

Conditionally granted and Opinion Filed August 31, 2017.



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00246-CV

**IN RE OMNICARE PHARMACY OF TEXAS 1, LP D/B/A OMNICARE OF FT.
WORTH AND NEIGHBORCARE PHARMACY SERVICES, INC. D/B/A OMNICARE
OF SAN ANTONIO, Relators**

**Original Proceeding from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-05089**

MEMORANDUM OPINION

Before Justices Lang, Evans, and Stoddart
Opinion by Justice Stoddart

In this original proceeding, relators complain of the trial court's refusal to enforce contractual forum selection clauses and denial of their motion to dismiss based on those clauses. Unambiguous forum selection clauses are generally enforced by Texas courts. Here, the Court must decide whether a post-contractual, Rule 11 agreement to allow venue in Dallas County supersedes or waives the forum selection clauses. On this record, the forum selection clauses control and are enforceable. Because we have determined that the trial court abused its discretion by denying the motion to dismiss, we conditionally grant the relief requested.

Background

Relators (Omnicare) and real parties in interest (Remarkable) are parties to four contracts that each contain the same forum selection clause designating Delaware state and federal courts as having exclusive jurisdiction over disputes arising under or relating to the contract. The

forum selection clauses also state that Delaware’s jurisdiction is “to the exclusion of any and all other possible venues.” Remarkable filed four separate lawsuits against Omnicare in four separate Texas counties because there were four separate contracts. The parties agreed to consolidate the four lawsuits into the Dallas County lawsuit and signed a Rule 11 agreement to that affect. The Rule 11 agreement also states that Omnicare agrees to “waive any objections they may have to venue over the claims against them being in Dallas County.” After the cases were consolidated in Dallas County, Omnicare moved to dismiss the cases based on the forum selection clauses. Remarkable opposed the motion, arguing that the Rule 11 agreement superseded the contractual clauses and resulted in a waiver of the forum selection clauses by Omnicare. Remarkable also argued that enforcing the Rule 11 agreement and maintaining suit in Dallas County is necessary to further the policy of expeditious judicial proceedings. Finally, Remarkable argues that Omnicare substantially invoked the litigation process and, thus, impliedly waived the forum selection clause, by engaging in settlement discussions, entering into Rule 11 agreements, filing answers and counterclaims, and serving discovery requests. Omnicare maintains that allowing venue in Dallas County did not waive or otherwise supersede the forum selection clause requiring the cases to be filed and tried in Delaware. Rather, the Rule 11 agreement permitted venue to be in Dallas County to determine the jurisdictional issue related to the forum selection clause in a single venue. The trial court denied the motion to dismiss, and this original proceeding followed.

Applicable Law

Mandamus relief is available when a trial court clearly abuses its discretion and relief on appeal after a final judgment is inadequate. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). Contractual forum selection clauses are enforceable in Texas, and mandamus is an appropriate vehicle for enforcing such clauses. *In re Lisa Laser USA, Inc.*, 310

S.W.3d 880, 883 (Tex. 2010). A trial court abuses its discretion when it fails to properly interpret or apply a forum-selection clause. *Id.* “Further, an appellate remedy is inadequate when a trial court improperly refuses to enforce a forum-selection clause because allowing the trial to go forward will ‘vitiating and render illusory the subject matter of an appeal’—i.e., trial in the proper forum.” *Id.* (internal citations omitted). Unambiguous forum selection clauses, like the clauses at issue here, are generally enforced by Texas courts. *Id.*

“Forum” and “venue” are distinct terms of art with distinct legal meanings. *In re Brown*, 441 S.W.3d 405, 408 (Tex. App.—Dallas 2013, orig. proceeding). “A forum-selection agreement is one that chooses another state or sovereign as the location for trial, whereas a venue-selection agreement chooses a particular county or court within that state or sovereign.” *Id.* (citing *Ramsay v. Tex. Trading Co., Inc.*, 254 S.W.3d 620, 627 (Tex. App.—Texarkana 2008, pet. denied) (quoting *In re Great Lakes Dredge & Dock Co., L.L.C.*, 251 S.W.3d 68, 74–75 (Tex. App.—Corpus Christi 2008, orig. proceeding))). “Venue determinations follow forum selection. In other words, for a Texas venue statute to apply, Texas must first be the appropriate forum.” *Hoskins v. Gulf Stream Coach, Inc.*, No. 14-11-00703-CV, 2012 WL 2394055, at *3 (Tex. App.—Houston [14th Dist.] June 26, 2012, no pet.) (mem. op.); *In re Brown*, 441 S.W.3d at 408 (Virginia was proper forum pursuant to forum selection clause and, therefore, Texas’s “mandatory venue statute is never triggered.”)

Analysis

Here, the forum selection clauses are unambiguous. By entering the Rule 11 agreement, Omnicare waived objections to venue but did not waive its objections as to forum. The Rule 11 agreement served its purpose and furthered judicial efficiency by consolidating four cases into one to determine the jurisdictional issues. Under the plain language of the clauses, however, Texas is not the proper forum to determine the merits of these cases. The Rule 11 agreement did

not waive the forum selection clauses. Further, Omnicare’s actions in the underlying cases did not substantially invoke the litigation process. *See, e.g., Ascendant Anesthesia, PLLC v. Abazi*, 348 S.W.3d 454, 463, 464 (Tex. App.—Dallas 2011, no pet.) (filing declaratory judgment action and noticing deposition did not substantially invoke litigation process); *see also Phytel, Inc. v. Smiley*, No. 05–12–00607–CV, 2013 WL 1397085, * 4 (Tex. App.—Dallas Apr. 5, 2013, no pet.) (mem. op.) (party did not substantially invoke litigation process where the party engaged in mediation, filed an answer, engaged in non-extensive discovery, and filed motion to compel arbitration early in the litigation process). The trial court abused its discretion by refusing to enforce the forum selection clauses and denying the motion to dismiss.

Accordingly, we conditionally grant the petition for writ of mandamus. We order the trial court, within fifteen (15) days of the date of this opinion, to make written rulings (i) vacating the trial court’s January 25, 2017 order denying relators’ motion to dismiss, and (ii) granting relators’ motion to dismiss. A writ will issue only if the trial court fails to comply with this opinion and the order of this date.

/s/Craig Stoddart/

CRAIG STODDART
JUSTICE

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