

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-001300-MR

MIDNIGHT TERROR PRODUCTIONS, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 09-CI-011504

WINTERLAND, INC.

APPELLEE

OPINION  
VACATING AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: CLAYTON, COMBS, AND THOMPSON, JUDGES.

COMBS, JUDGE: Midnight Terror Productions, LLC, a Kentucky limited liability company, appeals from an order of the Jefferson Circuit Court dismissing its complaint against Winterland, Inc. Winterland is a foreign corporation having a mailing address in Cicero, Indiana. After our review, we vacate and remand for further proceedings.

Midnight Terror promotes local, for-profit, public events. Winterland sells, leases, and erects outdoor decorations and light displays. On September 17, 2009, the parties entered into a contract entitled, “Joint Venture Agreement.” Under the terms of this agreement, Winterland was to provide decorations, display equipment, and other materials to Long Run Park in Louisville for an event called “Gift of Lights.” This event was to be operated and promoted by Midnight Terror during the 2009 holiday season and was scheduled to run from November 26, 2009, through December 30, 2009. The agreement provided that Winterland would enter into a contract (“the License Agreement”) with the Louisville/Jefferson County Metro Parks Department in order to be licensed to participate in the event.

Winterland was to complete delivery of its materials to Long Run Park by November 9, 2009. The agreement also provided for a division of profits. In a provision analogous to a non-compete clause, the parties agreed that they would not “assist with, promote, provide light displays for, or participate in any fashion with a substantially similar event within 50 miles of Long Run Park. . . .” Finally, the agreement provided the following choice-of-laws and forum selection clauses:

This Agreement shall be governed by the laws of the State of Indiana. The parties agree that the venue for any litigation arising from any dispute concerning this Agreement shall be in the appropriate court of Grant County, Indiana. The parties further agree to submit to the jurisdiction of the appropriate court in Grant County, Indiana, for the resolution of any litigation arising from any dispute concerning this Agreement. In any such

litigation the prevailing party shall be entitled to recover their [*sic*] attorney fees and costs.

Louisville/Jefferson County Metro Government gave Winterland a license to use a designated portion of Long Run Park for the purpose of set-up, operation, and clean-up of the “Gift of Lights” event. The License Agreement between Winterland and Louisville/Jefferson County Metro Government provided for the payment of fees and set forth the terms and conditions for Winterland’s use of the public property. The License Agreement also contained the following provision:

This Agreement shall be governed by and construed in accordance with the laws of the State of Kentucky. In the event of any proceedings regarding this Agreement, the Parties agree that the venue shall be the state courts of Kentucky or the U.S. District Court for the Western District of Kentucky, Louisville Division. All parties expressly consent to personal jurisdiction and venue in such Court for the limited and sole purpose of proceedings relating to this Agreement or any rights or obligations arising thereunder.

On November 20, 2009, Midnight Terror filed an action for breach of contract against Winterland in Jefferson Circuit Court. Midnight Terror alleged that Winterland failed to complete delivery of all the light displays by November 9 as required. Midnight Terror also sought an order restraining Winterland from assisting, promoting, or participating in an event known as “Lights Under Louisville,” an event occurring simultaneously and in competition with the “Gift of Lights” according to Midnight Terror. Winterland filed a motion to dismiss.

The trial court relied on the forum-selection clause contained in the parties' Joint Venture Agreement and dismissed Midnight Terror's action against Winterland. In its analysis, the court concluded as follows:

The terms of §16 of the agreement are not unconscionable as defined in Conseco Finance Servicing Corp. v. Wilder, 47 S.W.3d 335, 341 (Ky.App. 2001) and (sic) therefore fully enforceable. A fundamental rule of contract law holds that, absent fraud in the inducement, a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms. Conseco at 341.

This appeal followed.

On appeal, Midnight Terror contends that the trial court erred by enforcing the forum-selection clause contained in the Joint Venture Agreement. It contends that the trial court failed to consider whether the clause was unfair or unreasonable. Midnight Terror also contends that the forum-selection clause contained in the License Agreement between Winterland and Louisville/Jefferson County Metro Government should have governed. It argues that the trial court erred in recognizing the primacy of the Joint Venture Agreement over the License Agreement. We shall address these contentions in reverse order.

The terms of the parties' Joint Venture Agreement indicate that Winterland "is to hold the contract with Metro Parks." Midnight Terror argues that this provision means that the forum-selection and choice-of-law clauses contained in the License Agreement are paramount to the similar clauses included in the parties' Joint Venture Agreement. However, Midnight Terror offers no support for this

argument, and we do not agree that Midnight Terror can avoid the terms of its agreement with Winterland on this basis. The License Agreement (including the attached Scope of Agreement) between Winterland and Louisville/Jefferson County Metro Government makes no reference to the Joint Venture Agreement of the parties. There is no indication that the provisions of the License Agreement were intended to govern the contract dispute that has arisen between Midnight Terror and Winterland. The subject matter of the License Agreement is distinct and separate from the substance of the dispute at issue. Consequently, we hold that the forum-selection provision included in the License Agreement is neither superior to the provision in the Joint Venture Agreement nor is it relevant to these proceedings. As a result of this holding, we must now consider whether the court properly concluded that the forum-selection clause included in the parties' Joint Venture Agreement is valid and enforceable.

Relying on our analysis in *Prudential Resources Corp. v. Plunkett* 583 S.W.2d 97 (Ky.App. 1979), Midnight Terror contends that the trial court erred by applying the generalized rules of contract enforcement contained in *Conseco, supra*, instead of considering a list of enumerated factors to determine whether the forum-selection clause is unfair or unreasonable. Midnight Terror argues that the court should have applied the multi-factor test set forth in *Plunkett, supra*. If it had done so, it might have concluded that the forum-selection clause included in the Joint Venture Agreement is unfair and unreasonable under the circumstances of this case.

Forum selection clauses are presumed to be valid and enforceable in Kentucky unless the party opposing enforcement can demonstrate that circumstances render the clause unfair or unreasonable. *Prezocki v. Bullock Garages, Inc.*, 938 S.W.2d 888 (Ky. 1997). In making this determination, the trial court must apply Kentucky law and consider a number of factors, including the following: the inconvenience to the parties, witnesses, and other access to proof created by holding the trial in the specified forum; the disparity of bargaining power that existed between the two parties at the time the contract was executed; and whether the state in which the incident occurred has at least a minimal interest in the action. *Id.* at 889.

Midnight Terror contends that Grant County, Indiana, is “monumentally” inconvenient as a forum since it has no ties to that venue, the access to proof is limited, and the witnesses reside in or near Louisville. Midnight Terror points out that it is a small company with limited resources to litigate in a foreign jurisdiction or to resist oppressive clauses included in Winterland’s contracts. Finally, it contends that Jefferson County, Kentucky, has the greater interest in the action since the contract was to be performed there and was allegedly breached there.

Based upon these contentions, Midnight Terror argues that this court should hold that the forum-selection clause included in the Joint Venture Agreement is unenforceable. Winterland, on the other hand, urges us to affirm the conclusion of the court that the forum-selection clause is enforceable -- despite the absence of a consideration of the individual factors as mandated by *Prudential, supra*.

We cannot grant the relief sought by either party. Instead, the trial court must conduct an evidentiary hearing, evaluate the proof in light of the relevant *Prudential* factors, and determine whether Midnight Terror has met its burden of demonstrating that the forum-selection clause should be set aside. *See Wilder v. Absorption Corp.*, 107 S.W.3d 181 (Ky. 2003). Only then can the trial court properly evaluate Winterland's motion to dismiss the action.

Consequently, we vacate the order of dismissal of the Jefferson Circuit Court and remand for additional proceedings. If, following the hearing, the trial court concludes that the forum-selection clause of the Joint Venture Agreement is unenforceable, the action filed by Midnight Terror should be permitted to proceed. If it concludes that the forum-selection clause is enforceable, it may re-issue an order dismissing.

The order of the Jefferson Circuit Court is vacated, and this matter is remanded for additional proceedings.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent because the appellant failed to meet its burden in contesting the enforceability of the forum-selection clause. Further, it failed to request findings by the trial court under CR 52.01, CR 52.03 and CR 52.04.

It is a fundamental rule of contract law that absent fraud in the inducement, a written agreement will be enforced according to the terms. *Conseco Finance Servicing Corp v. Wilder*, 47 S.W.3d 335, 341 (Ky.App. 2001). The law in this state is that “forum selection clauses are prima facie valid and that the burden rests on the movant to prove that enforcement is unreasonable.” *Kentucky Farm Bureau Mut. Ins. Companies v. Henshaw*, 95 S.W.3d 866, 867 (Ky. 2003).

In this case, the clause unambiguously states that the venue for any litigation arising from any dispute concerning the agreement shall be Grant County, Indiana. Despite its agreement to the forum-selection clause, the appellant now claims it is unreasonable because Indiana is inconvenient. I believe its mere allegation that Indiana, the forum agreed to by the parties, is now inconvenient is insufficient to rebut the presumption that the clause is enforceable. Moreover, I believe that the trial court could take judicial notice that the forum agreed to by the parties is in a central part of a neighboring state and does not cause an undue burden upon the appellant. Based on the undisputed facts, the trial court made a finding that the agreement was not unconscionable. The appellant did not meet its burden in response to the motion to dismiss when it failed to file any supplemental affidavits or exhibits to demonstrate why the factors under *Prudential Resources Corp v. Plunkett*, 583 S.W.2d 97 (Ky.App. 1979), precluded enforcement of the unambiguous clause.

Additionally, it is improper to reverse or remand this case for an evidentiary hearing and findings of fact. CR 52.04 states:



A final judgment shall not be reversed or remanded because of the failure of the trial court to make findings of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Trial courts have been routinely affirmed based on the dictates of CR 52.04 when factual findings were not requested. *Vinson v. Sorrell*, 136 S.W.3d 465, 471 (Ky. 2004); *Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997).

It was incumbent upon the appellant to request that the trial court make the required findings of fact as required by CR 52.02 and 52.04. Under our rules, the trial court does not have the burden of rendering findings of fact without a proper motion made by a party, and the trial court does not have the burden of practicing the case for either party.

For those reasons, I would affirm. I believe the remand for additional findings is an unnecessary expense and delay to the parties.

BRIEF FOR APPELLANT:

Michael F. Lawrence  
M. Jason Lawrence  
Louisville, Kentucky

BRIEF FOR APPELLEE:

David B. Blandford  
Jeremy J. Beck  
Louisville, Kentucky