FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-90

KUSTOM US, INC.,

Appellant,

v.

HERRY, LLC,

Appellee.

On appeal from the Circuit Court for Bay County.
John L. Fishel, II, Judge.

October 16, 2020

M. K. THOMAS, J.

Herry, LLC, is a subcontractor of Kustom US, Inc., doing work on a property in Bay County on Kustom's behalf. Herry filed suit against Kustom for breach of contract for unpaid work, which Kustom argued should be transferred to Seminole County. The trial court denied Kustom's motion to dismiss and transfer the case, a nonfinal order concerning venue which Kustom now appeals. *See* Fla. R. App. P. 9.130(a)(3)(A). We affirm.

Selection of venue is the prerogative of the plaintiff, and courts will not disturb the selection so long as it is proper as provided in the Florida Statutes. *See Am. Vehicle Ins. Co. v. Goheagan*, 35 So. 3d 1001, 1002 (Fla. 4th DCA 2010). Kustom is a foreign corporation doing business in Florida, thus, venue is proper

in any Florida county where Kustom "has an agent or other representative," or in the county where Herry's cause of action accrued. *See* § 47.051, Fla. Stat. (2019).[1]

An unsworn complaint is sufficient to lay venue if unchallenged by the defendant; however, the defendant may also challenge a complaint's allegations that venue is proper through the filings of motions and affidavits controverting the point. *Am. Vehicle Ins. Co.*, 35 So. 3d at 1003. Once venue is in dispute, and once the defendant has provided evidence successfully contesting venue, the burden shifts to the plaintiff to provide evidence in support of the claim that venue is proper. *See id.*; *see also Tropicana Prod., Inc. v. Shirley*, 501 So. 2d 1373, 1375 (Fla. 2d DCA 1987). If a plaintiff cannot do this, then venue is improper and the case should be transferred, if possible, to a county where venue is proper. *See* Fla. R. Civ. P. 1.060(b); *see also Am. Vehicle Ins. Co.*, 35 So. 3d at 1003.

That established, a plaintiff's burden to affirmatively prove venue does not arise where a defendant has not successfully carried its initial burden to controvert venue in affidavits and at a hearing. *See Polackwich v. Fla. Power & Light Co.*, 576 So. 2d 892, 894 (Fla. 2d DCA 1991); *Hancock v. Crippen*, 457 So. 2d 591, 592 (Fla. 3rd DCA 1984) (affirming a trial court's denial of a motion to dismiss for improper venue because the defendant's supporting affidavit did not sufficiently contest the claim that venue was proper under the statute, thus, the defendant never carried the initial burden).

Here, Kustom submitted an affidavit from the president of the corporation swearing that its principal place of business and all of its agents and representatives were located in Seminole County. The affidavit also swore that Kustom maintained no offices in Bay County and had no representatives there. However, at the hearing on its motion, Kustom did not deny the existence of the underlying contract or that it had come to Bay County to perform the work at

[1] There is no "property in litigation" for venue purposes in this case, thus, that provision of the statute is unavailable to Herry in laying venue. *See* § 47.051, Fla. Stat. (2019).

issue therein. Based on these undisputed facts, the trial court essentially determined that Kustom had not successfully controverted Herry's allegation that venue was proper, reasoning that the "county where such corporation has an agent" portion of the venue statute was "pretty broad" and had been satisfied by Herry's complaint alleging that Kustom had agents in Bay County performing business. Therefore, even though Herry presented no evidence contradicting Kustom's affidavit, the trial court nonetheless found venue to be proper in Bay County.

The trial court's conclusion that venue was proper based on these facts is a legal conclusion, reviewed de novo. *See Mercury Ins. Co. of Fla. v. Jackson*, 46 So. 3d 1129, 1130 (Fla. 1st DCA 2010) ("the issue of whether venue is proper in a particular forum is not a matter of judicial discretion.").

Kustom argues that the "doing business" reasoning employed by the trial court constitutes an erroneous interpretation of section 47.051. Even if we agreed with Kustom on this point, the trial court's denial of the transfer motion would nonetheless have to be affirmed if an alternative basis for affirmance is reflected in the record which was before the court below at the time of its ruling. *See Robertson v. State*, 829 So. 2d 901, 906–07 (Fla. 2002).

Kustom also claims that Herry's cause of action could not be deemed to have accrued in Bay for venue purposes because the damages sought were monetary and because the contract did not provide for payment of the disputed funds in Bay County. *See Magic Wok Int'l, Inc. v. Li*, 706 So. 2d 372, 374 (Fla. 5th DCA 1998) (explaining the "debtor-creditor rule"). In response, Herry correctly notes that the debtor-creditor rule cited by Kustom only applies in instances where liquidated damages are being sought and not where the amount of damages alleged must be proved by evidence. *See id.*

Because the damages sought here appear to be unliquidated, determination of whether Herry's complaint accrued in Bay County requires us to "look to the gravamen of the allegations . . . to determine where the cause of action accrued and proper venue lies." *Id.*; *see also Am. Int'l Food Corp. v. Lesko*, 358 So. 2d 250, 252 (Fla. 4th DCA 1978) (assessing suit for breach of contract and tort

to recover unliquidated damages brought by a Lesko in his county of residence and rejecting application of debtor-creditor rule, holding instead that cause of action accrued in county where the subject matter of the contract was located).

The gravamen of Herry's complaint is for breach of its contract with Kustom for work in Bay County. Kustom did not dispute the contract, nor the work in Bay County, in its affidavit or in the hearing. Because the subject matter of the contract allegedly breached can be found entirely in Bay County, we agree with Herry that its cause of action accrued there.[2] Thus, even if the trial court erred in reasoning that Kustom had failed to controvert venue based on the "having a representative in the county" provision of 47.051, its conclusion was nonetheless correct based on accrual of the claim in Bay County. *See Robertson*, 829 So. 2d at 906.

The foregoing considered, the trial court's denial of Kustom's motion to dismiss and transfer of the case is AFFIRMED.

ROBERTS and OSTERHAUS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

J. Keith Ramsey and James M. McCrae of Holland & Knight, LLP, Orlando, for Appellant.

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[2] Herry also argues that venue is proper because one of the affirmative defenses raised in Kustom's answer to the complaint accrued in Bay County. On this point, Herry is incorrect as accrual of a defense is not a proper ground for laying venue. *See Tropicana Prod., Inc. v. Shirley*, 501 So. 2d 1373, 1375 (Fla. 2d DCA 1987) ("The 'gravamen' of an action cannot be what the plaintiff anticipates the defendant may raise as a defense.").

William L. Ketchersid and David L. Powell of Ward & Ketchersid, Destin, for Appellee.