IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

Ramp Realty of Florida, Inc.,

Appellant,

vs.

CASE NO. 1D13-1332
L.T.: 2012 CA 6966

Google, Inc.,

Appellee.
_____/

AMENDED INITIAL BRIEF OF APPELLANT RAMP REALTY OF FLORIDA, INC.

Appealed from The Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida Case No.: 2012-CA-6966, Division: CV-H, Judge Waddell Wallace presiding.

Submitted By:

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STATEMENT OF THE CASE

o SYNOPSIS

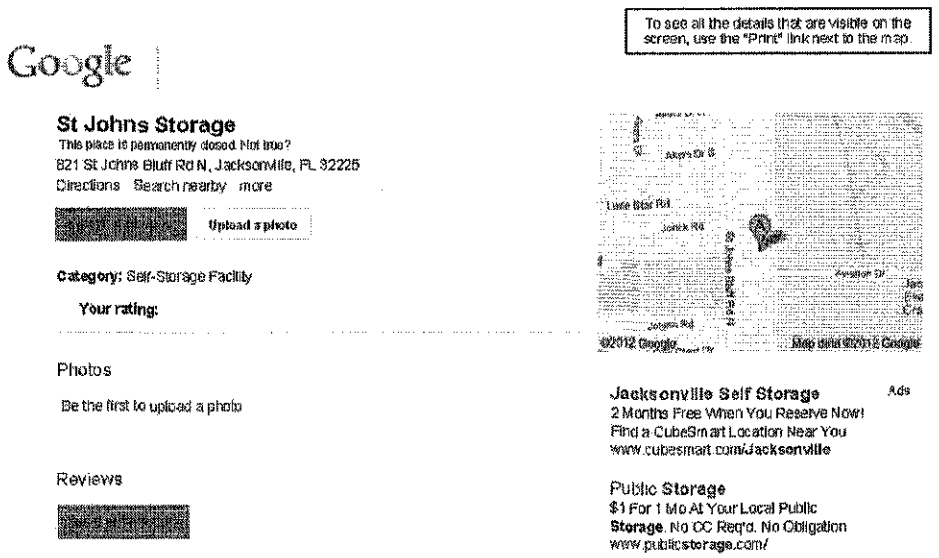
This case is about Ramp Realty of Florida, Inc.'s (hereinafter Ramp Realty) efforts to get information from Google, Inc. (hereinafter Google) about why a Google Maps Places webpage incorrectly said a self storage business owned by Ramp Realty was "permanently closed." Ramp Realty believes someone illegally either hacked Ramp Realty's computers, Google's computers, or supplied Google with false information for the purpose of manipulating Google's Places listing for the storage business. Accordingly, Ramp Realty filed a pure bill of discovery so it could serve a subpoena on Google to obtain information about why and how Google's listing for Ramp Realty's storage business was changed to say the business was permanently closed.

Google contends that a contract entered into between Ramp Realty and Google *months after* Google's listing for the storage company was changed governs where Ramp Realty can file its bill of discovery, even though the bill only seeks information about things that happened *before* Google and Ramp Realty had a contractual relationship. Ramp Realty, on the other hand, contends that, according to its plain language, the contract only dictates where Ramp Realty must assert claims against Google concerning services Google provides under the contract. Since Ramp Realty's pure bill of discovery concerns events that happened

in February 2012 (or earlier) that have nothing to do with the contractual services Google started providing in May 2012, the contract does not dictate where Ramp Realty must file its bill of discovery.

- BACKGROUND FACTS

Ramp Realty owns and operates a self-storage business named St. Johns Storage. (R. at 1; 50.) Sometime before April 26, 2012, the Google Maps Places listing for St. Johns Storage was changed to say "This place is permanently closed." (R. at 2; 50.) A partial screenshot of the Places listing webpage taken on April 24, 2012 is below (R. at 38.)



The permanently closed statement appears just below the words "St Johns Storage."

Ramp Realty does not know when the Places listing was changed. (*See* R. at 2.) Based on materials filed by Google, Google believes it changed the listing

sometime around February 15, 2012. (R. at 24.) Based on Ramp Realty's estimated business losses of $300,000, Ramp Realty believes the listing was changed to say St. Johns Storage was "permanently closed" before February 15, 2012. (*See* R. at 2.)

Ramp Realty believes someone other than Google illegally either hacked Ramp Realty's computers, Google's computers, or supplied Google with false information for the purpose of manipulating Google's Places listing for St. Johns Storage. (R. at 2.) On April 26, 2012, Ramp Realty contacted Google to ask how Ramp Realty could get the details behind how and why the Google Maps Places listing came to say that Ramp Realty was "permanently closed." (R. at 50.) On May 1, 2012, Google Legal Support responded and told Ramp Realty to serve Google with a "subpoena or other appropriate legal process." (R. at 49.) Google Legal Support did not say anything at all about any requirements to file an action in Santa Clara County, any requirements to have the subpoena issued out of Santa Clara County, or any Google terms or conditions that might apply to Ramp Realty. (R. at 49.)

On May 9, 2012, Ramp Realty and Google entered into a contract under which Ramp Realty could control some aspects of its Google Maps listing. (R. at 25.) Entering into this contract allowed Ramp Realty to have the "this place is permanently closed" statement removed from St. Johns Storage's Google Maps

Places listing. (*See* R. at 25.) This contract is called "Google Terms of Service" and it contains the forum selection clause on which Google based its motion to dismiss. (R. at 9; 29.) The forum selection clause simply says "All claims arising out of or relating to these terms or the Services will be litigated in the federal or state courts of Santa Clara County, California, USA . . . ." (R. at 33.)

On June 26, 2012, Ramp Realty filed a pure bill of discovery in Duval County, Florida that sought to discover the "how and why the false statements were made and at whose bequest the false statements were put on the websites." (R. at 1-3.) The false statements of course were put on the Google Maps listing around February 15, 2012, according to Google, or even earlier according to Ramp Realty. (R. at 24.) Ramp Realty's pleading did not allege any misconduct on Google's part and did not seek any relief, monetary or otherwise, against Google. (R. at 1-3.) The complaint sought only discovery. (R. at 1-3.) At the time the false statements were put on the Google Maps listing, Ramp Realty and Google had no contractual relationship, and Google was not providing any services whatsoever to Ramp Realty. (*See* R. at 24-25.) The trial court dismissed this action based solely on the plain language of the forum selection clause. (R. at 52-53.)

- PROCEDURAL HISTORY

Ramp Realty began this action when it filed its pure bill of discovery in the Circuit Court for Duval County on June 26, 2012. (R. at 1-3.) On September 6,

2012, Google moved to dismiss for failure to state a claim, for improper venue based on the forum selection clause, and for Ramp Realty's alleged violation of the Florida fictitious name act. (R. at 9.) Google argued Ramp Realty failed to state a claim because Ramp Realty was really on a fishing expedition. (R. at 16-18). Google also argued that Ramp Realty could not maintain the action because it had not registered a fictitious name for its storage business. (R. at 20-21.)[1]

On December 13, 2012, the trial court held a hearing on Google's motion to dismiss. (*See* R. at 46.)[2] On February 13, 2013, the trial court entered an order dismissing the action. (R. at 52-53.) The order did not address Google's arguments that Ramp Realty failed to state a claim or failed to comply with the fictitious name act. (R. at 52-53.) Instead, the dismissal relied solely on the forum selection clause in Google's terms of service. (R. at 52-53.) Ramp Realty appealed the dismissal. (R. at 51.)

SUMMARY OF THE ARGUMENT

The trial court's order dismissing Ramp Realty's action relied solely on the forum selection clause in Google's terms of service. The forum selection clause

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[1] Ramp Realty has since registered the fictitious name St. Johns Storage for its self-storage business.

[2] The index to the record shows that the Affidavit of Jeb T. Branham was filed on February 14, 2013. The Affidavit was served on December 13, 2012, the date of the hearing on Google's motion to dismiss. The original affidavit was tendered to the court for filing during the hearing. Google's counsel attended the hearing telephonically and received his email service of the Affidavit prior to the hearing.

says "All claims arising out of or relating to these terms or the Services will be litigated in the federal or state courts of Santa Clara County, California, USA . . . ." The contract defines Services simply as Google's "products and services . . . ."

Ramp Realty's bill of discovery seeks only discovery about how and why St. Johns Storage's Google Maps Places listing was changed to falsely say St. Johns Storage was "permanently closed." Google admits that, as far is it can tell, Google changed St. Johns Storage's Google Maps Places listing sometime around February 15, 2012. Google also admits it and Ramp Realty did not enter into a contract that incorporated Google's terms of service until May 9, 2012, months after Google changed the Places listing for St. Johns Storage.

At the time Google changed St. Johns Storage's Places listing to falsely say the "location is permanently closed[,]" Google was not providing any Services to St. Johns Storage. Google published the Places listing on its own accord and for Google's own benefit to drive traffic to Google's sites so Google could sell ads on those sites. Prior to May 9, 2012, the existence and content of the Places listing was not the result of any business or contractual relationship between Google and Ramp Realty.

By its plain language, Google's forum selection clause applies only to claims that arise out of or relate to the terms of service or the Services themselves. First, Ramp Realty does not have a "claim." It is not seeking any relief against

Google. It is seeking only discovery. Second, Ramp Realty's bill of discovery does not arise out of or relate to either Google's terms of service or any Services Google provided to Ramp Realty. Ramp Realty's bill of discovery concerns only how St. Johns Storage's Places listing got changed months before Google started providing Services to Ramp Realty and months before Ramp Realty was subject to the forum selection clause in Google's terms of service. Accordingly, Ramp Realty's bill of discovery is not subject to Google's forum selection clause.

ARGUMENT

ISSUE PRESENTED: Did the trial court err when it decided a contract entered into on May 9, 2012 dictates where a plaintiff must file a pure bill of discovery to obtain information about things that happened months earlier and that have nothing to do with the business relationship created by the contract?

- A *DE NOVO* STANDARD OF REVIEW APPLIES.

This Court should review the trial court's dismissal of Ramp Realty's action under a *de novo* standard of review. *Bombardier Capital, Inc. v. Progressive Marketing Group, Inc.*, 801 So. 2d 131, 134 (Fla. 4th DCA 2001) In construing a forum selection clause, the Fourth District said "The interpretation or construction of a contract is a matter of law and *an appellate court is not restricted from reaching a construction contrary to that of the trial court." Id.* (emphasis added).

- THE PLAIN LANGUAGE OF GOOGLE'S FORUM SELECTION CLAUSE SHOWS THE PARTIES INTENDED THE CLAUSE TO HAVE A LIMITED SCOPE.

"The polestar guiding the court in the construction of a written contract is the intent of the parties. [cit. omitted.] Where, as here, the language used is clear and unambiguous the parties' intent must be garnered from that language." *Id.* In *Food Marketing Consultants, Inc. v. Sesame Workshop*, the Southern District of Florida "dr[ew] several lessons" from distilling numerous forum selection clause cases. 2010 WL 1571206, *12-13 (S.D. Fla. 2010). Among the lessons was the rule that "whether a *particular phrasing* of a forum-selection clause covers a given cause of action . . . depends on *the relationship of the claim in question to the contract* containing the forum-selection clause . . . ." *Id.* (emphasis added).

The question for the instant case thus becomes whether the plain language or "particular phrasing" of Google's forum selection clause shows the parties objectively intended Google's forum selection clause to apply to all legal proceedings between the parties regardless of the type of proceeding or when or how the matters at issue in the proceeding occurred. *See Armco, Inc. v. North Atl. Ins. Co. Ltd.*, 68 F. Supp2d 330, 338 (S.D.N.Y. 1999) ("'[t]he applicability of a forum selection clause is governed by 'objective consideration of the language' of the clause'").

The forum selection clause in Google's terms of service merely says "All claims arising out of or relating to these terms or the Services will be litigated in

the federal or state courts of Santa Clara County, California, USA . . . ." (R. at 33.) The contract defines Services simply as Google's "products and services . . ." (R. at 29.)

Broken down, the plain language of Google's forum selection clause limits the clause's application to legal actions that meet the following requirements:

> 1. The action must be a "claim;"
> **and**
> 2. The action must arise out of or relate to the terms of service; or
> 3. The action must arise out of or relate to the Services.

Despite the contract's plain language, Google is trying to make the forum selection clause apply to any legal proceedings between Google and Ramp Realty regardless of the nature of the proceedings or the lack of a connection between the proceedings and Ramp Realty's contractual relationship with Google.

If Google had wanted to make Ramp Realty agree to only pursue legal process against Google in Santa Clara County for all things regardless of when the events occurred or their context, Google's terms of service could have easily said something like "You agree that from this date forward you will only pursue legal process against Google in the federal or state courts of Santa Clara County, California, USA, regardless of the subject matter of the legal proceedings or when the events underlying the proceedings happened." Google chose not to do this. Instead, Google used much narrower language that limited the application of the

forum selection clause to claims that arise out of or relate to Google's contractually-provided Services or the terms of service themselves.

There is simply nothing in the language of the forum selection clause that establishes any party's objective intent to apply the clause to pre-contractual events that do not concern Google's Services provided under the contract or the terms of service themselves. As stated in *Bombardier Capital*, "[T]he polestar guiding the court . . . is the intent of the parties. . . . Where . . . the language is clear and unambiguous, the parties' intent must be garnered from that language." 801 So. 2d at 134.

- RAMP REALTY'S BILL OF DISCOVERY IS NOT A "CLAIM."

The plain language of Google's forum selection clause first limits the clause's application to "claims." Words used in a contract "must be given their plain and ordinary meaning. . . . One looks to the dictionary for the plain and ordinary meaning of words." *Beans v. Chohonis,* 740 So. 2d 65, 67 (Fla. 3d DCA 1999) (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE). A "claim" in its noun form is "A demand or request for something as one's rightful due: *file a claim for losses.*" THE AMERICAN HERITAGE DESK DICTIONARY (1981), p. 191 (emphasis supplied). Ramp Realty's bill of discovery is not a "claim" within any ordinary sense of the word. It does not seek damages or injunctive relief from Google. The bill only seeks a way to obtain information from Google.

Indeed, filing the bill of discovery is exactly what Google told Ramp Realty to do. When Ramp Realty asked Google how it could find out why St. Johns Storage's Maps listing was changed to say "this location is permanently closed[,]" Google told Ramp Realty to serve Google with "a valid third party subpoena or *other appropriate legal process*." (R. at 49.) (emphasis added.) The bill of discovery Ramp Realty filed is "other appropriate legal process." The bill of discovery is not a "claim." Since the bill is not a "claim," there is no way Google's forum selection clause can apply to the bill in the first place.

- RAMP REALTY'S BILL OF DISCOVERY DOES NOT ARISE OUT OF OR RELATE TO GOOGLE'S TERMS OF SERVICE.

Ramp Realty's bill of discovery has nothing to do with the contents of the terms of service. The bill of discovery arises out of and relates to changes Google made of its own accord or at a third-party's behest to St. Johns Storage's Google Maps Places listing months before Ramp Realty became subject to Google's terms of service. The bill of discovery is not seeking a declaration of the terms of service, it does not claim Google violated the terms, and it does not even challenge the application of the terms to the business relationship between Ramp Realty and Google that started on May 9, 2012.

The fact that Google made no mention whatsoever of the terms of service when Ramp Realty asked Google in April 2012 how to obtain the information it sought establishes that even Google did not think Ramp Realty's request for

information related to or arose out of Google's terms of service. Google's current efforts to use its forum selection clause to dodge Ramp Realty's bill of discovery does not *ipso facto* turn Ramp Realty's bill into a dispute over Google's terms of service either. Such an application of the forum selection clause would undo the very limitations Google itself wrote into the clause.

- RAMP REALTY'S BILL OF DISCOVERY DOES NOT ARISE OUT OF OR RELATE TO GOOGLE'S SERVICES.

Although Florida courts generally uphold forum selection clauses, the courts still require the legal proceedings subject to the clause to concern the business relationship that arises from the contract with the forum selection clause in it. *Management Computer Controls, Inc. v. Charles Perry Constr., Inc.*, 743 So. 2d 627, 632 (Fla. 1st DCA 1999); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1070 (11th Cir. 1987); *Food Marketing Consultants, Inc. v. Sesame Workshop*, 2010 WL 1571206, *12-13 (S.D. Fla. 2010); *Armco, Inc. v. North Atl. Ins. Co. Ltd.*, 68 F. Supp2d 330, 338-39 (S.D.N.Y. 1999).

In *Management Computer Controls*, this Court refused to apply a forum selection clause to a Florida Unfair and Deceptive Trade Practices Act claim in part because the FUDTPA claim did not "arise out of the contract . . . ." 743 So. 2d at 632 (the court also found the forum selection clause undermined the purpose of FUDTPA). While upholding a forum selection clause that applied to "any 'case or controversy arising under or in connection with this Agreement[,]'" the 11th Circuit

still recognized that such broad language only captured "causes of action arising directly or indirectly from the business relationship evidenced by the contract." *Stewart Org.*, 810 F.2d at 1010 (emphasis omitted). In *Food Marketing Consultants*, the Southern District of Florida discerned that "whether a . . . forum-selection clause covers a given cause of action . . . depends on the relationship of the claim in question to the contract containing the forum-selection clause . . . ." 2010 WL 1571206 at *12-13.

Armco, Inc. best illustrates the relationship between pre-contract events and the application of a forum selection clause to those events. 68 F. Supp2d at 338-39. In *Armco,* the Southern District of New York refused to apply a forum selection clause to tort claims concerning events that occurred before the parties entered into a contract with a forum selection clause, even though the events eventually led to the parties entering into that contract. The forum selection clause at issue in *Armco* said "the parties irrevocably submit themselves to the exclusive jurisdiction of the English Courts to settle any dispute which may arise out of or in connection with this Agreement." *Id.* at 338. In finding the forum selection clause inapplicable to the tort claims, the *Armco* court explained:

> Plaintiffs are not suing for breach of the Sale Contract, alleging any lack of performance required by the Sale Contract, or disputing either party's rights or obligations under the Sale Contract. . . .
> . . . .

> Here, the plaintiffs assert tort claims that also allegedly grew out of events and acts by defendants preceding the execution of the contract. . . . These allegations predate the signing and negotiation of the sale agreement, and do not arise from its terms.

68 F. Supp.2d at 338-39.

Although Ramp Realty's bill of discovery is by no means a tort claim against Google, the instant case otherwise mirrors *Armco*. Just as in *Armco*, Ramp Realty is seeking discovery about things that happened before Ramp Realty contracted with Google, and Ramp Realty's sought-after discovery does not concern any alleged breach of the contract by Google, Google's performance of that contract, or either parties' rights or obligations under that contract.

Google freely acknowledges that the terms of service did not apply to Ramp Realty until May 9, 2012. (R. at 26.) In an affidavit submitted by Google to support its motion to dismiss, Google explained that Ramp Realty became subject to the terms of service on May 9, 2012 when Ramp Realty established a Local Business Center account with Google. (R. at 25.)[3] The purpose of establishing the Local

[3] In its affidavit, Google identified Ramp Realty as "the user with the email address 'burganjax@aol.com' . . . ." The email address burganjax@aol.com is an email address used primarily by Grover Burgan, Ramp Realty's president. Obviously, Google does not dispute that "the user with the email address 'burganjax@aol.com'" was authorized to act on behalf of and bind Ramp Realty since Google's entire argument depends on that "user" binding Ramp Realty to the terms of service.

Business Center account is, as explained by Google, to allow a business owner to "submit merchant-verified edits to a business listing" within Google Maps. (R. at 25.) In other words, establishing the account with Google allowed Ramp Realty to exercise some control over its Maps listing, such as changing the statement that St. Johns Storage was permanently closed.

Google's terms of services defines Services as "our products and services[.]" (R. at 29.) Prior to May 9, 2012, Google did not provide any Services to Ramp Realty. (*See* R. at 25.) Google admits Ramp Realty did not agree to the terms of service until May 9, 2012. (R. at 25.) Indeed, the first thing Google's terms of services says is "Welcome to Google." (R. at 29.) The Google Places listing for St. Johns storage that existed prior to May 9, 2012 was a product Google produced of its own accord to drive traffic to Google's websites so Google could sell advertising. Google calls this "an unverified Google Places page." (R. at 24.) Prior to May 9, 2012, the St. Johns Storage Places listing and its contents did not exist because of any contractual or business relationship between Ramp Realty and Google. The listing existed only because Google took it upon itself to create it and publish it to the world.

Google admits it "started the process to determine whether the Google Maps Places page for St. Johns Storage should be updated to reflect the business was

closed" around February 15, 2012. (R. at 24.) Google claims it does not know why it started this process, but nonetheless Google acknowledges it was the party that started it. (R. at 24.) Google admits it took it upon itself to change the Places page three months before Ramp Realty agreed to Google's terms of service.

Ramp Realty's bill of discovery simply seeks to find out more information about why the Places listing changed in February 2012 (or before). Google freely admits that when Google changed the Places listing Google and Ramp Realty did not have a contractual relationship. Without a contractual relationship, Google could not be providing "Services" to Ramp Realty. Since Google was not providing Ramp Realty with "Services" when Google changed St. Johns Storage's Places listing, Ramp Realty's bill of discovery seeking to find out how and why the Places listing changed does not arise out of or relate to "Services." There is simply no rational way to argue Ramp Realty's efforts to find out more about why Google changed the Maps listing in February 2012 (or before) arise out of or relate to contractual Services Google did not start providing to Ramp Realty until May 9, 2012.

CONCLUSION

No doubt, Google chose narrower forum selection language to help insure its forum selection clause would be enforceable. Had Google overtly attempted to force a forum selection on customers for matters that predated customers' assent to

Google's terms of service, Google would risk running afoul of the widely-recognized exception to enforcement of forum selection clauses that arises when the clause is "the product of overwhelming bargaining power on the part of one party." *See Bombardier Capital*, 801 So. 2d at 134. However, Google is trying to accomplish covertly what it is unwilling to do overtly, namely force any party with a contractual relationship with Google to bring all legal proceedings involving Google in Santa Clara County regardless of whether the proceedings have any real relationship to the contract. This is an overly broad application of Google's forum selection clause that finds no support in the clause's plain language. Google should not be allowed to overreach in this manner. Google should be held to the plain language of its own contract. The language of Google's forum selection clause does not include Ramp Realty's bill of discovery within its ambit.

Ramp Realty asks this Court to reverse the trial court's order dismissing Ramp Realty's bill of discovery. Ramp Realty also asks this Court to remand this case back to the trial court with a mandate instructing the trial court to deny Google's motion to dismiss.

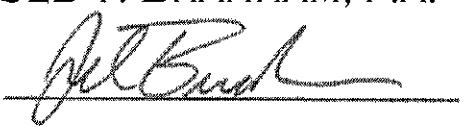
CERTIFICATE OF SERVICE

I certify that a copy hereof has been served this 11th day of July, 2013 via electronic and regular mail to Samuel A. Lewis, Esq. at slewis@FeldmanGale.com.

CERTIFICATE OF COMPLIANCE

I certify that the brief above complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

JEB T. BRANHAM, P.A.



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