RENDERED: AUGUST 3, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000675-MR

MARCUS CONSTRUCTION COMPANY, LLC,
d/b/a DIAMOND CONSTRUCTION OF KENTUCKY — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM E. LANE, JUDGE
ACTION NO. 16-CI-90085

DENARK CONSTRUCTION, INC. and
COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION CABINET — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

NICKELL, JUDGE: Marcus Construction Company, LLC, d/b/a Diamond Construction of Kentucky, appeals from the Rowan Circuit Court's dismissal of its complaint against Denark Construction, Inc., and the Commonwealth of Kentucky, Finance and Administration Cabinet. We affirm.

Denark and Marcus entered into a subcontract for masonry work on a dormitory project at Morehead State University. A dispute arose during construction leading to Marcus filing the instant suit in Rowan Circuit Court against Denark seeking payment for services performed and materials provided on the project and claiming a lien pursuant to KRS[1] 376.210 against funds due to Denark by the Commonwealth under the prime contract. In its answer to the complaint, the Commonwealth agreed to be bound by any judgment entered by the court.

Denark moved to dismiss the case, contending Marcus failed to comply with an alternative dispute resolution provision in the parties' contract prior to filing suit, and further alleging the contract contained a valid forum selection clause which required any lawsuit to be brought in the Chancery Court for Knox County, Tennessee. Denark posted a surety bond pursuant to KRS 376.212 to satisfy the lien claimed by Marcus. Marcus challenged dismissal, asserting the forum selection clause was invalid and KRS 376.250 mandated the action remain in Rowan Circuit Court. Marcus also demanded mediation.

After hearing arguments from the parties, the trial court recommended voluntary mediation and passed the matter for thirty days. At the next hearing, the trial court was informed Marcus had assigned a portion of its claims to an entity

[1] Kentucky Revised Statutes.

which had filed a collection action on its assigned claim against Denark and its surety in the United States District Court for the Southern District of New York. The trial court postponed ruling on the motion to dismiss pending outcome of the New York case which was subject to a similar dismissal motion based on the forum selection clause of the parties' contract. The parties' subsequent attempt to mediate the dispute was unsuccessful. Shortly thereafter, the trial court heard final arguments on the motion to dismiss. At the conclusion of the final hearing, the trial court concluded dismissal without prejudice was required. It found the forum selection clause in the parties' contract was reasonable, valid and enforceable, requiring all disputes arising from the contract not resolved by mediation to be adjudicated in the Chancery Court of Knox County, Tennessee. This appeal followed.

Marcus contends the trial court erred in dismissing its complaint because genuine issues of material fact existed. Next, it argues the forum selection clause was unreasonable and should not have been enforced. Finally, Marcus argues KRS 376.250(5) vests exclusive jurisdiction over the lien dispute in Rowan Circuit Court, thereby rendering dismissal inappropriate. We reject each of these assertions.

Initially, in contravention of CR[2] 76.12(4)(c)(v), Marcus does not state how any of the arguments presented were preserved in the trial court.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Further, in contravention of CR 76.12(4)(c)(iv) and (v) which require ample references to the trial court record supporting each argument, Marcus's brief contains only two such references in the argument section. This simply does not constitute ample citation to the record.

[2] Kentucky Rules of Civil Procedure.

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the briefs or dismiss the appeal for failure to comply. *Elwell*, 799 S.W.2d at 48. While we have chosen not to impose such a harsh sanction, we caution counsel such latitude may not be extended in the future.

Marcus first asserts dismissal was inappropriate because genuine issues of material fact existed. It argues a motion for judgment on the pleadings pursuant to CR 12.03 must be treated as a motion for summary judgment when matters outside the pleadings are considered. The entire argument is based on the standard for summary judgment. Denark's response is likewise couched in terms of summary judgment standards. However, both parties have confused the issue and utilized an incorrect legal standard, one not employed by the trial court. Marcus's argument and references to CR 12.03 and CR 59 ignore the actual basis for dismissal of its complaint.

Denark filed a motion to dismiss for improper venue pursuant to CR 12.02(c). After reviewing the language of the parties' contract and hearing arguments of counsel, the trial court determined, as a matter of law, that the forum selection clause was reasonable, valid and enforceable. As such, it matters not

whether issues of fact existed, but rather whether the trial court correctly upheld the forum selection clause. Because only questions of law are involved, our standard of review is *de novo*. *Scott v. Forcht Bank, NA*, 521 S.W.3d 591, 594 (Ky. App. 2017).

In Kentucky, a forum selection clause is generally given effect unless it is unfair or unreasonable. *Prudential Resources Corp. v. Plunkett*, 583 S.W.2d 97, 99 (Ky. App. 1979) (adopting RESTATEMENT (SECOND) OF CONFLICT OF LAWS §80 (1971)). "[I]f suit in the selected forum would be unfair or unreasonable, the clause will not be enforced." *Id*. A party challenging a *prima facie* valid forum selection clause must present countervailing evidence the selection of forum resulted from misrepresentation, duress, abuse of economic power or other unconscionable means. *Prezocki v. Bullock Garages, Inc.*, 938 S.W.2d 888, 889 (Ky. 1997). Determining whether a forum selection clause is unreasonable requires consideration of the inconvenience created by holding the trial in the specified forum; the disparity of bargaining power between the two parties; and whether Kentucky maintains a minimal interest in the lawsuit. *Prudential*, 583 S.W.2d at 99-100.

Marcus claims the chosen forum of Knox County, Tennessee, is inconvenient as it will force "a Kentucky Company with a single owner to go un-paid (sic) from the project and litigate in a foreign court. This is very

'inconvenient.'" Increased costs of litigation to a party is an insufficient basis to invalidate an otherwise valid forum selection clause. *See Creditors Collection Bureau, Inc. v. Access Data, Inc.*, 820 F. Supp. 311, 313 (W.D. Ky. 1993) (quoting *Moses v. Business Card Express*, 929 F.2d 1131, 1138-39 (6th Cir. 1991)). Marcus asserts no other valid challenge to the convenience of the forum and we are convinced none exists.

Marcus next alleges it is at a great economic disadvantage when compared with Denark because that company is "a huge National Construction Company bidding on jobs Nation-wide" while Marcus "is a locally owned business without numerous investors." Based on these assertions, Marcus contends there must be a bargaining disparity between the two sufficient to invalidate the forum selection clause. Notably, Marcus does not allege misrepresentation, duress, abuse of economic power or other unconscionable means were utilized to obtain agreement on the forum selection. Both Marcus and Denark are sophisticated corporate entities with presumably equal bargaining power who agreed to the forum in an arms-length transaction. We are unpersuaded by Marcus's "David and Goliath" comparison and find no reason to disturb the parties' written agreement.

Further, our review reveals Kentucky would have little more than a minimal interest in the outcome of this dispute. The lien Marcus asserted has been released and all government funds associated with this quarrel have been

disbursed. Work on the project continued after Marcus was removed as a subcontractor and the Commonwealth will still receive the finished product for which it bargained. Thus, we discern no more than a minimal public or governmental interest in the outcome of this fee dispute between these two parties.

Marcus has failed to show the forum selection clause was unreasonable or unfair. We therefore hold the trial court correctly concluded the parties' agreement was valid and binding on them. Enforcement was proper and dismissal was appropriate.

Finally, we briefly comment on Marcus's assertion KRS 376.250(5) rendered dismissal inappropriate as that statute vested exclusive jurisdiction over its lien enforcement action in Rowan Circuit Court. Pertinent to this appeal, KRS 376.250(5), in discussing suits to enforce liens perfected pursuant to KRS 376.210, states in relevant part:

> [w]here the property is owned by a public university, the suit shall be instituted in the Circuit Court of the county in which is located the main campus of the public university. This court shall have exclusive jurisdiction for the enforcement of liens asserted against the public funds due the contractors, subject to the same rights of appeal as in other civil cases.

At first blush, Marcus would appear to be correct in its assertion. However, as previously stated, Denark posted a surety bond pursuant to KRS 376.212 which released the lien. Thus, there was no lien to enforce, the Commonwealth was no

longer a necessary party, and the provisions of KRS 376.250 were no longer applicable. Marcus's reliance on a factually and legally distinguishable unpublished Opinion of this Court to support his contrary position is misplaced. There was no error.

For the foregoing reasons, the judgment of the Rowan Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dwight O. Bailey
Flatwoods, Kentucky

BRIEF FOR APPELLEE:

John H. Rompf, Jr.
Winchester, Kentucky