Affirmed and Opinion Filed April 1, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01351-CV

JOHN A. SAZY, Appellant
V.
J.R. BIRDWELL CONSTRUCTION AND RESTORATION, LLC, Appellee

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-09560

MEMORANDUM OPINION

Before Justices Myers, Osborne, and Carlyle
Opinion by Justice Myers

John A. Sazy appeals the trial court's judgment against him in this suit brought by J.R. Birdwell Construction and Restoration, LLC. Sazy brings one issue on appeal contending the trial court erred by denying his motion to transfer venue from Dallas County to Tarrant County. We conclude the trial court did not err by denying the motion to transfer venue, and we affirm the trial court's judgment.

BACKGROUND

Sazy owns and resides in a house in Tarrant County. The house has a copper roof. After the roof suffered storm damage, Sazy hired a roofing consultant, Bryan Revere, to find a contractor competent to repair the roof. Revere contacted appellee

in Dallas County. Nick D'Anna, appellee's regional sales manager, went to Sazy's house and inspected and measured the roof. D'Anna told Revere that appellee could repair the roof. Several months later, Revere contacted D'Anna and told him appellee was hired. Revere said time was of the essence because work had to be begun by a certain date for insurance to cover the depreciated amount.

Appellee put together a contract, agreeing to replace the copper roof for $327,371. The project was to be overseen by Erik Larsen, appellee's division manager. Larsen took the contract to Sazy's house, and Sazy signed it. Larsen signed the contract for appellee.

The written contract required Sazy to pay appellee half of the amount before work would commence, $163,685.50, and the other half on completion. However, Sazy did not pay half the amount before the work began. Instead, he gave appellee a check for $90,000. Appellee alleged Sazy said "he would contact his mortgage company in a few days to have additional funds released, and would deliver the remainder of what he owed to [appellee's] office in Dallas County." Appellee began work on the roof, but Sazy never paid appellee any more than the $90,000.

Appellees began work on the roof in late September or early October 2016, but Sazy did not pay any additional amounts. After about six or seven weeks, when the roof was about eighty percent complete and appellee had paid more than $90,000 for materials and labor, appellee ceased working on the house until Sazy paid the remaining part of the deposit. Joshua Birdwell, who owned appellee, went with

D'Anna to Sazy's house to discuss the situation with Sazy and resolve the issues. According to D'Anna, Sazy ordered him and Birdwell off the property and told them they were not allowed back on his property.

Appellee then filed suit in Dallas County against Sazy, alleging Sazy breached the contract and committed fraud. Sazy filed a counterclaim for breach of contract, breach of warranty, negligence and violations of the Texas Deceptive Trade Practices–Consumer Protection Act alleging appellee failed to repair the roof properly in a workmanlike manner. Sazy also brought claims for conversion and civil theft because one of appellee's employees stole the copper removed from the roof. Sazy moved to transfer venue to Tarrant County, which the trial court denied. The case proceeded to a jury trial. The jury found Sazy liable for breach of contract and fraud and awarded damages to appellee. The jury found appellee liable for theft and awarded damages to Sazy. The trial court rendered judgment on the breach-of-contract and theft findings, offset the damages findings, and awarded appellee damages of $134,089.50, plus interest and attorney's fees.

Sazy appeals the trial court's denial of the motion to transfer venue. He does not appeal any of the trial court's other rulings or the jury's findings.

VENUE

In his sole issue on appeal, appellant contends the trial court erred by denying his motion to transfer venue. We review a trial court's decision to grant a motion to transfer venue *de novo*. *See Jaska v. Tex. Dep't of Protective & Regulatory Servs.*,

106 S.W.3d 907, 909 (Tex. App.—Dallas 2003, no pet.). We look to determine if there is any probative evidence that venue would have been proper in the county chosen by the plaintiff. *See id.* If so, it is reversible error to grant the venue motion. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b).

Venue may be proper under general, mandatory, or permissive venue rules. *See Perryman v. Spartan Tex. Six Capital Partners, Ltd.*, 546 S.W.3d 110, 130 (Tex. 2018) (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.001–.040). The plaintiff makes the first choice of venue by filing the lawsuit. *See id.* When the plaintiff files in a "proper" venue, "that choice of venue should be honored absent a mandatory-venue statute that requires transfer." *See id.* "Proper" venue is defined by statute as

> (1) the venue required by the mandatory provisions of Subchapter B ["Mandatory Venue"] or another statute prescribing mandatory venue; or
>
> (2) if Subdivision (1) does not apply, the venue provided by this subchapter or Subchapter C ["Permissive Venue"].

See id. (citing CIV. PRAC. § 15.001(b)).

In this case, no mandatory-venue provision applies. Instead, the general-venue statute and one permissive-venue statute apply. Under the general-venue provisions applicable to this case, venue is proper:

> (1) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred; [or]
>
> (2) in the county of defendant's residence at the time the cause of action accrued if defendant is a natural person . . . .

CIV. PRAC. § 15.002(a)(1), (2). A permissive-venue statute provides that if a suit is brought by a creditor on a consumer transaction involving a written contract, the suit may be brought in the county in which the defendant in fact signed the contract or in the county in which the defendant resides. *Id.* § 15.035(a)(2). The statute also states that when a suit is based on a written contract requiring performance in a particular county and the contract expressly names the county or a particular place in that county in writing, then the suit may be brought in the county named for performance or in the county of the defendant's domicile. *Id.* § 15.035(a)(1).

The parties bear shifting burdens of proof when a defendant challenges venue. Generally, the plaintiff chooses the venue of the case, and the plaintiff's choice of venue cannot be disturbed if the suit is initially filed in a county of proper venue. *Id.* at 928; *Union Pac. R.R. Co. v. Stouffer*, 420 S.W.3d 233, 239 (Tex. App.—Dallas 2013, pet. dism'd). "Once the defendant specifically challenges the plaintiff's choice of venue, the plaintiff has the burden to present prima facie proof that venue is proper in the county of suit." *Ford Motor Co. v. Johnson*, 473 S.W.3d 925, 928 (Tex. App.—Dallas 2015, pet. denied).

A plaintiff satisfies this burden by properly pleading the venue facts and supporting them with an affidavit and "duly proved attachments" that "fully and specifically set[ ] forth the facts supporting such pleading." *Id.* (quoting TEX. R. CIV. P. 87.3(a)). "This prima facie proof is not subject to rebuttal, cross-examination, impeachment, or disproof." *Id.*; *see also Galindo v. Garner*, No.

05-19-00061-CV, 2019 WL 2098689, at *3 (Tex. App.—Dallas May 14, 2019, no pet.) (mem. op.) ("if the plaintiff offers prima facie proof through pleadings and affidavits that venue is proper, the inquiry is over") (quoting *Surgitek, Bristol-Myers Corp. v. Abel*, 997 S.W.2d 598, 602 (Tex. 1999)). "But, 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." *Ford Motor Co.*, 473 S.W.3d at 928.

Sazy argues venue was proper in Tarrant County and not proper in Dallas County because he resided in Tarrant County, he signed the contract in Tarrant County, and the repair work under the contract was performed in Tarrant County. Sazy asserts he did not breach the contract in Dallas County because the contract did not require Sazy to pay appellee in Dallas County and he did not commit fraud in Dallas County because all statements he made were in Tarrant County to persons also in Tarrant County.

Appellee argues that venue is proper in Dallas County because "a substantial part of the . . . omissions giving rise to the claim" occurred there. *See* CIV. PRAC. § 15.002(a)(1). The omission giving rise to appellee's claims was Sazy's failure to pay the rest of the deposit as agreed. Appellee alleged that Sazy said the insurance check was made payable to him and the mortgage company, and that to pay appellee the rest of the deposit, he would have to have the funds released from the mortgage company. Appellee then alleged:

> Sazy further represented and promised that, if Birdwell Construction would nonetheless commence the work even though his deposit was insufficient, he would contact his mortgage company within a few days to have additional funds released, and would deliver the remainder of what he owed to Birdwell Construction's office in Dallas County.

Appellee stated in the petition that venue lay in Dallas County because "under the parties' contract, Sazy was required to make a large payment to Birdwell Construction at its offices in Dallas County and his failure to do so constituted a material breach of contract in this County." These allegations were supported by Birdwell's affidavit attached to his response to Sazy's motion to transfer venue.

Sazy argues there was no breach in Dallas County because the contract did not require him to pay the deposit in Dallas County. *See Jones v. Wilkes*, 199 S.W.2d 864, 865 (Tex. App.—Galveston 1947, no writ) (written contract not requiring payment at a particular place "does not authorize venue of a suit to enforce such obligation in a county other than that of the defendant's residence"). We disagree. Although the written contract did not require payment in Dallas County, it did require Sazy to pay the deposit of half the contract amount before the repairs would commence. Appellee alleged that when Sazy failed to pay the full amount of the deposit, the parties agreed that Sazy would deliver the rest of the deposit "to Birdwell Construction's office in Dallas County." Thus, appellee alleged in the petition and supported by affidavit that the parties made an oral modification to the contract requiring Sazy to pay the remainder of the deposit in Dallas County. These allegations did not meet the requirement for permissive venue under section

15.035(a)(1) because the modification was not in writing. However, Sazy's failure to fulfill the alleged oral promise to deliver the rest of the deposit to appellee's office in Dallas County constituted "the substantial part of the . . . omissions giving rise to the claim," which complied with the general venue provision of section 15.002(a)(1).

We conclude appellee pleaded and presented prima facie proof that venue was proper in Dallas County under the general venue statute. *See* CIV. PRAC. §§ 15.001(b)(2), 15.002(a)(1). Therefore, appellee's choice of Dallas County as venue for the suit must be honored. *See Perryman*, 546 S.W.3d at 130; *see also KW Constr. v. Stephens & Sons Concrete Contractors, Inc.*, 165 S.W.3d 874, 879 (Tex. App.—Texarkana 2005, pet. denied) ("If the parties' dispute involves two counties of permissive venue, transferring the case is improper."). The trial court did not err by denying Sazy's motion to transfer venue. We overrule Sazy's issue on appeal.

CONCLUSION

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

191351F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOHN A. SAZY, Appellant No. 05-19-01351-CV V. J.R. BIRDWELL CONSTRUCTION AND RESTORATION, LLC, Appellee	On Appeal from the 192nd Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-17-09560. Opinion delivered by Justice Myers. Justices Osborne and Carlyle participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee J.R. BIRDWELL CONSTRUCTION AND RESTORATION, LLC recover its costs of this appeal and the full amount of the trial court's judgment from appellant JOHN A. SAZY and from the cash deposit in lieu of cost bond. After the judgment and all costs have been paid, the clerk of the District Court is directed to release the balance, if any, of the cash deposit to John A. Sazy.

Judgment entered this 1st day of April, 2021.