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# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1999-CA-003131-MR

JOSEPH LESTER HENSHAW — APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 99-CI-00088

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANIES — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: COMBS, EMBERTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Joseph Lester Henshaw appeals from an order entered by the Union Circuit Court on September 23, 1999, which dismissed his cause of action against Kentucky Farm Bureau Mutual Insurance Companies based on improper venue. Having concluded that the trial court erroneously applied the venue test for a contract action to this civil rights action, we vacate and remand.

Henshaw began working as a Farm Bureau agency manager in Union County, Kentucky, in 1955. His job duties included serving existing Farm Bureau customers and selling new insurance

policies. He was compensated in the form of commissions. In 1980, Henshaw entered into a written agency manager's agreement with Farm Bureau. The agency manager's agreement was revised by Farm Bureau in 1994, and the new agreement was introduced and explained to its Kentucky agency managers at a meeting in December of that year. Henshaw executed this new agreement, in January 1995, at the Farm Bureau annual kick-off meeting in Jefferson County, Kentucky.

On May 14, 1998, Farm Bureau terminated its agreement with Henshaw pursuant to paragraph 17, which states:

> 17. **TERMINATION BY NOTICE:** You or the Company have the right to terminate this Agreement with or without cause at any time by giving at least ten (10) days written notice delivered to the other party or mailed to the other party's last known address.

On May 14, 1999, Henshaw filed a complaint in the Union Circuit Court against Farm Bureau wherein he alleged he had been wrongfully terminated in violation of Kentucky Revised Statutes (KRS) Chapter 344, and sought monetary damages. On June 3, 1999, Farm Bureau filed a Kentucky Rules of Civil Procedure (CR) 12.02 motion to dismiss for improper venue, or, alternatively, to transfer the matter to the Jefferson Circuit Court.

In support of its motion, Farm Bureau attached, inter alia, a copy of the agreement signed by Henshaw. Specifically, Farm Bureau argued that the choice-of-forum clause contained therein controlled the case at bar. The provision provided as follows:

> 26. **LEGAL ACTIONS UNDER THIS AGREEMENT:** Any dispute which arises under this Agreement shall be subject to the following terms:

> A. VENUE, JURISDICTION, FORUM SELECTION, AND CHOICE OF LAW.
>
> This Agreement has been made and accepted in Jefferson County, Kentucky, and it shall be interpreted in accordance with and governed by the laws of the Commonwealth of Kentucky. The Company and the Agency Manager hereby agree that any action brought against the other relating to or arising out of this Agreement shall be brought only in a state or federal court of general jurisdiction in Jefferson County, Kentucky and that any objection to this jurisdiction or venue is specifically waived.

Based upon this provision, Farm Bureau contended that Jefferson County, Kentucky, was the proper venue to consider Henshaw's claims for relief. On September 23, 1999, the trial court concluded that the Union Circuit Court was an improper venue for Henshaw to pursue his claims and it entered an order dismissing the action. Henshaw then filed a motion to alter, amend or vacate that order, which was denied on November 24, 1999. This appeal followed.

We have considered all the issues, and sub-issues, presented in this appeal. However, in the interest of avoiding a protracted opinion, we will only address the issue which is dispositive of this matter. Accordingly, the only question for this Court's review is whether the trial court abused its discretion in dismissing the action based upon improper venue.[1] Since we believe it did, we must vacate its order and remand for further proceedings.

[1] American Advertising Distributors, Inc. v. American Co-op. Advertising, Inc., Ky., 639 S.W.2d 775, 776 (1982).

As previously mentioned, the trial court based its ruling on its finding that the agreement's choice-of-forum clause was enforceable and that the clause was neither unfair nor unreasonable. We agree with Farm Bureau that this standard is the correct standard to be applied when determining whether a contractual choice-of-forum provision is enforceable.[2] However, we hold that this civil rights cause of action, as pled in the complaint, is not appropriate for a Prudential interpretation.

Henshaw's complaint alleged a civil rights violation under KRS Chapter 344, and this Court has previously stated that contractual rights and civil rights are independent in their origin:

> Civil rights are a group of rights attendant to citizenship. They belong to all persons and are not necessarily akin to private rights which may emanate from contracts of individual persons. As we have previously noted, Kentucky's Civil Rights Act was enacted to in a measure enforce policy established in federal civil rights law. KRS 344.020. We believe, therefore, that federal decisions on this issue[3] may be properly deferred to for our guidance. . . . Contractual rights are not displaced merely because a statutory right against discrimination has been provided, both rights are independent in their origin [citation omitted].[4]

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[2]Prudential Resources Corp. v. Plunkett, Ky.App., 583 S.W.2d 97, 99 (1979); Prezocki v. Bullock Garages, Inc., Ky., 888 S.W.2d 938, 939 (1997).

[3]This Court was referring "to the question of whether the action under KRS Chapter 344 may be maintained in light of appellants' simultaneous grievances filed with their Union under the nondiscrimination clause of their collective-bargaining agreement."

[4]McNeal v. Amour & Co., Ky.App., 660 S.W.2d 957, 959 (1983).

Federal courts which have addressed the issue of whether choice-of-forum clauses can limit the forum for a civil rights action have recognized the principle from McNeal, supra, that contractual rights and statutory rights against discrimination "are independent in their origin."[5] In Red Bull Assoc's. v. Best Western Int'l, Inc.,[6] the United States Court of Appeals for the Second Circuit addressed this issue in relation to a forum-selection clause in an agreement between a limited partnership which owned and operated a motel in New York and an Arizona corporation which owned the rights to the hotel name, logo, emblems and registered marks.[7] After Best Western terminated Red Bull's membership, Red Bull filed a lawsuit in the United States District Court for the Southern District of New York claiming civil rights violations due to racial bias. Best Western's motion to transfer the litigation to the District of Arizona was denied by the district court and affirmed on appeal.

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[5]See Francis M. Dougherty, J.D., Annotation, Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought, 31 A.L.R.4th 404 (1984).

[6]862 F.2d 963 (2d Cir. 1988).

[7]The forum-selection clause read:

> Unless waived by Best Western in whole or in part, the Courts located in the State of Arizona, state or Federal, shall have exclusive jurisdiction to hear and determine all claims, disputes and actions arising from or relating to this application and agreement or to any relationship between the parties hereto and venue shall be in the courts located in Maricopa County, Arizona. Applicant expressly consents and submits to the jurisdiction of said courts and to venue being in Maricopa County, Arizona.

The following provides a concise summary of the Second Circuit's analysis:

> Judge Knapp assumed Bremen [v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)] to be his lodestar in assessing the validity of forum selection clauses in the civil rights context. Bremen was an admiralty case in which the Supreme Court considered the weight accorded a choice-of-forum provision in an international towage contract. The court held that such a clause is prima-facie valid unless the party challenging it clearly shows that "enforcement would be unreasonable and unjust." Bremen, 407 U.S. at 15.
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> The Supreme Court has since decided Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988), in which it concluded that, outside the admiralty realm, § 1404(a) transfer motions are not governed by the standard articulated in Bremen but by the terms of § 1404(a) itself. Consequently, the question now before us is whether the district court examined the appropriate factors under § 1404(a) in denying Best Western's motion to transfer. Appellant contends that Judge Knapp abused his discretion by improperly considering the potential inhibitory effect on the enforcement of civil rights laws if a transfer were granted. This argument fails because pursuant to Bremen, forum selection clauses may be avoided upon a showing that enforcement "would contravene a strong public policy of the forum." Bremen, 407 U.S. at 15. Red Bull invoked federal Fair Housing, Public Accommodations, and Civil Rights laws. After an analysis of the legislative history of these statutes, Judge Knapp concluded:
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> > Congress' basic purpose in incorporating the concept of the private attorney general into the civil rights laws was to encourage litigation of civil rights claim. That public policy would obviously be hindered by enforcing a contract which would prevent or seriously discourage the pursuit of such litigation.

> Red Bull v. Best Western, 686 F.Supp. 447, slip op. at 2 (S.D.N.Y. 1988).
>
> Judge Knapp thus properly noted a clear statutory declaration that civil rights actions such as Red Bull's were to be encouraged [footnote omitted].
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> . . .
>
> While individuals are free to regulate their purely private disputes by means of contractual choice of forum, we cannot adopt a per se rule that gives these private arrangements dispositive effect where the civil rights laws are concerned. Congress declared two factors decisive on a motion for transfer pursuant to § 1404(a). The private convenience of the parties (which favors Red Bull) was only one of the elements to be considered. The other component of analysis — the interest of justice — is not properly within the power of private individuals to control. The existence of a forum selection clause cannot preclude the district court's inquiry into the public policy ramifications of transfer decisions.[8]

As the United States District Court noted in Nelson v. Master Lease Corp.,[9] "under Red Bull, the interests of justice factor in a section 1404(a) analysis may preclude the enforcement of a forum selection clause in civil rights cases." "A forum selection clause is a private matter between the parties and the interest of justice must take into account other concerns." "The interest of justice is best served by assuring the plaintiff's logistical ability to present her civil rights claim."[10]

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[8]Red Bull, supra at 966-67.

[9]759 F.Supp. 1397, 1400 (D. Minn. 1991).

[10]Id. at 1403.

Farm Bureau relies upon Weiss v. Columbia Pictures Television, Inc.,[11] where the United States District Court ordered the transfer of a federal age discrimination action. The Court held that "Weiss has failed to demonstrate that the public policy of this district and the public interests implicated in the ADEA[12] will be frustrated, and in light of the general policy of this Circuit favoring the enforcement of forum selection clauses, this Court hereby orders that this action shall be transferred."[13] Farm Bureau argues that since Red Bull and Nelson involved race discrimination claims, they are distinguishable from Weiss, which involved an age discrimination claim. We cannot agree. From our analysis of the cases, the same legal test was applied in all three cases. The distinguishing factors in the cases were the particular circumstances of the parties in each case and the exercise of discretion by the trial court - not the nature of the plaintiff's civil rights claims.

In Weiss, the United States District Court stated that in considering a motion to transfer under 28 U.S.C. § 1404(a) the court "must determine whether the forum selection clause is valid with reference to the factors specified in section 1404(a): the interests of the parties to the litigation and the public interest, as reflected in the public policy of the forum where

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[11]801 F.Supp. 1276 (S.D.N.Y. 1992).

[12]Age Discrimination in Employment Act.

[13]Weiss, supra at 1282.

the suit is pending" [citations omitted].[14] The Court in Weiss, supra at 1280, noted that the Court in Red Bull, supra, "clearly did not rule that forum selection clauses are never enforceable in civil rights actions; rather Red Bull teaches that the district court, upon consideration of the alleged violations and the particular circumstances of the parties and the action, may in its discretion find cause to ignore the general rule of the enforceability of valid forum selection clauses."

Accordingly, since Henshaw in his action alleged violations of our civil rights statutes as opposed to merely claims arising out of the terms of the agreement itself,[15] the trial court erred by applying the wrong analysis in determining whether the Union Circuit Court was the proper venue for Henshaw's claims.

The order of the Union Circuit Court is vacated and this matter is remanded to the Union Circuit Court for further proceedings consistent with this Opinion for the purpose of adjudging whether it is the proper forum to hear Henshaw's civil rights claims.

ALL CONCUR.

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[14] Id. at 1278.

[15] See American Advertising, 639 S.W.2d at 776.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Steve P. Robey
Providence, KY

BRIEF FOR APPELLEE:

James B. Brien, Jr.
J. Todd Elmore
Mayfield, KY

ORAL ARGUMENT FOR APPELLEE:

James B. Brien, Jr.
Mayfield, KY