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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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Ex parte Tim Seriana

PETITION FOR WRIT OF MANDAMUS

(In re: Tim Seriana

v.

Joe Todd Stevens and Joe Stevens, LLC)

(Calhoun Circuit Court, CV-15-900517)

WISE, Justice.

Tim Seriana, the remaining plaintiff below, filed a petition for a writ of mandamus requesting that this Court

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order the Calhoun Circuit Court to vacate its October 23, 2018, order granting the motion for a change of venue filed by Joe Stevens, LLC ("Stevens"), one of defendants below. We grant the petition and issue the writ.

Facts and Procedural History

On September 24, 2015, Seriana and his wife, Karen Seriana, sued Joe Todd Stevens and various fictitiously named defendants in the Calhoun Circuit Court. The complaint alleged that Joe Todd Stevens was a contractor who did business in northeast Alabama. The complaint further alleged:

"5. In the early morning hours of March 14, 2014, the plaintiff, Tim Seriana, was traversing the premises of his employer, Alabama Speciality Products, Inc. In the hours preceding the plaintiff's course of pedestrian travel, Joe Todd Stevens and/or fictitious party defendants constructed and/or participated in certain landscaping and/or earth removal so as to create an exposed ditch, hole and/or other excavated area. The defendants, both named and fictitious, failed to barricade, recover and/or otherwise light the area[,] thus giving rise to a hazardous, dangerous and/or otherwise altered condition.

"6. While taking his usual pedestrian course from his vehicle to his place of work, plaintiff, Tim Seriana, was caused to fall into the ditch and/or hole and/or excavated area created by the defendants, both named and fictitious.

"7. Plaintiff alleges that the ditch and/or hole and/or excavated area was created without notice to

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the plaintiff and without warning to the plaintiff. Furthermore, the ditch, hole and/or excavated area was neither barricaded, 'roped off,' illuminated and/or otherwise recovered or restored to its original condition so as to warn the plaintiff and/or others of the danger and risk of injury."

In the section designating the fictitiously named defendants, the complaint indicated that the Alabama Speciality Products, Inc., facility, where the injury occurred, was located in Munford, Alabama, which is in Talladega County. Seriana alleged that he suffered injuries and damage as a result of the fall. Seriana asserted that the defendants' actions constituted negligence, willfulness, wantonness, and/or recklessness and that their actions also constituted "a violation of rules, regulations and guidelines governing the conduct of the defendants, both named and fictitious." Karen asserted a claim alleging loss of consortium. On August 19, 2016, the plaintiffs filed an "Amendment to Complaint to More Particularly Identify Defendant Party." The amended complaint alleged:

"15. That the defendant, Joe Stevens, LLC., is an entity owned exclusively by defendant Joe Todd Stevens. Joe Stevens, LLC., contracted with plaintiff, Tim Seriana's, employer, Alabama Speciality Products, Inc., to excavate and/or otherwise perform certain construction activities on the property of Alabama Speciality Products, Inc.

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"16. Although Alabama Speciality Products, Inc., paid Joe Todd Stevens for services that Joe Stevens, LLC., and Joe Todd Stevens provided to Alabama Speciality Products, Inc., Joe Todd Stevens has identified Joe Stevens, LLC., as the entity that, by agreement, performed the services at [the] Alabama Speciality Products, Inc., facility.

"Therefore, pursuant to provisions of [Ala. R. Civ. P.] 15(c)(3), plaintiffs amend their complaint to identify, on the basis of information provided by Joe Todd Stevens, Joe Stevens, LLC., as a proper party defendant to respond to claims made the basis of this litigation."

On August 23, 2016, the trial court entered an order allowing the amendment to the complaint. On August 14, 2017, Stevens filed an answer, and, on June 13, 2018, the plaintiffs moved to dismiss Karen's loss-of-consortium claim.

On October 18, 2018, Stevens filed a motion for a change of venue from Calhoun County to Talladega County. In its motion, Stevens alleged:

- "1. The plaintiffs inadvertently filed the case in Calhoun County, Alabama instead of Talladega County, Alabama.
- "2. Defendant resides in Talledega County, Alabama.
- "3. Defendant's place of business is in Talladega County, Alabama.
- "4. The location of the accident occurred in Talladega County, Alabama."

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Seriana filed an objection to the motion for a change of venue.

On October 23, 2018, the trial court entered an order granting Stevens's motion for a change of venue and transferring the case to Talladega County. Seriana then filed this petition for a writ of mandamus.

Standard of Review

"Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court." Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). This Court reviews mandamus petitions seeking review of a venue determination by asking whether the trial court exceeded its discretion in granting or denying the motion for a change of venue. Ex parte Scott Bridge Co., 834 So. 2d 79, 81 (Ala. 2002).'

Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309-10 (Ala. 2003).

"The question of proper venue for an action is determined at the commencement of the action." Ex parte Pratt, 815 So. 2d 532, 534 (Ala. 2001). "If venue is not proper at the commencement of an action, then, upon motion of the defendant, the action must be transferred to a court where venue would be proper." Ex parte

Overstreet, 748 So. 2d 194, 196 (Ala. 1999). "A petition for a writ of mandamus is the appropriate means for challenging a trial court's refusal to transfer an action and such a petition is due to be granted if the petitioner makes a clear showing of error on the part of the trial court." Ex parte Alabama Power Co., 640 So. 2d 921, 922 (Ala. 1994). "In considering a mandamus petition, we must look at only those facts before the trial court." Ex parte American Res. Ins. Co., 663 So. 2d 932, 936 (Ala. 1995).'

"Ex parte Walter Indus. [, Inc.], 879 So. 2d [547,] 549 [(Ala. 2003)]."

Ex parte AAMCO Transmissions, Inc., 897 So. 2d 285, 287-88 (Ala. 2004).

Discussion

In his petition, Seriana argues that the trial court erroneously transferred this case to Talladega County because, he says, Stevens waived any objection it might have had to venue in Calhoun County when it answered the amended complaint without raising the defense of improper venue. In addressing a similar argument in Ex parte AAMCO Transmissions, Inc., this Court stated:

"In its answer to AAMCO's petition for a writ of mandamus, Maddox maintains that by answering the original complaint without raising the defense of improper venue AAMCO waived any objection it might have to venue in the Bessemer Division.

"In Ex parte Till, 595 So. 2d 871, 872 (Ala. 1992), this Court stated:

"Rule 12(b) [, Ala. R. Civ. P.,] provides, in part:

""(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (3) improper venue.... A motion making any of these defenses shall be made before pleading if a further pleading is permitted."

"Rule 12(b), therefore, requires that a claim of "improper venue" be made in the responsive pleading or in a motion filed before the responsive pleading. A "responsive pleading" in regard to a complaint is an answer. See Rule 7[, Ala. R. Civ. P.]. If a party fails to raise a Rule 12(b)(3) objection in the first responsive pleading or in a motion filed before that first responsive pleading, the objection is waived. There is an exception to that general rule, of course; a party can waive only an objection "then available to him.'" See Jerome A. Hoffman and Sandra Guin, Alabama Civil Procedure, § 4.82 p. 256 (1990). The exception provides that an objection to the venue of an action may be raised after an amended complaint is filed, if the impropriety of venue appears for the first time in the

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complaint as amended. Id. The exception to the general rule is not applicable here, because the facts giving rise to the defendant's venue objection did not arise for the first time upon the filing of the amendment. Consequently, the [defendant] did not timely file the motion for a change of venue....'"

897 So. 2d at 288 (emphasis omitted).

In this case, Stevens did not raise the issue of improper venue in a motion for a change of venue filed before it filed its answer. Additionally, Stevens filed its answer almost a year after the filing of the amended complaint. However, Stevens did not raise the defense of improper venue in its answer. Rather, it raised the issue of improper venue for the first time in a motion for a change of venue that was filed more than a year after it filed its answer.

Stevens argues that it did not waive its right to challenge venue because the plaintiffs moved to dismiss Karen's claim on June 13, 2018. Thus, Stevens asserts:

"In the present case, the dismissal of [Karen]'s claim has the same effect as amending the complaint. A Plaintiff seeking damages, whose residence was in Calhoun County, was dismissed from the case entirely. Following the dismissal of [Karen]'s claims and depositions occurring that same day, this was the first time the [Stevens] possessed the requisite information entirely needed to file a motion to transfer venue."

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(Stevens's brief, at p. 7.) However, Stevens based its motion for a change of venue on the fact that Joe Todd Stevens resided in Talladega County; the fact that Stevens's place of business was located in Talladega County; and the fact that the accident at issue occurred in Talladega County. Therefore, the facts giving rise to Stevens's objection to venue were present when Seriana filed the amended complaint on August 19, 2016. Further, the dismissal of Karen as a plaintiff was irrelevant to Stevens's venue objection. Accordingly, Stevens's argument in this regard is without merit.

Stevens also asserts:

"[G]iven we reserved our right to amend our answers, including affirmative defenses, until full discovery was completed, we did not waive our objection to improper venue."

(Stevens's brief, at p. 7.) In its answer, Stevens stated: "Defendant reserves the right to amend this Answer, including affirmative defenses, after full and complete discovery." This Court addressed a similar situation in Ex parte Lugo de Vega, 65 So. 3d 886, 896 (Ala. 2010):

"The Wilson defendants also petition this Court for a writ of mandamus directing the trial court to transfer the plaintiffs' claims against them to

Tuscaloosa County. As referenced above, the trial court denied the Wilson defendants' motion for a change of venue on the ground that they 'waived their right to transfer by not timely filing a request for the same.'

"Rule 12(h)(1), Ala. R. Civ. P., states:

"'A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g),⁸ or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.'

"Here, the Wilson defendants neither raised the defense of improper venue by motion under Rule 12 nor included the defense of improper venue in their initial answer to the complaint. Instead, in their initial answer, they stated that '[t]he Wilson defendants expressly reserve the right to assert any and all additional defenses, including Rule 12b defenses' and '[t]he Wilson defendants adopt and incorporate herein any and all defenses that may be asserted by any other defendant or defendants which may later be named in this case.' (Emphasis added.) This is not sufficient pleading of a defense of improper venue in a responsive pleading because both assertions are merely reservations of the right to raise any defenses in the future, rather than the assertion of a certain defense. ...

"

⁸Rule 12(g), Ala. R. Civ. P., states:

"'A party who makes a motion under this rule may join with it any other motions

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herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated'"

Similarly, in this case, Stevens did not raise the defense of improper venue in its answer to the complaint. Therefore, Stevens did not preserve its right to file a motion for a change of venue in accordance with Rule 12(h), Ala. R. Civ. P. Accordingly, Stevens waived its right to challenge venue in Calhoun County, and Seriana has a clear legal right to an order vacating the trial court's order granting Stevens's motion for a change of venue.

Conclusion

For the above-stated reasons, we grant Seriana's petition for a writ of mandamus, and we direct the trial court to vacate its October 23, 2018, order granting the motion for a change of venue and transferring the case to Talladega County.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.