RENDERED: SEPTEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-000152-MR

DAVID W. ROBINSON, JR. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 11-CI-005681

COLORADO PERSONNEL RESOURCES INC. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: David W. Robinson, Jr., has appealed from the Jefferson Circuit Court's refusal to exercise jurisdiction and dismissal of his claims against Colorado Personnel Resources, Inc. (CPR) because of a choice of forum provision in a contract between the parties. We reverse and remand.

CPR is a Colorado corporation holding contracts with health care facilities in several states. CPR contracts with licensed professionals to provide anesthesia services to the health care facilities. Robinson is a Certified Registered Nurse Anesthetist (CRNA). On December 3, 2010, Robinson and CPR entered into a "Full-Time Equivalent CRNA Acceptance Agreement" whereby Robinson was to provide his professional services to CPR's clients for a period of one year. Robinson successfully negotiated a substantially higher daily rate of pay than other CRNA's employed by CPR. The two-page agreement detailed the rights and responsibilities for each of the parties.

In June of 2011, CPR negotiated a new contract with Premier Surgery Center, in Louisville, Kentucky, the health care facility in which Robinson worked. CPR sought to renegotiate with Robinson his rate of pay to bring him in line with the other CRNA's it employed. Robinson requested time to consider the offer. CPR immediately terminated his employment.

Robinson filed the instant action in the Jefferson Circuit Court alleging CPR breached the December 3, 2010, contract by terminating him nearly six months earlier than the expiration of the contractual period. CPR moved to dismiss[1] the action pursuant to the choice of forum provision set forth in the parties' contract which states as follows:

> The laws of the State of Colorado shall govern this agreement. Any dispute arising under the term or

[1] Contrary to Robinson's suggestion, CPR's motion was not the same as a motion to compel arbitration. His reliance on *Padgett v. Steinbrecher*, 355 S.W.3d 457 (Ky. App. 2011), and *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009), in support of his argument is misplaced.

> execution of this agreement shall be submitted to arbitration in the State of Colorado pursuant to the laws of the State of Colorado.

After hearing oral argument, the trial court dismissed the action by order entered on December 29, 2011, stating:

> Defendant, Colorado Personnel Resources, Inc., having moved the Court for an order dismissing this action, and the Court being otherwise sufficiently advised;
>
> IT IS ORDERED that the Court declines to exercise jurisdiction in this matter as a result of the parties' selection of forum, and that this action is hereby dismissed.
>
> There being no just cause for delay, this is a final and appealable order.

This appeal followed.

Robinson contends the trial court erred in dismissing his claim and sets forth numerous arguments supporting his position. However, we need not address Robinson's assertions as we believe a fundamental flaw exists in the judgment requiring reversal for further proceedings.

In *Prudential Resources Corp. v. Plunkett*, 583 S.W.2d 97, 99 (Ky. App. 1979), Kentucky adopted Section 80 of the Restatement (Second) of Conflict of Laws (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.

In discussing its decision to adopt the Restatement provision, the Court went on to hold

> a court not specified does not lose its jurisdiction as a result of the clause, but such a court declines to exercise its jurisdiction in recognition that the parties by their consent have designated the most convenient forum for their litigation. However, if the suit in the selected forum would be unfair or unreasonable, the clause will not be enforced.
>
> Although public policy will not void a forum choosing clause, such a provision still must withstand the test of reasonableness.

Id. Proper analysis of the reasonableness of a forum selection clause includes: 1) inconvenience of the chosen forum; 2) disparity in bargaining powers between the parties; and 3) whether Kentucky maintains more than a minimal interest in the dispute. *Id*. at 99-100. A choice of forum provision "should be enforced as *prima facie* valid, unless appellants present the trial court with countervailing circumstances that would render the clause 'unreasonable.'" *Prezocki v. Bullock Garages, Inc.*, 938 S.W.2d 888, 889 (Ky. 1997) (citing *Prudential*). Thus, some factual development is required before a trial court may adequately determine whether a choice of forum agreement is reasonable.

Although the trial court may have conducted the required analysis prior to determining it would not exercise jurisdiction in this dispute, the record is silent as to whether it considered the reasonableness of the forum selection clause at issue here. As in *Prezocki*, because the trial court's decision "was based on a motion to dismiss, matters outside the pleadings were not considered. Thus, given

the limited record in the present case, this Court has an inadequate set of facts upon which to base an appropriate legal determination." *Id*. While the trial court likely reached the proper conclusion in dismissing the action, because it did not make the appropriate findings as to the reasonableness of the choice of forum provision in the parties' agreement, we must reverse and remand for further proceedings. On remand, the trial court is directed to make findings on the record in conformity with *Prudential*.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Lawrence E. Osterhage
Louisville, Kentucky

BRIEF FOR APPELLEE:

John H. Dwyer, Jr.
Louisville, Kentucky