

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000121-MR

HAROLD G. HAYDEN AND WIFE,
ANNA L. HAYDEN

APPELLANTS

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 01-CI-00246

CMH HOMES, INC.,
D/B/A LUV HOMES

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Harold and Anna Hayden, husband and wife, have appealed from an order entered by the Bell Circuit Court on November 6, 2001, which dismissed their action based on lack of jurisdiction and lack of venue due to a forum-selection clause. Having concluded that the trial court properly dismissed the Haydens=action due to lack of venue, we affirm.

On June 28, 1993, the Haydens entered into a contract with Clayton Mobile Homes, Inc., d/b/a LUV Homes (CMH Homes) for the purchase of a mobile home. The Haydens traveled to Tennessee

to purchase the mobile home and the contract¹ was executed in Tennessee. The Haydens understood that the purchase price was to be \$47,000.00, with a ten percent (10%) down payment, and an interest rate of 8.5%. The total purchase price was \$55,200.04.

However, the Haydens have alleged that on the closing date CMH Homes added a "future release credit" (FRC) charge to the contract which provided that in the event the Haydens prepaid the loan, they would be required to pay an FRC charge of \$4,701.00 to CMH Homes. The Haydens have claimed that CMH Homes promised this FRC charge would be credited to the Haydens= account if they did not prepay the debt within four years. Furthermore, the Haydens have alleged that on the closing date the down payment was increased from \$4,700.00 to \$5,700.00, and the contract provided for an interest rate of 10.5%, rather than 8.5%. The Haydens have also alleged that since CMH knew that they had already demolished their old home, moved in with a sister,² borrowed on their insurance policy, and poured concrete "footers" for the mobile home they planned to purchase from CMH Homes, their purchase of the mobile home was made under duress.

On April 7, 2000, almost seven years after the contract was executed, the Haydens=counsel wrote a letter to CMH Homes in Knoxville, Tennessee, requesting information regarding the FRC

¹ The term Acontract@ is used interchangeably with the term Apurchase agreement.@

² It is unclear whether it was Harold's sister or Anna's sister.

charge. In a reply letter dated May 3, 2000, Stephanie Fagan, CHM Homes=Legal Coordinator, informed the Haydens' counsel that she Afound nothing that would explain [the FRC] charge@added to the Haydens=loan. CMH Homes offered to credit the Haydens= account for \$4,701.00, the amount of the FRC charge, and to credit their loan for the interest accrued, which was \$4,568.79. The Haydens=total credit was \$9,269.79, which reduced their account by 55 payments, or 4.58 years.

The Haydens initiated this action by filing a complaint against CMH Homes in Bell Circuit Court on July 9, 2001. The Haydens alleged a violation of the Consumer Protection Act, fraud, conversion, and breach of an implied covenant of good faith. CMH Homes filed an answer on September 5, 2001, and asserted the following affirmative defense:

[T]he specific contractual language as found within AExhibit A@controls and provides that the laws of the State of Tennessee are to be used in interpreting this contractual agreement. As such, the plaintiffs' Complaint pursuant to Kentucky law is improper in that Tennessee law is the proper law, including conflict of laws to be applied in this matter.

CMH Homes relied upon the specific language located within paragraph 14, which provided as follows:

CONTROLLING LAW AND PLACE OF SUIT: The law of the State, in which I sign this contract, is the law which is to be used in interpreting the terms of the contract. You and I agree that if any dispute between us is submitted to a court for resolution, such legal proceeding shall take place in the county in which your principle [sic] offices

are located. If under state law a special dispute resolution procedure or complaint process is available, I agree to the extent permitted by law that procedure shall be the only method of resolution and source of remedies available to me.

On September 20, 2001, CMH Homes filed a "motion to dismiss, or for summary judgment, for lack of venue." After considering the parties' memoranda of law, the trial court entered an order on November 6, 2001, dismissing the Haydens= action for lack of jurisdiction and venue. The order stated that ~~A~~by virtue of the parties=contractual agreement[,], that Blount County, Tennessee, the defendant's principal place of business, is the only appropriate venue for these proceedings.@The trial court then ordered "that this action be and the same hereby is dismissed as the court lacks jurisdiction and venue to try the instant proceedings."

On November 16, 2001, the Haydens filed a "motion to set aside order dismissing action for lack of jurisdiction and venue." The trial court in an order entered on December 12, 2001, denied the motion and stated:

The Court's previous Order dismissing this action for lack of venue was based upon the plain language of the contract designating the place of suit for any dispute between the parties. The Plaintiffs plead the existence of the contract in their complaint and attached the contract as an exhibit to the Complaint. In its Answer the Defendant admitted that part of Plaintiffs' Complaint alleging the existence of a valid contract. In this instance no other proof or evidence is required for the Court to rule on venue.

This appeal followed.

The Haydens present six assignments of error on appeal: (1) that the Bell Circuit Court is a proper venue for this action; (2) that the Bell Circuit Court has jurisdiction in this action; (3) that the choice of forum provision in the purchase agreement is not a term agreed to by the parties; (4) that the choice of forum provision would not apply to this action even if valid; (5) that the Bell Circuit Court should have retained venue and jurisdiction even if the choice of forum clause is part of a valid contract; and (6) that the Bell Circuit Court improperly granted summary judgment when genuine issues of material fact existed. Although the Haydens present six assignments of error, the single issue on appeal is whether the Bell Circuit Court erred by ruling that it was not the appropriate venue for litigating the Haydens=action due to the forum-selection clause found in paragraph 14 of the contract. However, we will address each of the Haydens=six assignments of error.

The Haydens=first and second assignments of error are related and can be dispensed with simultaneously. Venue is defined as ~~A~~the particular county, or geographical area, in which a court with jurisdiction may hear and determine a case.³ Section 80 of the Restatement (Second) of Conflict of Laws (1971) states that ~~A~~[t]he parties=agreement as to the place of the action cannot oust a state of judicial jurisdiction but such an

³ Black's Law Dictionary 1557 (6th ed. 1990).

agreement will be given effect unless it is unfair or unreasonable. In Prudential Resources Corp. v. Plunkett,⁴ this Court, employing ' 80 of the Restatement (Second) of Conflict of Laws, stated that

a court not specified does not lose its jurisdiction as a result of the [forum-selection] clause, but such a court declines to exercise its jurisdiction in recognition that the parties by their consent have designated the most convenient forum for their litigation. However, if suit in the selected forum would be unfair or unreasonable, the clause will not be enforced.⁵

Furthermore, Although public policy will not void a forum choosing clause, such a provision still must withstand the test of reasonableness [footnote omitted].⁶ To determine if the choice of forum clause is reasonable, several factors must be considered, including the inconvenience created by holding the trial in the specified forum[,] the disparity of bargaining power between the two parties[,] and whether the state in which the incident occurred has a minimal interest in the lawsuit.⁷

The forum-selection clause in the case sub judice specifically provides that A[CMH Homes] and [the Haydens] agree that if any dispute between us is submitted to a court for

⁴ Ky.App., 583 S.W.2d 97 (1979).

⁵ Id. at 99.

⁶ Id. at 99.

⁷ Prezocki v. Bullock Garages, Inc., Ky., 938 S.W.2d 888, 889 (1997) (citing Prudential Resources Corp., supra at 99-100).

resolution, such legal proceeding shall take place in the county in which [CMH Homes] princip[al] offices are located@ [emphasis added]. CMH Homes=principal offices are in Blount County, Tennessee. Although the Haydens cite correct rules of law which, if not for the forum-selection clause, would certainly provide for jurisdiction and venue of their action in Bell Circuit Court,⁸ they have nevertheless failed to demonstrate any grounds in either their first or second arguments on appeal to overcome the validity of the forum-selection clause. Neither argument demonstrates how the forum-selection clause is unreasonable;⁹ therefore, both arguments must fail.

The Haydens=third assignment of error is that the choice of forum provision in the purchase agreement was not a term that had been agreed to by the parties. The Haydens base this argument on their claim that the APurchase Agreement is signed by the buyers but no signature appears for the seller.¹⁰ The Haydens insist that A[t]here is nothing on the face of the contract that supports a finding that the agreement was signed and accepted=by an officer of the company.@ The Haydens acknowledge that the Purchase Agreement referred to a ARetail Installment Contract - Security Agreement@which they signed.

⁸ KRS 452.450; KRS 454.210; KRS 367.220.

⁹ Prudential Resources Corp., 583 S.W.2d at 99.

¹⁰ The Haydens concede that A[t]here is a stamped name XUV Homes=but this does not conform with the Purchase Agreement=s plain language=which recites: not valid unless signed and accepted by an officer of the company.@

The Haydens then rely upon the Entire agreement clause for their claim that the Installment Contract superseded the Purchase Agreement and became the Entire Agreement between the parties. Significantly, there is no choice of forum provision in the Retail Installment Contract - Security Agreement

[emphases added]. In summary, the Haydens argue as follows:

Moreover, based upon the plain language of the agreements between the Appellants [] and Appellee, there is no choice of forum provision affecting this action. This is true for the following reasons. First, the Purchase Contract containing the choice of forum provision made available to the Appellants was never accepted (signed) by the Appellee. Secondly, if accepted, the Purchase Agreement was superseded by the Retail Installment Contract - Security Agreement that does not contain a choice of forum provision.

Initially, we note that the Haydens are correct in asserting that no officer of CMH Homes signed the contract. Furthermore, the language at the bottom of the contract explicitly reads: Not Valid Unless Signed and Accepted by an Officer of the Company. However, this argument must fail because as a contract for the sale of a mobile home, the Uniform Commercial Code applies. Specifically, KRS¹¹ 355.2-201 provides, in pertinent part, as follows:

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a

¹¹ Kentucky Revised Statutes.

contract for sale has been made between the parties and signed by the party against whom enforcement is sought

. . . .

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

. . . .

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made[.]

In the case sub judice, CMH Homes seeks enforcement of the forum-selection clause against the Haydens. Therefore, because the Haydens signed the contract, KRS 355.2-201(1) is satisfied and KRS 355.2-201(3)(b) is not triggered. Additionally, the Haydens have not alleged that a contract did not exist. To the contrary, they have proceeded with full knowledge that a contract existed between them and CMH Homes. In fact, in the trial court's order denying the Haydens' motion to alter, amend or vacate its order of dismissal, the trial court specifically noted that the Haydens' plead the existence of the contract in their complaint and attached the contract as an exhibit to the [c]omplaint.@ The trial court further noted that CMH Homes' answer admitted that part of the Haydens' complaint which alleged "the existence of a valid contract.@ The trial court concluded that Anno other proof or evidence is required for the [c]ourt to rule on venue.@ Because both parties have

admitted the existence of the contract, the Haydens will not now be permitted to claim that CMH Homes' failure to have one of its officers sign the contract renders such contract, specifically the forum-selection clause, unenforceable.

The Haydens also argue that the retail installment contract superseded the purchase agreement, and that since the retail installment contract did not contain the forum-selection clause, such clause did not apply to their lawsuit. This argument provides the Haydens no relief since the portion of the purchase agreement entitled "ADDITIONAL TERMS AND CONDITIONS" distinctly mentions the retail installment contract. This same portion of the purchase agreement contains the forum-selection clause. Furthermore, the purchase agreement contains the following language: "THIS AGREEMENT CONSTITUTES THE ENTIRE UNDERSTANDING BETWEEN YOU¹² AND ME¹³ AND NO OTHER REPRESENTATION OR INDUCEMENT, VERBAL OR WRITTEN, HAS BEEN MADE WHICH IS NOT CONTAINED IN THIS CONTRACT." Both the purchase agreement and the retail installment contract contain language reflecting that these two instruments contain the entire agreement.

However, nowhere in the retail installment agreement does it contain language purporting to supersede the purchase agreement. In that the purchase agreement references the retail installment contract, which is a subsequent document, the

¹² CMH Homes.

¹³ The Haydens.

inference must be that the retail installment contract was incorporated by reference into the purchase agreement. The Haydens cannot be allowed to disregard the initial purchase agreement by simply asserting that the retail installment contract was the parties' entire agreement. The retail installment contract was a term and condition of the purchase agreement, as was the forum-selection clause.

The Haydens' fourth assignment of error is that even if the choice of forum provision were valid that it would not apply to this action. The Haydens base this argument upon the important distinction that [] [their] causes of action are tort actions - not contract actions. The Haydens rely upon Tractor and Farm Supply, Inc. v. Ford New Holland, Inc.,¹⁴ where the forum-selection provision stated that the Agreement shall be governed by and interpreted in accordance with the laws of the State of Michigan.¹⁵ The forum-selection provision in Tractor and Farm Supply, Inc. is distinguishable from the one at issue before us since it was explicitly drafted to solely deal with the agreement itself. In the case sub judice, the forum-selection clause states that if any dispute between us is submitted to a court for resolution, such legal proceeding shall take place in the county in which [CMH Homes'] princip[al] offices are located [emphasis added]. We conclude that this provision must be read

¹⁴ 898 F.Supp. 1198 (W.D.Ky. 1995).

¹⁵ Id. at 1201.

to encompass all disputes which may arise from the contract between the Haydens and CMH Homes.¹⁶ The forum-selection clause explicitly applies to Any dispute. A[A] [] fundamental goal of contract law is to uphold clearly ascertained and negotiated contract rights.¹⁷

The Haydens also rely upon American Advertising Distributors, Inc. v. American Cooperative Advertising, Inc.,¹⁸ which involved the following forum-selection language: AThis agreement shall be governed by the laws of the State of Arizona, which shall be the forum for any arbitration or litigation arising hereunder[.]¹⁹ In American Advertising Distributors, Inc., the Supreme Court of Kentucky noted that the action primarily Alleg[ed] fraud in the inducement to contract, not one arising out of the agreement itself.²⁰

The Haydens argue that the trial court should have considered whether fraud negated any consent to the contract containing the forum-selection clause. However, the Haydens did not make this claim before the trial court. In addition, the Haydens have not attempted to rescind the contract. Similarly,

¹⁶ In addition, unlike the case sub judice, in Tractor and Farm Supply, Inc., it was the drafter of the forum-selection clause who requested that a different law apply.

¹⁷ Tractor and Farm Supply, 898 F.Supp. at 1203.

¹⁸ Ky., 639 S.W.2d 775 (1982).

¹⁹ Id. at 776.

²⁰ Id.

in American Advertising Distributors, Inc., our Supreme Court observed that the appellant did not seek to rescind the contract. To properly address this argument it is necessary for us to also address the Haydens=sixth assignment of error.

The Haydens=sixth assignment of error is that the Bell Circuit Court improperly granted summary judgment when genuine issues of material fact existed. The Haydens allege that the trial court's Order of November 6, 2001, . . . constitutes a Summary Judgment or Judgment on the Pleadings regardless of the title of [CMH Homes's] motion.

ACR 12.02 and CR 12.03 require that a motion in which matters outside the pleadings are considered is to be treated as a motion for summary judgment.²¹ In Cabinet for Human Resources v. Women's Health Services, Inc.,²² this Court noted that where Women's Health Services filed an affidavit in support of its motion to dismiss, such Affidavit was considered by the court to be determinative of the issue [and] . . . the accompanying motion must be treated as a motion for summary judgment under CR 56.²³

As with all of their other arguments, the Haydens=brief of this argument failed to comply with the requirement of CR 76.12(4)(c)(v) in that it did not Acontain at the beginning of

²¹ Cabinet for Human Resources v. Women's Health Services, Inc., Ky.App., 878 S.W.2d 806, 807 (1994) (citing Craft v. Simmons, Ky.App., 777 S.W.2d 618 (1989)).

²² Ky.App., 878 S.W.2d 806 (1994).

²³ Id. at 807.

the argument a statement with reference to the record showing whether the issue was properly preserved for review, and, if so, in what manner.@ CMH homes stated in its brief Athat until the plaintiffs filed their civil pre-hearing statement herein, plaintiffs had never suggested that the contract should be rescinded or otherwise that there was never a meeting of the minds or an agreement as to the existence of a contract.@ In their brief, the Haydens identify the factual issues as Awhether the contracts, if any, were agreed to by the parties[;]@and Aconcerning the enforceability of these agreements as well as an issue of whether one, or all, of these agreements were intended to define the parties=rights and obligations.@ However, the Haydens have failed to identify where this argument was presented to the trial court; and from our review of the record, we must agree with CMH Homes that it was not. The trial court must first be given the opportunity to rule on an issue before we will consider it upon appellate review.²⁴ Thus, the claims in the fourth and sixth arguments concerning genuine issues of material fact being unresolved in relation to the invalidity of the purchase agreement and its inapplicability to the tort claims was not properly preserved for our review.

The Haydens raised as their fifth assignment of error their argument that the Bell Circuit Court should have retained venue and jurisdiction of this case even if the choice of forum

²⁴ Payne v. Hall, Ky., 423 S.W.2d 530, 532 (1968).

clause were part of a valid contract. The Haydens rely upon Prezocki, supra, which involved the following forum-selection clause:

ILLINOIS LAW TO GOVERN

This contract shall be governed by the laws of the State of Illinois, both as to interpretation and performance. The place of this contract, its situs and forum, shall at all times be the State of Illinois. All matters relating to the validity, construction, interpretation and enforcement of this contract shall be determined in the appropriate courts in the State of Illinois.

In Prezocki, the Supreme Court reversed the circuit court and remanded the action because, given the limited record, the Court ~~had~~ an inadequate set of facts upon which to base an appropriate legal determination.²⁵ The Supreme Court noted that the district court's limited findings required a ~~hearing~~ and a factual determination in conformity with the decision in Prudential Resources Corp. v. Plunkett, Ky.App., 583 S.W.2d 97 (1979).²⁶

We note that the forum-selection clause found in Prezocki was noticeably different from the forum-selection clause in the case sub judice. The forum-selection clause in Prezocki mandated that the ~~contract~~ shall be governed by the laws of the State of Illinois, both as to interpretation and performance.²⁶ In addition, it provided that ~~all~~ matters relating to the

²⁵ Id. at 889.

²⁶ Id. at 889.

validity, construction, interpretation and enforcement of this contract shall be determined in the . . . State of Illinois.@ This language is significantly more restricted than the language found in the forum-selection clause in the case sub judice. The language in Prezocki exclusively applied to the contract itself, whereas the provision in the contract in the case sub judice stated Any dispute.@

Nevertheless, the Haydens argue in their brief that the following issues should be addressed:

the inconvenience created by holding the trial in Tennessee; the disparity of bargaining power between the parties; whether the state in which the incident occurred has a minimal interest in the lawsuit; and whether Kentucky, as a matter of public policy, should retain jurisdiction[.]

As previously stated, in determining whether the forum-selection clause is unreasonable, a trial court should consider the inconvenience created by holding the trial in the specified forum, the disparity of the bargaining power between the two parties, and whether the state in which the incident occurred has a minimal interest in the lawsuit.²⁷ We fail to see how requiring the Haydens to litigate their claims in Blount County, Tennessee, would be unfair or unreasonable. The Haydens traveled to that county to purchase their mobile home and the contract was executed there.

²⁷ Prezocki, 938 S.W.2d at 889 (citing Prudential Resources Corp., 583 S.W.2d at 99-100).

For the foregoing reasons, the order of the Bell
Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANTS:

W. Henry Lawson
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BRIEF AND ORAL ARGUMENT FOR
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