal found the explanation inadequate because the newly presented decision "issued in 1994 and could therefore have been provided the trial court prior to its initial ruling . . . ." (*Ibid.*)

Baldwin was decided after the 1992 amendment of section 1008 added "'new or different . . . circumstances, or law'" as grounds for reconsideration. (*Baldwin*, *supra*, 59 Cal.App.4th at p. 1198.) The *Baldwin* court explained that the amendment did not "'dispense[] with the court-declared need to show a satisfactory explanation for failing to provide the evidence [or law] earlier, which can only be described as a strict requirement of diligence.'" (*Id.* at p. 1199.) "The legislative history of the 1992 amendment . . . shows that the measure was 'designed "to reduce the number of motions to reconsider . . . heard by judges in this state."'" (*Ibid.*) To abandon the diligence requirement "would be a 'miserable result' that would 'defeat the Legislature's stated goal . . . and . . . remove all incentive for parties to efficiently marshall [the law in support of their case].'" "If counsel need not explain the failure to earlier produce pertinent legal authority that was available, the ability of a party to obtain reconsideration would expand in inverse relationship to the competence of counsel. . . . [T]he number of times a court could be required to reconsider its prior orders would be limited only by the ability of counsel to belatedly conjure a legal theory different from those previously rejected, which is not much of a limitation." (*Ibid.*; see *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 687 [rejecting as inadequate counsel's explanation that "'important facts and evidence'" were not presented earlier "'due to an inadvertent oversight.'"].) Thus, the 1992 amendment "'has tightened, not loosened, the requirements of the statute.'" (*Baldwin*, at p. 1199.)

Baldwin is on point and we agree with its reasoning. Dutta's declaration that he is "licensed to practice only in California" and "do[es] not have [a] detailed knowledge of New Jersey law" was a plainly insufficient excuse for plaintiffs' failure to bring the New Jersey law to the trial court's attention earlier. Lawyers are often called upon to research

the law of other jurisdictions. Moreover and contrary to Dutta's characterization, the New Jersey law is not particularly "unusual." "In many states, employment agencies are required by statute to be licensed, and the plaintiff's failure to comply with licensing requirements may constitute a defense to an action to recover a placement fee." (Ey, Robert Michael, Cause of Action by Employment Agency to Recover Placement Fee, 4 Causes of Action 2d 653 (Sept. 2016); e.g., *TEC & Associates, Inc. v. Alberto-Culver Co.* (1985) 131 Ill.App.3d 1085, 1096 [476 N.E.2d 1212, 1221] ["the failure of TEC to secure the necessary license and file the appropriate schedule precludes it from recovering any fees for services rendered . . . ."]; *Dunhill of Fargo, Inc. v Lahman Mfg., Co*. (S.D. 1982) 317 N.W.2d 824, 825 ["Since Dunhill failed to procure a license pursuant to SDCL ch. 60-6A the contract is illegal and cannot be enforced."].) Dutta's declaration did not satisfactorily explain why he did not or could not have researched whether New Jersey had such a requirement and what the consequences of ignoring any such requirement might be. It does not explain whether anyone else researched the issue before plaintiffs agreed to the New Jersey forum selection clauses in February 2013 or at any time before they filed their California lawsuit in 2014. We note that the declarations that Duraipandi and Khurana filed do not state that either was unaware of New Jersey's registration requirement. But even if they were unaware, "[a] mistake based on . . . ignorance of the law . . . is not a proper basis for reconsideration." (*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 670 (*Pazderka*).) Because plaintiffs failed to satisfy the requirements of section 1008, the trial court lacked jurisdiction to grant their motion for reconsideration. (§ 1008, subd. (e); *Baldwin*, *supra*, 59 Cal.App.4th at pp. 1200-1201.) The court's denial of the motion was not an abuse of discretion. (*Pazderka*, at p. 670.)

C. Timeliness

1. Background

After the hearing on plaintiffs' motion for reconsideration and nearly a week after they approved as to form the order denying the motion, plaintiffs filed a three-paragraph "Notice of Untimely Motion for Dismissal/Stay." In that "Notice," plaintiffs argued for the first time that defendants' motion to enforce the forum selection clauses was untimely because it was not filed contemporaneously with their demurrer to plaintiffs' original complaint. The "Notice" stated that the court "retain[ed] the 'inherent authority' to reconsider [its order enforcing the forum selection clauses] *sua sponte*, irrespective of whether a motion for reconsideration has been filed." We infer from the record that the trial court declined what was in essence an invitation to *sua sponte* reconsider its order granting defendants' motion to enforce the forum selection clauses.

2. Analysis

Defendants argue that plaintiffs waived any objection to the timeliness of defendants' motion to enforce the forum selection clauses by failing to properly raise that argument below. We agree.

A jurisdictional challenge may be raised at any time, even for the first time on appeal. (E.g., *In re Demillo* (1975) 14 Cal.3d 598, 601.) However, "[t]he doctrine of inconvenient forum is not jurisdictional." (Judicial Council com., 14A West's Ann. Code Civ. Proc. § 410.30 (2004 ed.) p. 489.) "'An appellate court will ordinarily not consider procedural defects . . . where an objection could have been but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected [below].' [Citation.]" (*Doers v. Golden Gate Bridge etc.* (1979) 23 Cal.3d 180, 184, fn. 1; see *Kunz v. California Trona Co.* (1915) 169 Cal. 353,

356-357 ["[A]s no objection whatever was made by Merrill against being brought in as a cross-defendant . . . , it is too late for him . . . to make any claim that the filing of the cross-complaint was improper. He is deemed to have waived that point by failure to make it at the opportune time in the trial court."].)

In our view, plaintiffs' eleventh hour timeliness objection was no objection at all. We decline to entertain their timeliness argument.

III. Disposition

The November 6, 2014 order is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.