Affirmed and Opinion filed September 30, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00482-CV

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WALLPAPERS TO GO, INC., Appellant

V.

PETER F. BRENNAN AND MARY RITA BRENNAN, Appellees

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 97-07122

O P I N I O N

Appellant, Wallpapers to Go, Inc., (WTG) appeals a summary judgment in favor of appellees, Peter F. Brennan and Mary Rita Brennan. Appellant appeals on one issue presented. We affirm the trial court judgment.

BACKGROUND FACTS

WTG is a Texas corporation, which at the time of filing its petition had its principal offices in Houston. WTG is a franchise company which licenses the use of its trademarks and business systems for the operation of retail stores offering wallpaper and other home decorating products. In March of 1995,

two franchisees of WTG, Charles and Angela Pacana, sold their existing WTG franchise to the Brennans. WTG approved the sale. On March 8, 1995, the Brennans executed a WTG franchise agreement for the operation of a WTG store in English town, New Jersey. In this franchise agreement, the Brennans agreed to pay WTG, on a monthly basis, six percent of their gross sales as a royalty and up to five percent of their gross sales as an advertising fund contribution. This franchise agreement was for ten years. Included in the franchise agreement was the following language:

> G. Any litigation between the parties may only be brought in the United States District Court for the district nearest the then-current home office of the Company, provided federal jurisdiction is obtainable, and in the event federal jurisdiction is not obtainable, in the local state court in the county in which the home office of the Company is then located. This provision applies to any dispute between the parties, whether or not other parties are also involved in the litigation and whether or not the dispute is subject to the ADR process.
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> H. Nothing contained herein shall bar the Company's rights to proceed directly to court in whatever forum the Company deems appropriate under equity rules, including the applicable rules for obtaining restraining orders and preliminary injunctions, to obtain injunctive relief against conduct (threatened or otherwise) that may cause the Company loss or damage.

In accordance with the terms of this agreement, WTG provided the Brennans with training, written procedures, advertising materials, and other valuable business tools. In March of 1996, the Brennans ceased to pay royalties. In August of 1996, the Brennans stopped providing WTG with sales reports. In December of that same year, the Brennans told WTG that they no longer wished to be franchisees.

On February 10, 1997, WTG filed its petition in the district court of Harris County, Texas. In this petition, WTG alleged that the Brennans breached the franchise agreement by failing to pay royalties and advertising fees to WTG and by violating the covenant not to compete by de-identifying themselves from WTG. The Brennans were personally served with the petition on February 20, 1997.

On May 27, 1997, the Brennans filed a special appearance and their answers subject to that special appearance. However, in December, the Brennans entered into an agreed order, by which they withdrew their special appearances and generally appeared in the case.

Seven months later, on January 23, 1998, the Brennans filed a motion to dismiss based upon the franchise agreement's forum selection clause. They argued that the case should be dismissed because

WTG did not file its claims in federal court. In response, WTG argued that the Brennans had waived their right to proceed in federal court by failing to remove the case to federal court within thirty days of service. While waiting for the trial court to rule on its motion to dismiss, the Brennans filed a statement regarding alternative dispute resolution and a witness list. The Brennans also objected to and answered discovery served on them by WTG. The Brennans also served WTG with a request for production of documents and interrogatories. On March 23, 1998, the trial court granted the Brennans' motion to dismiss. WTG appeals on one issue presented.

STANDARD OF REVIEW

The proper standard of review for a motion to dismiss is abuse of discretion. *Bowers v. Matula*, 943 S.W.2d 536, 538 (Tex. App.—Houston [1st Dist.] 1997, no writ). In determining whether a trial court abused its discretion, we must determine whether the trial court acted with reference to guiding rules and principles or whether the trial court's actions were arbitrary and unreasonable. *See Miller v. Gann*, 822 S.W.2d 283, 286 (Tex. App.—Houston [1st Dist.] 1991), *writ denied*, 842 S.W.2d 641 (Tex. 1992) (per curiam). In addition, if the ruling is contrary to the case law, that, also, is an abuse of discretion. *See Baywood Country Club v. Estep*, 929 S.W.2d 532, 535 (Tex. App. – Houston [1st Dist.] 1996, writ denied). In any event, our scope of review is limited to those arguments raised by the motion to dismiss. *See Miller*, 822 S.W.2d at 836.

DISCUSSION AND HOLDINGS

In its sole issue, Wallpaper raises several reasons why the trial court abused its discretion in granting the Brennans' motion to dismiss. We will discuss each argument separately.

First, WTG argues that the Brennans waived their right to proceed in any court other than the lower court because the parties contracted that any litigation would take place in a court "nearest the then-current home office" of WTG. This argument misinterprets WTG's own franchise agreement. The franchise

agreement provides that "[a]ny litigation between the parties may only be brought in *the United States District Court for the district nearest the then-current home office of the Company*." Clearly, WTG and the Brennans did not contract to bring the litigation in a state court in Harris County, but, rather, a federal district Court.

Second, WTG argues that the Brennans waived their right to proceed in any other court than the Harris County District Court by failing to file a motion to dismiss until after they agreed to submit to the jurisdiction of the lower court. WTG argues that when the Brennans entered into an agreed order withdrawing their special appearances, the Brennans waived all challenges to the jurisdiction of the trial court. As we discuss below, we disagree.

WTG's argument is flawed; it is trying to turn a contractual, forum selection clause issue into a jurisdictional, statutory issue. For example, WTG argues that the Brennans must comply with the due order of pleadings set out in rule 86 of the Texas Rules of Civil Procedure.[1] However, as the Brennans point out, rule 86 applies to those cases in which a defendant claims, based on the "venue" chapter, Chapter 15 of the Civil Practice and Remedies Code, that it should be sued in a county other than the one chosen by the plaintiff. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.001 et. seq. (Vernon Supp. 1999). The provisions of Chapter 15 are based on legislative decisions regarding where Texas will require or allow a defendant to respond to suit. *See id*. In essence, Chapter 15 contains a number of legislatively mandated forum selection clauses for the counties in Texas. *Id*. Some of the provisions are mandatory, see TEX. CIV. PRAC. & REM. CODE ANN. § 15.015(Vernon 1986); some are permissive, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 15.017(Vernon 1986); none govern contractual forum clauses.[2] Since rule 86 does not govern a contractual forum selection clause, but, instead, pertains to legislatively mandated

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[1] The rule states in pertinent part,

> An objection to proper venue is waived if not made by written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a. A written consent of the parties to transfer the case to another county may be filed with the clerk of the court at any time. *See* TEX. R. CIV. P. 86.

[2] Section 15.035 applies to contracts generally. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.035 (Vernon 199x). The legislature has not addressed contractual forum selection clauses.

venue provisions, the due order of pleadings set out in rule 86 does not apply to contractual forum selection clauses.

WTG also relies on rule 120a, which governs special appearances. *See* TEX. R. CIV. P. 120a. That rule governs when a party claims, for due process reasons, that it is not subject to the court's jurisdiction. *See id*.[3] Unquestionably, that, also, is not the issue in this case. In their motion to dismiss, the Brennans are not claiming that requiring them to respond to suit in Texas violates the Due Process Clause. Consequently, although WTG argues that the Brennans should not have waived their special appearance, that procedural device is not an appropriate mechanism to enforce a forum selection clause; it is used to plead jurisdictional issues. More than a few Texas courts have reached this same conclusion. See *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App.—Dallas 1996, no writ); *Busse v. Pacific Cattle Feeding Fund No. 1, Ltd.*, 896 S.W.2d 807, 812-13 (Tex. App.—Texarkana 1995, writ denied); *Greenwood v. Tillamook Country Smoker*, 857 S.W.2d 654, 656 (Tex. App.—Houston [14th Dist.] 1993, no writ); *Barnette v. United Research Co.*, 823 S.W.2d 368, 369 (Tex. App.—Dallas 1991, writ denied).

WTG tries to distinguish these cases by arguing that the Brennans filed a special appearance motion and then withdrew it, and did not file its motion to dismiss until after the special appearance. However, this argument ignores the distinction - which we have already pointed out - between a special appearance motion and a motion to dismiss. A special appearance motion challenges jurisdiction, while a motion to dismiss is the proper method to raise a contractual forum selection clause. *See Accelerated Christian Educ., Inc.*, 925 S.W.2d at 70. In addition, the First Court of Appeals affirmed a case where a motion to dismiss was filed after a special appearance motion was denied by the trial court. *See Greenwood*, 857 S.W.2d at 656.

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[3] That rule states, in pertinent part,

> Notwithstanding the provisions of Rules 121, 122, and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. . . .

See TEX. R. CIV. P. 120a.1.

In short, the Brennans did not waive their right to proceed in the federal court when they withdrew their special appearance and filed a motion to dismiss.

In addition to arguing that WTG filed the wrong procedural device at the wrong time, WTG argues that the Brennans availed themselves of the court's jurisdiction by filing documents with the state court in Harris County. According to WTG, after having benefitted from the court's jurisdiction by engaging in discovery, the Brennans may not now choose a different court. WTG cites *Dart v. Balaam*, 953 S.W.2d 478, 482 (Tex. App.—Fort Worth 1997, no writ) to support its argument. There, a contractual provision specified that any disputes between the two parties would be settled in the courts of Vanuatu. *See id.* However, ignoring that provision, the appellee in that case filed suit in Australia. *See id.* The appellant, who also ignored the contractual provision, in turn made an unconditional appearance in the Australian court and filed a counter-claim seeking affirmative relief, *See id.* While before the Australian courts, Appellant never claimed that the issue should be decided by the courts in Vanuatu, rather than by the Australian courts. *See id.*

However, *Dart* is distinguishable from the present case. First, as we noted, the appellant in Dart never alleged that the case should not be in the Australian courts. *See id.* Appellant raised the issue for the first time in the Texas courts, when the appellee requested Texas courts to recognize the Australian judgment. *See id.* at 481. Here, the Brennans raised the issue before the proper court by filing a motion to dismiss based on a the contractual forum clause in the franchise agreement. Second, before the Brennans engaged in discovery, they filed their motion to dismiss. Consequently, all of the activity occurred while waiting for the trial judge to rule on the motion to dismiss. Third, the Brennans did not avail themselves of the jurisdiction of the state court in Harris County as much as the parties in *Dart*. The Brennans filed an ADR letter, filed a witness list, and participated in some discovery. We do not find this to be such an invocation of the court's jurisdiction that they should be prevented from availing themselves of their contractual rights. In short, *Dart* is not controlling.

In its final argument, WTG contends that the Brennans waived their right to be heard in a federal court. Specifically, WTG argues that the proper remedy for the Brennans, if they truly wanted to proceed in federal court, was to follow the procedures to invoke federal jurisdiction by filing a notice of removal.

See 28 U.S.C. § 1446. However, in its argument, WTG only cites general rules of law and cases which discuss the removal statute. WTG has cited no authority which supports its contention that (1) filing a motion to dismiss is an inappropriate means to obtain a federal forum, or (2) that a motion to dismiss may not be filed after the time has passed for filing a notice of removal. Much like the court in *Barnette*, we decline to address this argument because WTG has brought forth no authority to support its argument. *See Barnette*, 823 S.W.2d 370 n.1.

Based on the reasons stated above, the trial court acted properly. The motion to dismiss was the appropriate procedural device to invoke the contractual forum selection clause. The trial court did not abuse its discretion by granting the motion to dismiss. We, therefore, overrule WTG's sole issue and affirm the trial court's dismissal of the case.

Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed September 30, 1999.
Panel consists of Justices Yates, Fowler and Draughn.[4]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[4] Senior Justice Joe Draughn sitting by assignment.