RENDERED: OCTOBER 18, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001361-MR

INTERNATIONAL GRAPHIC SERVICES, INC. APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 99-CI-00210

HOST COMMUNICATIONS, INC. APPELLEE

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, JOHNSON, and SCHRODER, Judges.

GUDGEL, JUDGE: International Graphic Services, Inc. (IGS) appeals from the Fayette Circuit Court's orders determining that it was a proper forum for this lawsuit, and granting summary judgment to Host Communications (Host) in a contract dispute concerning the sale and purchase of a printing press. We affirm.

IGS sells machinery and supplies used in the printing business. In August 1998, the parties entered into a contract whereby IGS was to acquire a printing press from White Horse Machinery (White Horse) in England and sell it to Host for $945,000. The agreement contained a price adjustment clause providing that IGS could revise the price by written notice at any time prior to ten days before shipment. If Host desired to

cancel the agreement, it was required to do so in writing within ten days of the notice's receipt. Host paid IGS a $60,000 earnest money deposit in conjunction with the contract's execution.

On September 21, 1998, Bill Litviak of IGS faxed a message to Mike Wells of Host. Attached to the fax was a copy of a fax from Robin Vouvello of White Horse to Jeff Moore of IGS. Although the two documents, read together, indicated that IGS's cost of purchasing the press from White Horse would increase, the Litviak fax did not specifically indicate that IGS intended to increase the price it would charge Host. The parties subsequently discussed the price increase by telephone, including a discussion on September 24 regarding how, if at all, the price increase would impact the contractual price. On October 1, IGS wrote to Host indicating that it might be able to absorb some portion of the price increase, but clearly implying that there would be some increased cost to Host for purchasing the press. On October 7, Host informed IGS of its intent to cancel the contract, and it demanded return of the $60,000 earnest money deposit.

IGS asserted that Host's effort to cancel the contract was untimely, and it refused to return the earnest money. On January 20, 1999, Host filed a complaint in the Fayette Circuit Court seeking return of the earnest money. IGS apparently filed a breach of contract lawsuit in Maryland on the same date and moved to dismiss the Fayette County case pursuant to the contract's forum selection clause. On March 23, 1999, the

Fayette Circuit Court entered an order denying the motion to dismiss and holding that it was a proper forum for the proceeding.

Host subsequently filed a motion for summary judgment, arguing that it was first given notice of a price increase on October 1, 1998, and that its notification of cancellation on October 7 therefore was timely. IGS argued in response that Host had notice of the price increase as of September 21, 1998, and that the attempted cancellation therefore was untimely. On May 25, 2001, the trial court found that the October 1 correspondence provided the first proper notice of the price increase and entered an order granting summary judgment to Host. Final judgment, awarding Host $60,000 plus interest, was entered on June 8, 2001. This appeal followed.

First, IGS contends that the trial court erred by denying its motion to dismiss based upon the contract's forum selection clause, which provided:

> This contract shall be governed by the laws of Maryland and VENUE for any legal action sought must be a competent Maryland court.

It is therefore necessary to determine whether Kentucky or Maryland law should be used in interpreting the forum clause. Having reviewed Prezocki v. Bullock Garages Inc., Ky., 938 S.W.2d 888 (1997), we conclude that Kentucky law should be used at any stage of the proceedings in which the validity and enforceability of the forum selection clause is at issue.

In Prezocki, the plaintiff filed a complaint against Bullock Garages in Oldham County, Kentucky, alleging breach of

contract, negligence, and breach of state and local building codes and ordinances. Bullock Garages subsequently filed a motion to dismiss, asserting that any lawsuit was required to be filed in Illinois pursuant to the contract's forum selection clause, which stated as follows:

ILLINOIS LAW TO GOVERN

> This contract shall be governed by the laws of the State of Illinois, both as to interpretation and performance. The place of this contract, its situs and forum, shall at all times be the State of Illinois. All matters relating to the validity, construction, interpretation and enforcement of this contract shall be determined in the appropriate courts in the State of Illinois. (Emphasis added.)

938 S.W.2d at 888. The Kentucky Supreme Court ultimately remanded the matter to the trial court for additional factual determinations in accordance with Prudential Resources Corp. v. Plunkett, Ky. App., 583 S.W.2d 97 (1979). The supreme court indicated that the forum selection clause's enforceability should be determined in light of the adoption in Prudential of the Restatement (Second) of Conflict of Laws § 80 (1971), which states:

> The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction but such an agreement will be given effect unless it is unfair or unreasonable.

Further, the Prezocki court noted that Prudential identified several factors which should be considered in determining whether a forum selection clause was unreasonable, including "the inconvenience created by holding the trial in the specified forum; the disparity of bargaining power between the two parties;

and whether the state in which the incident occurred has a minimal interest in the lawsuit." 938 S.W.2d at 889 (citing Prudential, 583 S.W.2d at 99-100). See James T. Gilbert, Choice of Forum Clauses in International and Interstate Contracts, 65 Ky.L.J. 1, 32-42 (1976). See also Horning v. Sycom, 556 F. Supp. 819 (E.D. Ky. 1983). Where the parties have contractually selected a forum, it is incumbent upon the resisting party to establish that the choice was unreasonable, unfair or unjust. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S.Ct. 1907, 32 L.Ed.2d 513, 520 (1972).

Here, consistent with its duty to do so, the trial court analyzed the enforceability of the forum selection clause in light of Prudential, and found that enforcement of the clause would be unfair or unreasonable. In doing so, the court determined that Maryland would be a seriously inconvenient forum, and that Kentucky had more than a minimal interest in the action. Contrary to appellant's assertions, the trial court made both factual findings and legal conclusions, which are supported by the record, in reaching its choice of forum determination. In our view, the trial court's decision not to enforce the forum selection clause clearly did not amount to an abuse of its discretion. As such, it may not be disturbed.

Next, IGS contends that the trial court improperly granted summary judgment as to whether Host gave proper and timely notice of its decision to cancel the contract. We disagree.

The appellate standard of review of a summary judgment is whether the trial court correctly found that there was "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. Further, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should only be used "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)); Turner v. Pendennis Club, Ky. App., 19 S.W.3d 117, 119 (2000).

The contract between IGS and Host provided as follows:

> PRICE ADJUSTMENT:
>
> It is agreed between the parties that the price or terms applying to the sale of the equipment herein may, by written notice, be revised by the Seller at any time prior to, but no later than, 10 days after the date of shipment of the equipment. On receipt of such notice, Buyer shall give to Seller a notice in writing accepting the said new price or canceling the contract, within ten (10) days after the date of notice of revision of price terms.

IGS communicated with Host in writing on September 21[1] and October 1, 1998, concerning the price of the printing press. While the parties apparently also had verbal communications

[1]Although Host contends that it never received the September 21 fax, for summary judgment purposes we assume that it did.

between those dates, such communications are irrelevant here since the contract required any price increase notification to be in writing. Host then notified IGS on October 7 that it was canceling the contract. Hence, whether Host is entitled to summary judgment depends upon whether there is any genuine issue of material fact as to whether the September 21 communication from IGS notified Host that there would be a price increase.

The record shows that the September 21 communication included Litviak's fax transmittal sheet to Wells, plus a copy of a fax from Vouvello to Moore. Litviak's fax stated:

> I received this fax this afternoon. I tried to contact Jeff Moore who is in route to England today. I must admit that I have been out of the loop since I was away. I had hoped to have reached Jeff this afternoon to tell me how to proceed, but he has not responded. That is why I am forwarding you this fax.
>
> The enclosed fax indicates the price has increased and it will be shipping in three weeks. Please let me know how you want me to proceed.

Vouvello's fax in turn advised Moore that IGS's cost of purchasing the printing press was increasing by 50,000 pounds sterling, or approximately $82,500 depending upon the exchange rate. The message also stated, "[p]lease urgently advise whether [Host Communications] is able to absorb this price increase to enable us to finalis [sic] this press or not."

Viewing the September 21 communication in the light most favorable to IGS and resolving all doubts in its favor, we conclude that the communication did not inform Host that IGS was giving notice of an increase in the purchase price of the press.

Indeed, in the transmittal sheet Litviak stated that he had been "out of the loop" on the printing press sale, and that he was sending the Vouvello fax to Mike Wells of Host only because he had been unable to reach Jeff Moore. Further, while the communication informed Host that White Horse was increasing the cost of the press to IGS, it did not inform Host that any of the increase would be passed through to it, with the result that it did not satisfy the contract's requirement that IGS give Host written notice of any "new price." Hence, the September 21 communication did not trigger Host's obligation to notify IGS of its rejection of a price increase, and Host's October 7 rejection was timely as it was given within the ten-day cancellation period from the October 1 communication. Thus, we agree with the trial court's determination that Host was entitled to summary judgment.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

JOHNSON, J., CONCURS.

SCHRODER, J., DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING. The trial court applied the four Prudential factors, beginning with whether the clause was freely negotiated. The record discloses that Host Communications is a large and sophisticated sports marketing company which, among other things, publishes sports brochures and programs for colleges and universities throughout the United States. The trial court found that Host Communications was on equal footing with International Graphic in negotiating the contract (both large companies) and I find no abuse of discretion

in finding a freely negotiated provision of the contract. Unless the trial court's findings were clearly erroneous, we cannot find the trial court abused its discretion and we must affirm the finding of fact. National Collegiate Athletic Ass'n. v. Lasege, Ky., 53 S.W.3d 77 (2001).

The trial court next considered whether the specified forum was a seriously inconvenient place for trial. The trial court concluded:

> Although IGS will be inconvenienced slightly by the trial in Kentucky, the true inconvenience would fall on Host if it were in Maryland. The nature of this action is rescissional and therefore almost all of the witnesses will be in Kentucky where Host alleges they rescinded the contract. There will also be the question of whether Host received the change in the price from IGS and that question will be answered by witnesses in Kentucky. Furthermore, Host does not do business in Maryland, but IGS has chosen to do business in Kentucky.

I do not disagree with the trial court's finding that Host Communications will be inconvenienced if the case is litigated in Maryland. However, I believe the mere finding of inconvenience does not meet the requisite legal standard. International Graphic would be equally inconvenienced if the litigation is held in Kentucky, and Host Communications has at least equal legal and financial resources to litigate in another forum. M/S Bremen, 407 U.S. 1, 92 S. Ct. 1907, 32 L. E. 2d 513, articulated the standard:

> it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for

> concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

Id. 407 U.S. at 18, 92 S. Ct. at 1917, 32 L. Ed. 2d at 525. Kentucky adopted this standard in Fite & Warmath Construction Co. v. MYS Corp., Ky., 559 S.W.2d 729 (1977). Where the issue is a question of law, the reviewing court decides de novo. Scifres v. Kraft, Ky. App., 916 S.W.2d 779 (1996). I do not believe Host met this factor. See Prudential, 583 S.W.2d at 99.

The third factor in Prudential is whether enforcement would contravene a strong public policy of the forum in which suit is brought. Prudential, 583 S.W.2d 97, and Prezocki, 938 S.W.2d 888, approve forum selection clauses. The trial court found the facts of this case differed from Horning, 556 F. Supp. 819, wherein a large corporation was taking advantage of a small business man. Here, the trial court concluded both companies were sophisticated companies that involved no public policy considerations or conflicts in laws. This finding is supported by the record. Lasege, 53 S.W.3d 77.

The last factor in Prudential requires that the trial court consider whether Kentucky has more than a minimal interest in the lawsuit. This lawsuit concerns the purchase by a Kentucky corporation from a Maryland corporation of a printing press shipped from England. The collateral for the contract will remain in Kentucky and although IGS is based in Maryland, it did business in Kentucky while Host Communications has no other connections with Maryland. The trial court found that Kentucky has more significant contacts with this action than Maryland.

Appellants do not really argue that Kentucky does not have more than a minimal interest, but rather that Maryland has a valid interest too. Under Prudential, this is just one factor to consider and under Lasege, 53 S.W.3d 77, I cannot say the finding was clearly erroneous.

Finally, the trial court found the forum selection clause itself was ambiguous because it stated "venue should be in a competent Maryland court, . . ." (Emphasis added.) However, this statement contradicts the court's finding on page two of its opinion that states the clause in issue is as follows: "and VENUE for any legal action sought must be a competent Maryland court." (Emphasis added.) There is no ambiguity in the word "must" even according to the trial court.

I am persuaded that the trial court erred by not enforcing the forum selection clause of the contract. I would reverse the judgment of the Fayette Circuit Court and remand for an order of dismissal.

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