

# Illinois Official Reports

## Appellate Court

### *Eckhardt v. The Idea Factory, LLC, 2021 IL App (1st) 210813*

Appellate Court Caption	THOMAS DONOVAN ECKHARDT JR., Plaintiff-Appellant, v. THE IDEA FACTORY, LLC, a California Limited Liability Company, d/b/a Big Table Media, and SCRIPPS NETWORKS, LLC, a Delaware Limited Liability Company, d/b/a HGTV, Defendants- Appellees.
District & No.	First District, Fourth Division No. 1-21-0813
Filed	September 30, 2021
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 21-L-298; the Hon. Patricia O'Brien Sheahan, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Daniel P. Hogan, of McCabe & Hogan, P.C., of Palatine, for appellant.  Steven A. Levy, of Goldberg Kohn Ltd., of Chicago, and Josh H. Escovedo, of Weintraub Tobin Law Corp., of Sacramento, California, for appellee The Idea Factory, LLC.  Steven P. Mandell, Brian D. Saucier, and George V. Desh, of Mandell Menkes LLC, of Chicago, for other appellee.

Panel

JUSTICE MARTIN delivered the judgment of the court, with opinion. Justices Lampkin and Rochford concurred in the judgment and opinion.

## OPINION

¶ 1 In this appeal, we determine whether a contract’s forum selection clause—where a television production company engaged an individual to appear as an “On-Camera Personality” and “Renovation Expert” for a “reality” show about renovating houses—encompasses tort claims based on the individual’s negative portrayal in the show. The plaintiff, Thomas Donovan Eckhardt Jr. (Donovan),<sup>1</sup> appeals from the circuit court’s order dismissing his complaint upon finding that the forum selection clause in his agreement with Big Table Media required him to file his tort claims of defamation and intentional infliction of emotional distress in the state of California. Though our reasoning differs, we affirm.<sup>2</sup>

### ¶ 2 I. BACKGROUND

¶ 3 According to his complaint,<sup>3</sup> Donovan founded two construction and design companies that focus on residential real estate in the Chicago area. In 2016, Donovan started collaborating with Alison Gramenos, who is also known as Alison Victoria (Alison),<sup>4</sup> to develop a television series titled *Windy City Rehab*. The show would depict Donovan and Alison’s partnership to acquire, renovate, and sell residential properties in Chicago. Filming for *Windy City Rehab* began in September 2017 and was broadcast on the network HGTV beginning in 2019.

¶ 4 Defendants, The Idea Factory, LLC, and Scripps Networks, LLC (hereinafter Big Table Media and HGTV, respectively), had complete discretion over the editing and production of what ultimately aired on television. Donovan’s complaint alleges that the defendants staged and edited the show for dramatic effect, falsely portraying him as a villain. Specifically, he claims the show insinuated that he misappropriated funds, was dishonest, or incompetently managed projects.

¶ 5 As a result of his portrayal on *Windy City Rehab*, Donovan alleges that his reputation and construction business have been harmed. He claims viewers believe that he committed a crime, lacks integrity, and is unreliable. Donovan avers that his mental and physical health have suffered in addition to his business.

¶ 6 Donovan brought this action naming Big Table Media and HGTV as defendants. His complaint asserts claims for defamation and intentional infliction of emotional distress. The defendants filed a joint motion to dismiss pursuant to section 2-619 of the Code of Civil

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<sup>1</sup>In his complaint, other filings before the circuit court, and his briefs in this court, the plaintiff is referred to as “Donovan.” We will do the same.

<sup>2</sup>In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

<sup>3</sup>Donovan filed an amended complaint that attached DVDs of the television show. For simplicity, we refer to the amended complaint as “the complaint.”

<sup>4</sup>The defendants’ trial court filings and brief refer to Gramenos as “Alison.” As with the plaintiff, we will follow suit.

Procedure (Code) (735 ILCS 5/2-619 (West 2018)).<sup>5</sup> The motion asserted that Donovan executed a written agreement with Big Table Media for his appearance on *Windy City Rehab* that included “Standard Terms and Conditions.” Among the standard terms is a forum selection clause in which the parties agreed to the exclusive jurisdiction of California and venue in Sacramento County. A copy of the agreement was attached to the motion. Paragraph 16 of the 8-page agreement states as follows:

“This Agreement shall be governed by the laws of the State of California. The parties agree to submit to exclusive personal jurisdiction in the State of California with venue in the County of Sacramento and waive any rights they might otherwise have to lack of jurisdiction and/or inconvenient forum.”

¶ 7 The trial court found that, although Donovan was not asserting contract claims, the forum selection provision covered his tort claims because their adjudication would require interpretation of the agreement. The court pointed to paragraph 2(b), which gave defendants the “unlimited right to cut, edit, add to subtract and omit from, adapt, change, arrange, rearrange, or otherwise modify” the show. Due to that term, the court concluded it was “readily apparent” that interpretation of the agreement would be necessary to resolve the claims. After finding the forum selection clause *prima facie* valid, the court then rejected Donovan’s contention that enforcement would be unreasonable based on the court’s finding that relevant factors weighed in favor of enforcement. Thus, the court ultimately concluded that it lacked subject-matter jurisdiction and dismissed the complaint without prejudice for Donovan to refile in California. This appeal followed. Donovan claims the circuit court erred in dismissing his complaint by finding that the forum selection clause applied to his tort claims and requests we remand this cause to the circuit court for further proceedings. We granted Donovan’s motion for expedited review pursuant to Illinois Supreme Court Rule 311(b) (eff. July 1, 2018).

## ¶ 8 II. ANALYSIS

¶ 9 Donovan’s complaint was dismissed pursuant to section 2-619 of the Code. Dismissal under section 2-619 is appropriate when an affirmative matter bars the plaintiff’s claims. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120 (2008). This court has considered the existence of an enforceable forum selection clause in a contract as an affirmative matter that may warrant dismissal under section 2-619. See, e.g., *Brandt v. MillerCoors, LLC*, 2013 IL App (1st) 120431, ¶¶ 12, 23; *Dace International, Inc. v. Apple Computer, Inc.*, 275 Ill. App. 3d 234, 237 (1995). We review a circuit court’s section 2-619 dismissal *de novo*. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. However, we may affirm on any basis supported by the record. *BDO Seidman, LLP v. Harris*, 379 Ill. App. 3d 918, 923 (2008).

¶ 10 Illinois courts consider forum selection clauses *prima facie* valid and enforceable unless the party opposing enforcement demonstrates that requiring them to litigate in the selected forum “will be so gravely difficult and inconvenient that [the opposing party] will for all practical purposes be deprived of [its] day in court.” (Internal quotation marks omitted.) *Brandt*, 2013 IL App (1st) 120431, ¶ 13 (quoting *Calanca v. D&S Manufacturing Co.*, 157 Ill. App. 3d 85, 87-88 (1987), quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)). To determine whether a forum selection clause is unreasonable, courts consider (1) the

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<sup>5</sup>While HGTV was not a signatory, the agreement expressly contemplated the production of a show for HGTV. Donovan has not challenged HGTV’s standing to enforce the forum selection clause.

law governing the formation and construction of the contract, (2) residency of the parties, (3) location of execution or performance of the contract, (4) location of the parties and witnesses, (5) the inconvenience to the parties of any particular location, and (6) whether the parties bargained for the clause. *Id.* (citing *Calanca*, 157 Ill. App. 3d at 88).

¶ 11 However, Donovan argues this case presents a preliminary issue of whether the forum selection clause even applies to his claims. Accordingly, we must first resolve that question before considering the reasonableness of enforcement. Illinois courts have had little occasion to address whether noncontractual claims fall within the scope of a forum selection clause. In two cases, *Boatwright v. Delott*, 267 Ill. App. 3d 916 (1994), and *Solargenix Energy, LLC v. Acciona, S.A.*, 2014 IL App (1st) 123403, this court mentioned that a forum selection clause could encompass noncontractual claims. The trial court cited both *Boatwright* and *Solargenix* to support its finding that the forum selection clause applied to Donovan’s claims. However, neither opinion’s brief treatment of the issue went beyond mere recognition of the possibility that a forum selection clause could encompass noncontractual claims, and the issue was collateral to the dispositive questions in both appeals.

¶ 12 In *Boatwright*, the court remarked, “forum selection clauses apply to tort claims which require interpretation of the contract” and went on to cite federal court decisions to support that proposition. *Boatwright*, 267 Ill. App. 3d at 918. However, the issue in *Boatwright* was whether Illinois or Texas law applied to establish the pleading standard for fraud since the parties’ written contract provided Texas law would apply. The court seemed to imprecisely refer to the contract’s choice-of-law provision as a forum selection clause and conflate the two concepts. In any event, forum was not at issue in the case.

¶ 13 Similarly, in *Solargenix*, the issue was whether Illinois state courts could exercise personal jurisdiction over Spanish companies when their American subsidiaries were parties to a joint venture agreement that provided for disputes “ ‘relating to this Agreement’ ” to be adjudicated in Chicago. (Emphasis omitted.) *Solargenix*, 2014 IL App (1st) 123403, ¶ 15. Citing decisions from federal appellate courts, the *Solargenix* court observed “forum selection clauses have been held to apply not merely to contract claims involving the terms of the contract in which the clause appears, but also to other claims that are otherwise connected to the contract, such as tort claims arising from the contract.” *Id.* ¶ 34. In context, this statement was offered as part of the court’s explanation as to why the Spanish defendants could foresee that they would be bound by the forum selection clause agreed to by their subsidiaries. *Id.* ¶¶ 31-36. Further, the underlying claims asserted in *Solargenix* included breach of the joint venture agreement, fraudulent inducement to enter the agreement, tortious interference with contract, and unjust enrichment—claims all closely “relat[ed] to” the joint venture agreement at the heart of the dispute. *Id.* ¶¶ 7, 15.

¶ 14 “[A] judicial opinion \*\*\* is authority only for what is actually decided in the case.” *In re N.G.*, 2018 IL 121939, ¶ 67. Neither *Boatwright* nor *Solargenix* actually decided the scope of a forum selection clause over noncontractual claims. Arguably, the *Solargenix* opinion did so by implication. But the noncontractual claims in that case were asserted in addition to a breach of contract claim and were disputes about the making and fulfillment of a contract. By contrast, only noncontractual claims are asserted here. Thus, *Boatwright* and *Solargenix* provide little guidance for the resolution of this case.

¶ 15 Lacking precedent from Illinois courts of review, the parties rely largely on decisions of federal district and circuit courts of appeal and decisions from other states to support their

positions. “[L]ower federal court decisions are not binding on Illinois courts but may be considered persuasive authority.” *State ex rel. Leibowitz v. Family Vision Care, LLC*, 2020 IL 124754, ¶ 74. Illinois courts have long relied on federal case law when interpreting forum selection clauses. *Yamada Corp. v. Yasuda Fire & Marine Insurance Co.*, 305 Ill. App. 3d 362, 373 (1999). Decisions from other state courts are, likewise, not binding but may be considered as persuasive authority when apposite. *People v. Nelson*, 2021 IL App (1st) 181483, ¶ 36. Accordingly, we may take guidance from decisions of the federal courts and other state courts.

¶ 16

We also note, as a preliminary matter, that the agreement’s California choice-of-law provision does not limit us to consideration of decisions from the courts of that state. California and Illinois law do not appear to conflict regarding forum selection clauses. “ ‘[T]here can be no injury’ ” in applying Illinois law when it does not actually conflict with the law of another jurisdiction. *Bridgeview Health Care Center, Ltd. v. State Farm Fire & Casualty Co.*, 2014 IL 116389, ¶ 25 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985)). Indeed, both California and Illinois seem to be in accord on this issue. See, e.g., *Verdugo v. Alliantgroup, L.P.*, 187 Cal. Rptr. 3d 613, 617-19 (Ct. App. 2015) (setting forth California “[g]overning [l]egal [p]rinciples on [f]orum [s]election [c]lauses” (emphasis omitted)); *Olinick v. BMG Entertainment*, 42 Cal. Rptr. 3d 268, 279 (Ct. App. 2006) (finding forum selection clause in an employment contract applied to former employee’s tort claims). Additionally, since neither party relies on California law, the agreement’s choice-of-law provision does not restrict us. See *Adams v. Raintree Vacation Exchange, LLC*, 702 F.3d 436, 438 (7th Cir. 2012) (stating court may disregard contract’s choice of law provision when neither party asks the court to apply it).

¶ 17

Donovan asserts that the forum selection clause does not contain language defining its scope and the clause must be read in conjunction with the sentence preceding it—the choice-of-law provision—which refers solely to “[t]his Agreement.” By reading the terms together, he argues, the agreement must be construed to limit the application of the forum selection clause to claims asserting a breach of the contract. Donovan further contends that the absence of words stating that the clause applies to “any claims” or “any disputes” “arising out of” or “related to” the agreement, or other comparable language, supports a narrow interpretation. In addition, Donovan argues that the term is ambiguous regarding its application to noncontractual claims and, as such, it must be interpreted against the drafter, Big Table Media.

¶ 18

To be sure, the forum selection clause here does not contain any words specifying what it encompasses. It simply states that the parties “agree to submit to exclusive personal jurisdiction in the State of California.” Thus, we are called upon to interpret the meaning and effect of this phrase.

¶ 19

“The primary goal of contract interpretation is to give effect to the parties’ intent in entering the contract.” *Kasper v. McGill Management Inc.*, 2019 IL App (1st) 181204, ¶ 39. We look to the language of the contract itself to discern the parties’ intent. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). But when a contract is largely nonnegotiable boilerplate, as with the terms at issue here, it is difficult to credibly maintain that it reflects the actual intent of the particular parties. See John F. Coyle, *Interpreting Forum Selection Clauses*, 104 Iowa L. Rev. 1791, 1794 (2019). But, unless unconscionable, an adhesive contract term<sup>6</sup> is generally

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<sup>6</sup>Accepted boilerplate terms are considered “adhesive” and are synonymous with an “adhesion contract.” “An adhesion contract is generally a form agreement submitted to a party for acceptance

enforceable against the adhered-to party if within their reasonable expectations. *Spadoni v. United Airlines, Inc.*, 2015 IL App (1st) 150458, ¶ 50 (Harris, J., dissenting); *Lane v. Francis Capital Management LLC*, 168 Cal. Rptr. 3d 800, 810-11 (Ct. App. 2014). Likewise, “contracts are interpreted objectively and must be construed in accordance with the ordinary expectations of reasonable people.” *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 92 (2009). Therefore, our interpretation of the forum selection clause will seek to honor the reasonable expectations of the parties to the contract. *Cf. Ronar, Inc. v. Wallace*, 649 F. Supp. 310, 312-13 (S.D.N.Y. 1986) (stating the court’s goal in interpreting a forum selection clause was to “honor the legitimate expectations of the parties to the contract”).

¶ 20 Contracts are to be read as a whole, and each provision viewed in light of the other provisions. *Thompson*, 241 Ill. 2d at 441. Applying these principles, we agree with Donovan that the forum selection clause should be read in conjunction with the sentence preceding it, which states “[t]his Agreement shall be governed by the laws of the State of California.” Accordingly, these provisions indicate that the subject matter of any litigation for which California would be the exclusive, mandatory forum would be “[t]his Agreement”—that is, the agreement by which Big Table Media engaged Donovan to appear on *Windy City Rehab*. It does not follow, however, that the scope was necessarily limited solely to claims for breach of the agreement. The agreement could have included language to that effect, but it did not. See Coyle, *supra*, at 1804-05 (giving examples of language indicating an intent to exclude noncontractual claims from a forum selection clause). “A presumption exists against provisions that easily could have been included in the contract but were not.” *Gallagher v. Lenart*, 367 Ill. App. 3d 293, 301 (2006). So, while Donovan argues against an expansive interpretation based on the lack of language so indicating, we cannot necessarily construe the clause to include the limitation he urges when language to that effect is also absent. Rather, the forum selection clause here is generic, lacking language signaling its scope over noncontractual claims.

¶ 21 “In the absence of language signaling which, if any, extra-contractual disputes are to be heard in a [selected forum], courts have generally assumed an intent that only disputes ‘arising under’ the contract are subject to the forum selection clause.” *Hansa Consult of North America, LLC v. hansaconsult Ingenieurgesellschaft mbH*, 35 A.3d 587, 593 (N.H. 2011) (citing *Terra International, Inc. v. Mississippi Chemical Corp.*, 119 F.3d 688, 693 (8th Cir. 1997)). In *Hansa*, the Supreme Court of New Hampshire found that a generic forum selection clause with the minimal language “ ‘Place of Jurisdiction is only Hamburg [Germany]’ ” should be read to encompass only noncontractual claims “arising under” the contract. *Id.* That court believed such a reading would limit the reach of the clause to “disputes involving the rights and obligations that the contract itself creates and give effect to the most likely intent of the parties and help foster stable and predictable commercial relationships.” *Id.* at 594.

¶ 22 Similarly, the Seventh Circuit Court of Appeals interpreted a forum selection clause that merely provided “ ‘Buyer agrees to consent to jurisdiction, venue and forum in the State Court of Fulton County, Georgia’ ” to encompass a plaintiff’s fraudulent inducement claim. *Kochert v. Adagen Medical International, Inc.*, 491 F.3d 674, 679-80 (7th Cir. 2007). The court reasoned that the claim stemmed from the plaintiff’s contractual relationship with the

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without any opportunity to negotiate terms.” *Endsley v. City of Chicago*, 319 Ill. App. 3d 1009, 1019 (2001).

defendant and that the contract language called for resolution of disputes in Georgia “regardless of the category of the claim.” *Id.* at 679.

¶ 23

We, likewise, find that the generic forum selection clause here should be read to include all claims arising under the agreement between Donovan and Big Table Media. Such a reading is not so broad to include any litigation whatsoever. The hypothetical example in Donovan’s brief—a happenstance auto accident with an employee of the defendants—could not reasonably arise under their agreement. But Donovan could reasonably expect that he would need to sue in California for an injury stemming directly from his contractual relationship with the defendants. In other words, he could reasonably expect the forum selection clause to encompass claims based on injury resulting directly from his agreement to appear on the show the defendants produced and aired. We again take guidance from the Seventh Circuit:

“[T]he existence of multiple remedies for wrongs arising out of a contractual relationship does not obliterate the contractual setting, does not make the dispute any less one arising under or out of or concerning the contract, and does not point to a better forum for adjudicating the parties’ dispute than the one they had selected to resolve their contractual disputes.” *American Patriot Insurance Agency, Inc. v. Mutual Risk Management, Ltd.*, 364 F.3d 884, 889 (7th Cir. 2004).

¶ 24

Having determined that the forum selection clause applies to claims arising under the agreement between Donovan and Big Table Media, we next consider whether Donovan’s claims, in fact, arise under the agreement. Courts have employed varying approaches to assess whether tort claims arise under a contract. These include (1) whether the tort claims ultimately depend on the contractual relationship between the parties (*Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983)), *overruled on other grounds by Lauro Lines v. Chasser*, 490 U.S. 495 (1989)), (2) whether resolution of the tort claims would arguably require interpretation of the contract (*Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988); *Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F.3d 600, 603 (7th Cir. 1994)), and (3) whether the tort claims involve the same operative facts as a parallel claim for breach of contract (*Lambert v. Kysar*, 983 F.2d 1110, 1121-22 (1st Cir. 1993)).

¶ 25

The first approach essentially binds the parties to a forum selection clause when the cause of action would not have arisen but for their contractual relationship, which will nearly always be true. See *Bahamas Sales Associate, LLC v. Byers*, 701 F.3d 1335, 1340-41 (11th Cir. 2012) (“[T]he fact that a dispute could not have arisen but for an agreement does not mean that the dispute necessarily ‘relates to’ that agreement. [Citation.] The phrase ‘related to’ marks a boundary by indicating some direct relationship. [Citation.] Requiring a direct relationship between the claim and the contract is necessary because, if ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, it would have no limiting purpose because really, universally, relations stop nowhere. [Citation.]” (Internal quotation marks omitted.)). Thus, the first approach could potentially encompass matters outside of the parties’ reasonable expectations. The second approach is also problematic. Just as a plaintiff should not be able to evade a forum selection clause through artful pleading, a defendant should not be able to enforce an otherwise inapplicable clause by “raising flimsy contract-based defenses to non-contract-based claims.” *Hansa*, 35 A.3d at 595. So, this approach might also extend the reach of a clause beyond the reasonable expectations of the parties. The first and second approaches are appropriate factors for a court to consider but should not be applied so expansively. As our

guiding principle is to honor the reasonable expectations of the parties, we find that the third approach best effectuates that principle when parties have agreed upon a generic forum selection clause, particularly for a party to whom the clause adhered. If a party should reasonably expect the clause to apply to breach of contract claims, they should also reasonably expect the clause to apply when the same operative facts of a noncontractual claim would be cognizable as a breach of the contract.

¶ 26

A tort claim involves the same operative facts as a parallel claim for breach of contract when “[t]he same exact facts surrounding [the plaintiff’s] tort claims would also give rise to a breach of contract claim.” *Terra*, 119 F.3d at 695. In this case, the operative facts, as set forth in Donovan’s complaint, allege that after engaging Donovan to appear in a television show about his renovation projects with Alison, the defendants staged and edited scenes for the second season of *Windy City Rehab* to falsely insinuate that Donovan had misappropriated money and caused other problems with the projects. Examples include scenes where Alison purports to be surprised to learn of improper payments to Donovan’s companies when, according to the complaint, the payments were appropriate and Alison was aware of and approved such payments and had also received similar payments to her own companies. In one episode, Alison suggests Donovan caused the City of Chicago to issue a stop work order on a certain property, but his complaint asserts that he was not involved with that property and another contractor had obtained the permit and performed the work that prompted the City’s order. In another episode, Alison states that a project’s end cost was \$300,000 over budget, suggesting Donovan had seriously underestimated the cost. His complaint asserts that the figures Alison stated were inaccurate and the project was completed under the actual budget. Season two culminates in Alison ending her partnership with Donovan and making statements indicating that he had caused her financial ruin. The final episode includes a scene with the camera viewing through a closed bathroom door showing Alison crying and saying that she “got into business with a person who cost her everything.” Donovan’s complaint alleges that the defendants knew or should have known that Alison’s statements and insinuations were false and that she was acting to spice up the show. As a result of the portrayal, Donovan’s business has declined, and he suffers both mentally and physically. In sum, Donovan complains that the defendants injured him by falsely and disparagingly portraying him in the show for which they contracted him to appear.

¶ 27

The agreement with Big Table Media for Donovan’s appearance on *Windy City Rehab* provides in paragraph 1(a) “Producer [Big Table Media] and/or Network [HGTV] shall not require Artist [Donovan] to render any services that are disparaging to Artist.” The same facts surrounding Donovan’s defamation and intentional infliction of emotional distress claims would support a claim for a breach of this nondisparagement term. Therefore, his tort claims involve the same operative facts as a parallel claim for breach of contract.

¶ 28

In addition, every contract contains an implied covenant of good faith and fair dealing. *McCleary v. Wells Fargo Securities, L.L.C.*, 2015 IL App (1st) 141287, ¶ 19. “The purpose of this duty ‘is to ensure that parties do not take advantage of each other in a way that could not have been contemplated at the time the contract was drafted or do anything that will destroy the other party’s right to receive the benefit of the contract.’” *Id.* (quoting *RBS Citizens, National Ass’n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 191 (2011)). While paragraph 2(b) grants the defendants the broad discretion to edit and “produce [*Windy City Rehab*] in

whatever manner [they] choose,” their exercise of discretion was subject to the implied covenant of good faith and fair dealing.

“Where a contract specifically vests one of the parties with broad discretion in performing a term of the contract, the covenant of good faith and fair dealing requires that the discretion be exercised ‘reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.’ ” *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 165 (2004) (quoting *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 112 (1993)).

“[A] party who does not properly exercise contractual discretion breaches the implied covenant of good faith and fair dealing that is in every contract.” *Id.*

¶ 29

Under Donovan’s agreement with Big Table Media, he would earn \$3500 per episode in which he appeared. Donovan’s complaint indicates that his company had annual revenues near \$1.5 million before *Windy City Rehab* ever aired. It is reasonable to infer that Donovan’s interest in participating in *Windy City Rehab* went beyond what he would earn by appearing on the show. See *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55 (a court may draw reasonable inferences from the complaint in reviewing a section 2-619 motion). Indeed, one need look no further than the magazine covers at a grocery store checkout counter to ascertain that “on-camera personalities” commonly use their appearance on these kinds of shows to promote their businesses and other ventures beyond the show. In addition, such shows generally portray “on-camera personalities” in a positive light. Donovan’s agreement contemplated that his performance would be like that “customarily rendered by On-Camera Personalities and Renovation Expert[s] in the television industry.” Thus, he could reasonably expect that the defendants would not exercise their editorial discretion to portray him in a negative light, which could then harm his business and other prospects. In essence, Donovan’s tort claims assert that the defendants took advantage of him in a way he did not contemplate when he agreed to appear on their show. His asserted injury implies the defendants deprived him of the benefit he expected to receive from his appearance in *Windy City Rehab*. But since the operative facts alleged support such a claim, the covenant of good faith and fair dealing is another basis to conclude that his tort claims parallel a claim for breach of contract.

¶ 30

In this analysis, we have taken the allegations in the complaint at face value, as we must when reviewing a section 2-619 motion to dismiss. *Patrick Engineering*, 2012 IL 113148, ¶ 31. We make no finding on the merits whether the defendants have, in fact, breached the agreement. Rather, we merely recognize that the operative facts would support a cognizable breach of contract claim. Thus, we consider the tort claims to “arise under” the agreement, and therefore, they are subject to the forum selection clause.

¶ 31

In arguing for reversal, Donovan urges us to go no further than to find the forum selection clause ambiguous and construe it against the defendants who drafted it. However, the doctrine that an ambiguous term is to be interpreted against the drafter is a last resort to be employed only after a court has exhausted other interpretive guides. *William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 344-45 (2005); *Bunge Corp. v. Northern Trust Co.*, 252 Ill. App. 3d 485, 493 (1993). A term is not ambiguous merely because the parties disagree as to its meaning. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). And courts should not strain to find ambiguity where none exists. *State Farm Mutual Automobile Insurance Co. v. Elmore*, 2020 IL 125441, ¶ 21.

¶ 32 Here, we have ascertained the meaning of the forum selection clause to encompass claims arising from the agreement. We further concluded that Donovan’s tort claims arise under the agreement because the same operative facts surrounding his claims would support a parallel claim for breach of contract. We arrived at this construction by following the reasoning, which we found persuasive, of other courts that interpreted forum selection clauses with comparable language. Thus, we need not resort to simply finding the term ambiguous and construing it against the drafter.

¶ 33 Nevertheless, our task is not complete. Even if a forum selection clause applies to the plaintiff’s claims, we must consider whether it should be enforced. As we noted, courts consider (1) the law governing the formation and construction of the contract, (2) residency of the parties, (3) location of execution or performance of the contract, (4) location of the parties and witnesses, (5) the inconvenience to the parties of any particular location, and (6) whether the parties bargained for the clause. *Brandt*, 2013 IL App (1st) 120431, ¶ 13. The party opposing enforcement bears the burden of proving the selected forum is unreasonable. *Id.* ¶ 18.

¶ 34 As provided in the agreement, California law governs its formation and construction. Donovan is a resident of Illinois, but Big Table Media is a California limited liability company headquartered in that state. HGTV is a Delaware limited liability company headquartered in Tennessee. The parties executed the agreement in Illinois and California respectively. Donovan’s performance under the agreement took place in Illinois, along with filming by Big Table Media. However, the record does not reveal where editing and production took place. Most witnesses—Donovan, Alison, and others identified in the complaint—are in Illinois. The complaint asserts that HGTV’s president, Jane Latman, made statements in an interview suggesting the network purposefully emphasized, what the magazine called, the “soapy storyline” of *Windy City Rehab* for the benefit of ratings. The record does not indicate Latman’s location or that of other executives and employees of the defendant companies who may be potential witnesses.

¶ 35 Some inconvenience is apparent for Donovan in having to litigate in California. But “[m]ere inconvenience is not a reasonable basis for voiding an express forum selection clause.” *Id.* ¶ 17 (citing *Dace*, 275 Ill. App. 3d at 239). Rather, the degree of inconvenience necessary to invalidate a forum selection clause must be so onerous that the plaintiff would be deprived of any “ ‘real opportunity to litigate the issues in a fair manner [such] that enforcement of the clause is tantamount to depriving the plaintiff access to the courts.’ ” *Id.* (quoting *Dace*, 275 Ill. App. 3d at 239). Donovan has made no showing that the courts situated in Sacramento, California, could not afford him a meaningful opportunity to pursue his claims and obtain an adequate remedy. The global COVID-19 pandemic has added inconvenience to litigating even in the most accessible forum. Yet, at the same time, lawyers and judges have proven adept at using technology and other measures to maintain the administration of law despite the challenges of the pandemic. We do not find that Donovan is unduly burdened by having to litigate his claims in California.

¶ 36 Last, as we noted, the forum selection clause appeared in nonnegotiable, boilerplate “Standard Terms and Conditions.” “[A] forum selection clause contained in boilerplate language indicates unequal bargaining power, and the significance of the provision is greatly reduced.” *IFC Credit Corp. v. Rieker Shoe Corp.*, 378 Ill. App. 3d 77, 86 (2007) (citing *Williams v. Illinois State Scholarship Comm’n*, 139 Ill. 2d 24, 72 (1990)). However, this protection is primarily concerned with “an unsophisticated consumer in a small transaction in

the marketplace.” *Mellon First United Leasing v. Hansen*, 301 Ill. App. 3d 1041, 1046 (1998). Donovan, an educated and experienced businessperson, is not an unsophisticated consumer, and his agreement to appear on *Windy City Rehab* is far from a small transaction in the marketplace. This court has held business entities to boilerplate forum selection clauses. *Brandt*, 2013 IL App (1st) 120431, ¶¶ 19-20; *IFC Credit*, 378 Ill. App. 3d at 92; *Dace*, 275 Ill. App. 3d at 241. “[A] forum selection clause puts business entities on notice that by signing the contract they assume the risk of litigating in a less convenient forum.” *Brandt*, 2013 IL App (1st) 120431, ¶ 21 (citing *IFC Credit*, 378 Ill. App. 3d at 89). The agreement put Donovan on notice that he assumed the risk of litigating in California when he accepted the contract to appear on *Windy City Rehab*. We see no reason to treat Donovan differently from similar litigants.

¶ 37 Overall, some of the factors show a greater connection to Illinois. But, like most multifactor inquiries, no one factor is controlling, and we may enforce the clause even if most of the factors favor nonenforcement.<sup>7</sup> Ultimately, Donovan bears the burden of presenting some “‘compelling and countervailing reason’” why the forum selection clause should not be enforced. *Calanca*, 157 Ill. App. 3d at 88 (quoting *The Bremen*, 407 U.S. at 12). He has not done so. Accordingly, we will honor the term he accepted.

¶ 38 The circuit court, upon finding that the forum selection clause should be enforced, dismissed Donovan’s complaint under section 2-619(a)(1) for lack of subject-matter jurisdiction. This point is academic, as the result is the same, but a contract provision selecting another forum does not deprive other courts of subject-matter jurisdiction. “[S]ubject-matter jurisdiction refers to a tribunal’s power to hear and determine cases of the general class to which the proceeding in question belongs.” *Zahn v. North American Power & Gas, LLC*, 2016 IL 120526, ¶ 13. Undoubtedly, the circuit courts of Illinois are empowered to hear and determine cases involving claims of defamation and intentional infliction of emotional distress. Like any contract term, a party could waive, forfeit, or be estopped from invoking its right to enforce a forum selection clause, which would enable the court to adjudicate the underlying case. Additionally, the circuit court has subject-matter jurisdiction to determine the scope and enforceability of the forum selection clause, as occurred here. To be more precise, a clause selecting another forum is an “affirmative matter” barring a claim against a defendant, and dismissal on this basis is proper under section 2-619(a)(9).

### ¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, we find that the forum selection clause in the agreement between Donovan and Big Table Media applies to his tort claims since the claims arise under the agreement and that such claims must be filed in California. Accordingly, we affirm.

¶ 41 Affirmed.

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<sup>7</sup>We also observe that courts are not limited to the six enumerated factors. For example, courts may refuse to enforce a forum selection clause if doing so would violate public policy. See, e.g., *Intershop Communications v. Superior Court of the City & County of San Francisco*, 127 Cal. Rptr. 2d 847, 853 (Ct. App. 2002) (“a forum selection clause will not be enforced if to do so would bring about a result contrary to the public policy of this state”).