Opinion issued July 16, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00739-CV

SCOTT LAW OFFICES & DANNY RAY SCOTT, INDIVIDUALLY, Appellants

V.

QUINNEY HOLDINGS, LLC D/B/A LOSS SOLUTIONS, Appellee

On Appeal from the 25th District Court
Colorado County, Texas
Trial Court Case No. 24730

MEMORANDUM OPINION

Appellee, Quinney Holdings, LLC, doing business as Loss Solutions ("Quinney"), sued appellants, Scott Law Offices and Danny Ray Scott, individually, for breach of contract, seeking to recover expert-witness fees. Appellants challenge the trial court's order denying their motion to transfer venue in Quinney's suit. In

their sole issue, appellants contend that the trial court erred in denying their motion to transfer venue from Colorado County to Jefferson County.

We affirm.

Background

Appellants represent insureds in claim disputes involving windstorm, hail, and fire damage to real properties. Beginning in 2013, appellants retained Quinney, pursuant to an oral contract, to serve as an expert witness for its clients. Pursuant to the agreement, Quinney traveled to client properties and inspected and photographed the subject structures. Quinney then, at its principal office in Colorado County, Texas, performed loss calculations and drafted formal expert reports, which it submitted to appellants. Quinney also provided expert-witness testimony.

In 2017, Quinney brought a breach-of-contract claim against appellants in Colorado County. Quinney asserted that, after it provided expert services related to 24 properties located in various Texas counties,[1] appellants failed to pay as agreed. Specifically, appellants failed to pay invoices, dated February 23, 2015 through April 24, 2016, totaling $40,646.00. Quinney asserted that venue was proper in Colorado County because "the contract at issue and the services to be performed dealt primarily with [Quinney's] office and staff which are located in Sheridan, Colorado County, Texas."

[1] The counties of Bell, Bexar, Caldwell, Dallas, Jim Wells, Taylor, and Webb.

Appellants answered, generally denying the claims, and moved to transfer venue to Jefferson County. Appellants specifically denied that the "contract at issue and the services to be performed dealt primarily with [Quinney's] office and staff" in Colorado County. They argued that Quinney did not plead venue facts demonstrating that Colorado County was proper and did not allege that all or a substantial part of the events or omissions giving rise to the claim occurred in Colorado County. Appellants asserted that Quinney "admitted" in its petition that this case is governed by Texas Civil Practice and Remedies Code section 15.002, the general venue rule. Thus, this case should be transferred to Jefferson County, where, at the time the cause of action accrued, appellee Danny Ray Scott resided and appellee Scott Law Office maintained its principal office.

On August 1, 2017, Quinney filed a First Amended Petition, in which it restated its breach-of-contract claim and asserted that venue was proper in Colorado County because the contract at issue and a substantial part of the work performed, i.e., performing loss/damage calculations and expert services, which gave rise to the claim at issue, occurred there.

Also on August 1, 2017, Quinney filed a response to the motion to transfer, asserting that the parties' contract, under which Quinney agreed to perform the work at issue, was entered into in Colorado County. In addition, "much of the work for each project, in the creation of the expert reports ultimately used by [appellants] to

settle and/or try [their] cases, occurred in Colorado County." As its evidence in support, Quinney adduced the affidavit of its owner, Darrell Quinney, who testified as follows, in pertinent part:

> I am the person who entered into the oral contract with Danny Ray Scott and his law firm to perform expert services on his Hurricane Ike and other property damage cases. On each job for the Scott Law Offices, much of the work was performed in our office located in Colorado County, Texas. The only work that would have been performed in the specific counties where the property damage occurred would have been photographs and diagraming of the property in question. The actual preparation of the expert reports, entry into the contract, telephone calls with [appellants] to discuss the contract and the work, billing and invoicing, and the acceptance of all new assignments sent over by Mr. Scott would have all occurred in Colorado County, Texas, at [Quinney's] place of business. Therefore, not only was the contract entered into in Colorado County, Texas, the initial contact and communication by Mr. Scott for my expert services occurred over the telephone when he called me at my office in Colorado County, Texas, and the bulk of the work related to the project, and the ultimate expert report to Mr. Scott occurred at my office in Colorado County, Texas. None of the work performed under the contracts in question were performed in Jefferson County, Texas. All of the letters sent to [appellants] to request payment, and all follow-up communications with [appellants] to try to avoid the filing of the present case was also created and generated in Colorado County, Texas.

On October 27, 2017, at a hearing on the motion to transfer, Quinney argued that venue was proper in Colorado County because a substantial portion of the cause of action accrued there. Although Quinney visited numerous properties in various counties for inspection, all communications between the parties took place in Colorado County. And, Quinney performed its analyses and created its expert reports on each of the properties at its office in Colorado County; it mailed its reports

to appellants from Colorado County; and Quinney created the invoices at issue and mailed them from its office in Colorado County.

Appellants asserted at the hearing that the "main work" that Quinney performed involved visiting each of the properties in the various counties in which they were located and that Quinney's expert reports were incidental and administrative. Accordingly, asserted appellants, venue was proper in Jefferson County, where appellants resided and maintained a principal place of business.

In rebuttal, Quinney argued that it was not retained to simply visit properties in various counties and to take photographs. Rather, it was hired to analyze and evaluate the applicable damages and to provide expert reports and testimony. Accordingly, venue was property in Colorado County, where the substantial portion of that work took place. On November 16, 2017, the trial court denied the motion to transfer venue.

On April 11, 2018, the parties entered into a Rule 11 Settlement Agreement ("Settlement Agreement"), pursuant to which the parties agreed to settle Quinney's claim for $45,000.00. Appellants agreed to pay monthly installments of $500.00 and annual installments of $10,000.00. In exchange, Quinney agreed to release its claim. After appellants paid two $500.00 installments, however, they stopped paying as agreed. Accordingly, Quinney did not dismiss its claim in the trial court.

On March 28, 2019, Quinney filed a Second Amended Petition, restating its previous claim and seeking to enforce the Settlement Agreement.[2] Quinney asserted that venue was proper in Colorado County because the "contract at issue was a Rule 11 Settlement Agreement of a previous contract made the basis of this lawsuit." Quinney attached the Settlement Agreement.

Quinney then moved for a summary judgment on its claim for breach of the Settlement Agreement. Quinney asserted that it was undisputed that the agreement constituted a valid, enforceable contract; that Quinney tendered performance; that appellants breached the agreement by failing or refusing to pay as agreed; and that, as a result, Quinney was damaged in the amount of $44,000.000 plus attorneys' fees. After appellants did not file a response, the trial court granted a final summary judgment in favor of Quinney, awarding it damages in the amount of $44,000.00 and

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[2] When a settlement dispute arises while the underlying action is on appeal, the party seeking enforcement must file a separate breach-of-contract action. *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658–59 (Tex. 1996). However, when a settlement dispute arises while the trial court has jurisdiction over the underlying action, as here, "a claim to enforce the settlement agreement should, if possible, be asserted in that court under the original cause number." *Id.* at 658; *see also Padilla v. LaFrance*, 907 S.W.2d 454, 462 (Tex. 1995) ("Padilla filed a counterclaim seeking enforcement of the parties' agreement, and both sides moved for summary judgment on that claim."); *Tony's Barbeque & Steakhouse, Inc. v. Three Points Invs., Ltd.*, 527 S.W.3d 686, 689 (Tex. App.—Houston [14th Dist.] 2017, no pet.) ("If the cause that the agreement was intended to resolve is still pending in the trial court, then disputes about the settlement agreement are to be pleaded and addressed in that cause, if it is possible to do so."); *Alvarez v. Martinez*, No. 04-99-00770-CV, 2000 WL 1585653, at *2 (Tex. App.—San Antonio Oct. 25, 2000, no pet.) (because settlement dispute arose while trial court still had jurisdiction, plaintiff was required to amend her pleadings to assert claim to enforce settlement agreement).

attorney's fees of $2,500.00. Appellants' motion for new trial was overruled by operation of law.

Venue

In their sole issue, appellants argue that the trial court erred in denying their motion to transfer venue to Jefferson County because Quinney failed to present prima facie proof that venue was proper in Colorado County. Appellants asserted that the facts and events on which Quinney based its choice of venue "did not constitute a substantial part of the events giving rise to its claim but were instead administrative and merely incidental." Appellants argued that Jefferson County "served as the only proper venue for the lawsuit" because the "services to be performed under the contract at issue were primarily performed in various and numerous Texas counties, none of which included Colorado County.

A. *Standard of Review*

Venue may be "proper" under "mandatory," "permissive," or "general" rules. *See* TEX. CIV. PRAC. & REM. CODE §§ 15.001–.039; *Perryman v. Spartan Tex. Six Capital Partners, Ltd*., 546 S.W.3d 110, 130 (Tex. 2018). "Proper" venue is defined under the Civil Practice and Remedies Code as

> (1) the venue required by the mandatory provisions of Subchapter B [§§ 15.011–.020] or another statute prescribing mandatory venue; or

> (2) if Subdivision (1) does not apply, the venue provided by this subchapter [§ 15.002 ("General Rule")] or Subchapter C [§§ 15.031–.039 ("Permissive Venue")].

TEX. CIV. PRAC. & REM. CODE § 15.001(b). Thus, if a suit is governed by a mandatory venue provision, the suit must be brought in the county specified by the statute. *See* TEX. CIV. PRAC. & REM. CODE §§ 15.011–.020; *In re Sosa*, 370 S.W.3d 79, 81 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding). "Permissive and general venue statutes always yield to mandatory venue statutes." *In re Fox River Real Estate Holdings, Inc*., 596 S.W.3d 759, 762–63 (Tex. 2020). If no mandatory provision applies, the permissive venue provisions allow suits involving specific types of claims to be brought in certain counties. *See* TEX. CIV. PRAC. & REM. CODE §§ 15.031–.039. If no mandatory or permissive venue provision governs the claim at issue, the general rule will apply. *See id*. § 15.002(a) ("Venue: General Rule") ("Except as otherwise provided by this subchapter or Subchapter B [mandatory venue] or C [permissive venue], all lawsuits shall be brought [as provided]."). Under the general rule, all lawsuits shall be brought:

> (1) *in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred*;
>
> (2) in the county of defendant's residence at the time the cause of action accrued if defendant is a natural person;
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> (3) in the county of the defendant's principal office in this state, if the defendant is not a natural person; or
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> (4) if Subdivisions (1), (2), and (3) do not apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.

Id. (emphasis added).

"The plaintiff makes the first choice of venue by filing the lawsuit." *Perryman*, 546 S.W.3d at 130. When the plaintiff files in a proper venue, "that choice of venue should be honored absent a mandatory venue statute that requires transfer." *Id.* (quoting *In re Omni Hotels Mgmt. Corp*., 159 S.W.3d 627, 629 (Tex. 2005)). If the parties' dispute is "between two counties of permissive venue, transferring the case is improper." *Chiriboga v. State Farm Mut. Auto. Ins. Co*., 96 S.W.3d 673, 677 (Tex. App.—Austin 2003, no pet.) (citing *Wilson v. Tex. Parks and Wildlife Dep't*, 886 S.W.2d 259, 262 (Tex. 1994)). A trial court must consider as true all venue facts set forth in the plaintiff's pleading, unless an adverse party specifically denies those facts. *See* TEX. R. CIV. P. 87(3)(a).

If an adverse party specifically denies venue facts, the plaintiff must then respond with prima facie proof for each challenged venue fact. *Id.* "Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading." *Id.*; *see Sustainable Tex. Oyster Res. Mgmt. L.L.C. v. Hannah Reef, Inc*., 491 S.W.3d 96, 106 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). The plaintiff's prima facie proof is "not subject to rebuttal, cross-examination, impeachment, or disproof." *In re Missouri Pac. R. Co*., 998 S.W.2d 212, 216 (Tex. 1999). If the plaintiff proves venue facts that support venue, the trial

court must maintain the lawsuit in the county where suit was filed unless the motion to transfer is based on an established ground of mandatory venue. TEX. R. CIV. P. 87(3)(c). If the plaintiff fails to discharge its burden, the right to choose a proper venue passes to the defendant, who must then prove that venue is proper in the defendant's chosen county. *Wilson*, 886 S.W.2d at 260 n.1.

We review a trial court's denial of a motion to transfer venue de novo. *Killeen v. Lighthouse Elec. Contractors, L.P.*, 248 S.W.3d 343, 347 (Tex. App.—San Antonio 2007, pet. denied). In deciding whether the trial court properly determined venue, we "conduct an independent review of the entire record to determine whether venue was proper in the ultimate county of suit." *Wilson*, 886 S.W.2d at 261; *see also* TEX. CIV. PRAC. & REM. CODE § 15.064(b). We uphold the trial court's ruling if there is any probative evidence supporting venue in the county of suit. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 471 (Tex. 1995).

B. *Analysis*

Here, Quinney, in its First Amended Petition,[3] asserted that venue was proper in Colorado County because, under the general rule,[4] all or a substantial part of the

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[3] Quinney's First Amended Petition, which it filed approximately three months prior to the hearing on appellants' motion to transfer, was the live pleading properly before the trial court at the hearing. *See* TEX. R. CIV. P. 63; *Watson v. City of Odessa*, 893 S.W.2d 197, 200 (Tex. App.—El Paso 1995, writ denied).

[4] It is undisputed that the general venue rule applies to Quinney's claim of breach of an oral contract for expert witness services. Neither party asserts that a mandatory venue provision governs. *See* TEX. CIV. PRAC. & REM. CODE §§ 15.011–.020. For

events or omissions giving rise to the claim occurred there. *See* TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1). Specifically, Quinney asserted that appellants retained it to perform loss/damage calculations and to provide expert services with regard to appellants' cases and that the labor Quinney performed under the contract occurred in Colorado County, at Quinney's place of business.

Appellants, in their motion to transfer, specifically denied Quinney's venue facts. *See* TEX. R. CIV. P. 87(3)(a). Namely, they argued that venue was not proper in Colorado County because Quinney did not plead venue facts demonstrating that Colorado County was proper and did not allege that all or a substantial part of the events or omissions giving rise to the claim occurred in Colorado County. Appellants asserted that Quinney's breach-of-contract claim was based on services it performed in several different counties across Texas, none of which included Colorado County. Thus, under the general rule, this case should be transferred to Jefferson County, where appellee Danny Ray Scott resided and appellee Scott Law Office maintained its principal office.

In determining whether a county bears a substantial relationship to the events giving rise to the suit, we examine the claim. *Tex. Windstorm Ins. Ass'n v. Boyle*,

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example, this is not an action for the recovery of real property, to recover on damages to real property, to remove an encumbrance, or to quiet title. *See id.* § 15.011. Further, there is not an applicable permissive venue rule. *See id.* §§ 15.031–.039.

No. 01-13-00874-CV, 2014 WL 527574, at *2 (Tex. App.—Houston [1st Dist.] Feb. 6, 2014, no pet.) (mem. op.). Here, Quinney sues appellants for breach of contract. The elements of a breach-of-contract claim are: (1) existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff as a result of the breach. *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no pet.). In determining venue under section 15.002(a)(1) in a breach-of-contract claim, we consider "where the contract was made, performed, and breached." *In re Red Dot Bldg. Sys., Inc*., 504 S.W.3d 320, 323 (Tex. 2016); *see Killeen*, 248 S.W.3d at 348 ("Contract claims generally accrue in any county where the contract was formed, where it was to be performed or where it was breached.").

Here, because appellants specifically denied Quinney's venue facts, Quinney was required to respond with prima facie proof for each challenged venue fact. *See* TEX. R. CIV. P. 87(3)(a). Again, "[p]rima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading." *Id*.

Quinney attached to its response to the motion to transfer the affidavit of its owner, Darrell Quinney, who testified as follows:

> ***I am the person who entered into the oral contract with Danny Ray Scott and his law firm to perform expert services*** on his Hurricane Ike

> and other property damage cases. On each job for the Scott Law Offices, *much of the work was performed in our office located in Colorado County, Texas*. The only work that would have been performed in the specific counties where the property damage occurred would have been photographs and diagraming of the property in question. *The actual preparation of the expert reports,* ***entry into the contract****,* ***telephone calls with [appellants] to discuss the contract and the work****, billing and invoicing, and the acceptance of all new assignments sent over by Mr. Scott would have* ***all occurred in Colorado County,*** Texas, *at [Quinney's] place of business*. Therefore, ***not only was the contract entered into in Colorado County, Texas, the initial contact and communication by Mr. Scott for my expert services occurred over the telephone when he called me at my office in Colorado County,*** Texas, and *the bulk of the work related to the project, and the ultimate expert report to Mr. Scott occurred at my office in Colorado County*, Texas. None of the work performed under the contracts in question were performed in Jefferson County, Texas. *All of the letters sent to [appellants] to request payment*, and all follow-up communications with [appellants] to try to avoid the filing of the present case was also *created and generated in Colorado County, Texas*.

(Emphasis added.)

Quinney's evidence demonstrates that it maintains its place of business in Colorado County. And, appellant Danny Ray Scott initially inquired about Quinney's services by calling Darrell Quinney at his office in Colorado County. The parties then entered into the contract at issue over the telephone, when appellant Danny Ray Scott called Darrell Quinney at his office in Colorado County. Appellants sent Quinney work assignments at Quinney's office in Colorado County. And, Quinney performed the work in Colorado County. Although Quinney traveled to various counties to inspect properties and gather information for its expert reports,

Quinney prepared its reports in Colorado County. Further, all billing and invoicing of appellants took place from Quinney's office in Colorado County. And, all of the letters sent to appellants to request payment were generated from Colorado County, as were the "follow-up communications with appellants" about the outstanding balance, i.e., appellants' breach of the contract. Thus, Quinney presented evidence that the parties' contract was formed in Colorado County, a substantial portion of the work was performed there, and the breach occurred there. *See In re Red Dot Bldg. Sys., Inc*., 504 S.W.3d at 323; *Killeen*, 248 S.W.3d at 348.

Appellants assert that the foregoing were merely administrative actions that were incidental to the "main work" that was to be completed under the contract. However, Quinney's affidavit shows that "the actual preparation of the expert reports" constituted performance of the contract. Again, the plaintiff's prima facie proof is "not subject to rebuttal, cross-examination, impeachment, or disproof." *In re Missouri Pac. R. Co*., 998 S.W.2d at 216.

We conclude that Quinney has presented some probative evidence that a substantial part of the events giving rise to its claim occurred in Colorado County. *See Killeen*, 248 S.W.3d at 348; *see also Nalle Plastics Family Ltd. P'ship v. Porter, Rogers, Dahlman & Gordon, P.C.*, 406 S.W.3d 186, 198 (Tex. App.—Corpus Christi 2013, pet. denied) (holding affidavit testimony that "some" work was performed in Nueces County and that invoices were issued from Nueces County

office, inter alia, constituted probative evidence supporting venue in Nueces County); *Duran v. Entrust, Inc*., No. 01-08-00589-CV, 2010 WL 1241093, at *7 (Tex. App.—Houston [1st Dist.] Mar. 25, 2010, pet. denied) (mem. op.) ("Based on the affidavit provided, there is probative evidence to support the conclusion that all or a substantial part of the events occurred in Harris County because the contract that forms the basis of this suit was partially executed there, was performed there to a large extent, and was allegedly breached there."); *Killeen*, 248 S.W.3d at 348 (holding evidence that demand for payment originated from, and that phone calls were made to, Bexar County constituted some probative evidence to support trial court's determination that substantial part of events occurred in Bexar County); *Siemens Corp. v. Bartek*, No. 03-04-00613-CV, 2006 WL 1126219, at *7 (Tex. App.—Austin Apr. 28, 2006, no pet.) (mem. op.) ("Texas courts have stated that the receipt of telephone calls and letters in a particular county weighs in favor of a finding that venue is appropriate in that county.").

Because Quinney presented prima facie proof supporting the trial court's determination that a substantial part of the events giving rise to Quinney's breach-of-contract claim occurred in Colorado County, we hold that the trial court did not err in denying appellants' motion to transfer venue. *See* TEX. R. CIV. P. 87(3)(a), (c) (providing that if plaintiff presents prima facie proof to support venue, trial court

must maintain lawsuit in county where suit was filed); *Beadle*, 907 S.W.2d at 471; *Duran*, 2010 WL 1241093, at *7.

We overrule appellants' sole issue.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.