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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001104-MR

ARIES ENTERTAINMENT, LLC APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE KENT HENDRICKSON, JUDGE
ACTION NO. 17-CI-00329

THE PUERTO RICAN ASSOCIATION
FOR HISPANIC AFFAIRS, INC.;
ROBERT ROLAND;[1] AND
JACQUELENE N. BURKE APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

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

NICKELL, JUDGE: This case addresses enforceability of a choice of forum clause in contracts for four celebrities to appear in Florida at a scholarship

[1] Roland's name is misspelled in the complaint and notice of appeal. He will be referenced herein by his correct last name, Roldan.

fundraiser organized by the Puerto Rican Association for Hispanic Affairs, Inc. ("PRAHA"). When PRAHA stopped payment on five checks, Aries Entertainment, LLC ("Aries"), the Kentucky corporation representing the celebrities, filed a civil complaint against PRAHA and two of its corporate officers in Harlan Circuit Court alleging breach of contract and tortious interference with contract. Aries subsequently moved for default judgment. The trial court granted defense motions to dismiss the complaint—without prejudice—due to lack of jurisdiction under Kentucky's long-arm statute, KRS[2] 454.210, and lack of minimum contacts with the state. The trial court found PRAHA signed the contracts, each containing a choice of forum clause, but concluded enforcing the provision would be "unreasonable" because the fundraiser was a "single transaction" not rising "to the level of 'transacting business in this Commonwealth'" and "Kentucky has only a minimal interest in this action[.]" Having reviewed the record, briefs and law, we reverse and remand for further proceedings consistent with this Opinion.

FACTS

Aries is a Kentucky corporation based in Harlan, Kentucky. Aries represents four celebrities PRAHA hired to appear June 17-19, 2016, at "Florida

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[2] Kentucky Revised Statutes.

Fandomania," a weekend fundraiser organized by PRAHA and held in Fort Pierce, Florida. PRAHA alleges appearance fees and associated responsibilities were discussed exclusively by telephone and the internet; Aries drafted the four contracts and emailed them to PRAHA; the choice of forum clause was included but not negotiated; the contracts were signed on PRAHA's behalf in Florida; witnesses to the event are Florida residents; celebrities[3] appearing at the event are from California, Texas and Canada; Aries and PRAHA have no ongoing relationship; and no business between Aries and PRAHA actually occurred in Kentucky. PRAHA argues Aries, which has a business office in Harlan, Kentucky, is the only entity in this saga connected to the Commonwealth.

PRAHA is a 26 U.S.C.A. § 501(c)(3) non-profit corporation based in Port St. Lucie, Florida. Robert Roldan and Jacquelene N. Burke,[4] PRAHA's President and Vice President, respectively, are Florida residents. PRAHA claims its sole business is raising money for scholarships for minority students in Florida via an annual fundraiser held in St. Lucie County, Florida. PRAHA claims it does

[3] During a hearing on October 26, 2017, counsel for appellees suggested the celebrities breached the agreements by renegotiating contracts on arrival in Florida with one performer being paid in cash causing PRAHA to pay Aries less than the full amount owed under the contracts.

[4] The complaint named PRAHA, Roldan and Burke as defendants. While Roldan and Burke were named in the notice of appeal and are, therefore, parties to this appeal and included in the style of the appeal, the argument on appeal focuses exclusively on PRAHA. Hence, comment about Roldan and Burke will be minimal.

all its business in Florida and has never sent an employee or representative to Kentucky and never outside Florida.

Jose Garofalo, PRAHA's Director, signed the four personal appearance contracts as PRAHA's authorized signatory. Neither Roldan nor Burke signed the contracts. It is alleged Burke wrote five checks required by the contracts totaling $19,000 which Roldan signed. When Aries attempted to deposit the checks, it learned payment had been stopped on all five checks.

Each contract contained the following provision:

> **Article 12. Governing Law, Enforcement, Jurisdiction and Venue:** For all purposes related to this Contract, the Parties agree that the Contract and any and all disputes arising therefrom shall be governed by and interpreted according to the laws of the Commonwealth of Kentucky. In the event there are any disputes or controversies that arise between the Parties pursuant to the Contract, the Parties agree that sole and *exclusive jurisdiction for litigation rests in the Circuit Court for Harlan County, Commonwealth of Kentucky***.** Such disputes or controversies are understood to include, but not be limited to, resolving all disputes and differences under the Contract, and to review the terms of the Contract, and determine the amount payable by one party to the other, if any. In the event of any action based upon or arising out of any alleged breach by any party of any covenant or agreement contained in the Contract, in addition to any other rights and remedies to which they might be entitled, the prevailing party shall be entitled to recover reasonable attorneys' fees and other costs of such action from the non-prevailing party.

(Italics added.)

In response to the stop payment orders, and consistent with the contracts, Aries filed suit in Harlan Circuit Court naming PRAHA, Roldan and Burke as defendants. Aries sought judgment against all three defendants; trial by jury; compensatory, liquidated and punitive damages; attorneys' fees; and both pre-and post-judgment interest.

Responding jointly, Roldan and Burke objected to personal jurisdiction, moved to quash summons and moved to be dismissed from the suit. They argued neither was a party to the contracts; their names appeared on no contract; neither was named as a guarantor; neither had been to Kentucky; and neither could be summoned under Kentucky's long-arm statute. While their motion to dismiss was pending, Roldan and Burke filed a special answer to the complaint.

PRAHA responded separately, objecting to personal jurisdiction, moving to quash summons and seeking dismissal of the complaint due to improper and void service of summons, improper venue, and lack of personal jurisdiction under Kentucky's long-arm statute plus lack of jurisdiction due to PRAHA having insufficient minimum contacts with the Commonwealth. PRAHA acknowledged signing the contracts with Aries and admitted the contracts contained a choice of forum clause, but argued the clause was unfair and unreasonable because the personal appearance contracts were for a one-time event "to be performed entirely

in Florida" over a single weekend. While its motion to dismiss was pending, PRAHA filed a special answer to the complaint.

At a hearing on October 26, 2017—mere days after motions to dismiss were filed—counsel for PRAHA acknowledged the only way for Aries to bring PRAHA before the Harlan Circuit Court was the choice of forum clause in the contracts. Counsel then stated such a clause would not be enforced if it were found to be unfair or unreasonable. Counsel's argument in support of the clause being declared unfair or unreasonable was PRAHA's lack of even minimal contacts with Kentucky and the "terrible hardship" PRAHA would encounter subpoenaing all the necessary witnesses from Florida, California, Texas and Canada—if they were even subject to subpoena in Kentucky. The trial court questioned whether Kentucky's long-arm statute applied. PRAHA's counsel candidly admitted PRAHA was not subject to jurisdiction under the long-arm statute. With this factual scenario in mind, we consider whether the trial court properly found it would be unreasonable to enforce the choice of forum clause agreed to by PRAHA and Aries and included in four separate contracts.

ANALYSIS

Jurisdiction can be neither waived nor "conferred by consent of the parties." *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005). However, contracting parties may designate a particular court to resolve future disputes

arising from a contract. *Prudential Resources Corp. v. Plunkett,* 583 S.W.2d 97, 99 (Ky. App. 1979) (adopting Section 80 of Restatement (Second) of Conflict of Laws (1971)). In executing agreements for four celebrities to appear at a weekend fundraiser, Aries and PRAHA agreed Harlan Circuit Court would use Kentucky law to resolve any future disputes arising from those contracts.

PRAHA acknowledges it signed the contracts designating Harlan Circuit Court in Harlan County, Kentucky, as the court to resolve all disputes stemming from the contracts. PRAHA does not insinuate the choice of forum clause was "unfairly negotiated, [or resulted from] fraud, undue influence, overreaching or boilerplating[.]" *Prezocki v. Bullock Garages, Inc*., 938 S.W.2d 888, 889 (Ky. 1997). From the scant record[5] developed and provided to us, it appears PRAHA freely agreed to the contracts containing the choice of forum clause with full knowledge disputes would be resolved by a Kentucky court using Kentucky law and could require travel to Kentucky. At the time of signing, we must assume this possibility was acceptable to PRAHA.

The basis of PRAHA's after-the-fact objection to Kentucky exercising jurisdiction is PRAHA is not subject to Kentucky's long-arm statute, PRAHA lacking minimum contacts with Kentucky, and it being unfair to force a small

[5] The entire record is two volumes of record—mostly motion practice—and one DVD with two hearings covering a total of twelve minutes.

501(c)(3) non-profit corporation from Florida "to come all the way to Kentucky" to defend itself. Stated differently, PRAHA maintains Harlan Circuit Court should ignore the choice of forum clause to which PRAHA freely agreed because now that a dispute has arisen it would inconvenience PRAHA to defend itself in Kentucky. We hold the trial court erred in finding it would be unreasonable to enforce the clause and declining to exercise jurisdiction.

Kentucky's leading cases on forum selection clauses are *Plunkett* and *Prezocki*. Both state the prevailing law in Kentucky applicable to "conventional contract cases." *Kentucky Farm Bureau Mut. Ins. Companies v. Henshaw*, 95 S.W.3d 866, 867 (Ky. 2003). There has been no showing this case reflects anything but a conventional contract dispute.

Kentucky adopted Section 80 of the Restatement (Second) of Conflict of Laws (1971) in *Plunkett*, 583 S.W.2d at 99. The provision reads:

> [t]he 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.

The comment to Section 80 explains how a choice of forum clause works.

> [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 suit in the selected forum would be unfair or unreasonable, the clause will not be enforced.

Plunkett, 583 S.W.2d at 99. Thus, the watchwords in evaluating a choice of forum clause are "unfair" and "unreasonable." Furthermore, "forum selection clauses are prima facie valid[,]" *Henshaw*, 95 S.W.3d at 867 (commenting on *Prezocki*), and "the burden rests on the movant to prove that enforcement is unreasonable." *Id.*

Henshaw chronicled a wrongful termination suit against an insurance company. The terminated employee filed suit in Union Circuit Court despite the employment contract specifying Jefferson Circuit Court would hear any disputes. Union Circuit Court dismissed the suit based on the contract's terms. Instead of applying *Plunkett* and *Prezocki*, a panel of this Court erroneously applied a different test[6] because a civil rights claim (age discrimination) was alleged and concluded the contractual clause should not have been enforced. In holding the choice of forum clause agreed to in the employment contract was not unreasonable, the Supreme Court of Kentucky wrote:

> [a]s the contract established the relationship between the parties, and as there is a probability that it will influence any subsequent litigation, enforcement of the choice-of-venue clause is not unreasonable.

Henshaw, 95 S.W.3d at 868. *Henshaw* provides no basis to decline to enforce the venue provision agreed to by Aries and PRAHA.

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[6] *Red Bull Assoc's. v. Best Western Int'l, Inc.*, 862 F.2d 963 (2d Cir. 1988).

In *Prezocki*, garage owners sued a construction company for breach of contract, negligence and violation of building codes and ordinances. Despite the signed contract specifying any dispute would be heard by Illinois courts, Prezocki filed suit in Oldham District Court which dismissed the action without prejudice citing as its sole reason *Creditors Collection Bureau, Inc. v. Access Data, Inc.*, 820 F.Supp. 311 (W.D. Ky. 1993). Oldham Circuit Court affirmed the dismissal, finding the venue clause was neither unfair nor unreasonable, and litigating the matter in Illinois would not be an "undue hardship" for Prezocki because the clause was not the product of unfair negotiations. A panel of this Court denied discretionary review because Prezocki stated no "special reasons" for review. The Supreme Court of Kentucky, however, granted discretionary review.

Because Oldham District Court had only a limited record, did not convene a hearing and did not make the factual findings required by *Plunkett*, the Supreme Court held the Oldham Circuit Court should have remanded the case to Oldham District Court. As a result, the Supreme Court reversed the circuit court and remanded the matter to district court for a hearing and findings conforming to *Plunkett*.

According to *Prezocki*, 938 S.W.2d at 889, relevant factors to consider in determining unreasonableness include:

> 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.

Other factors to consider include:

> [t]he law governing the formation and construction of the contract; the residencies of the parties; the place of execution and performance of the contract; and the location of the parties and witnesses involved in the litigation[.]

Francis M. Dougherty, "Validity of Contractual Provision Limiting Place or Court in which Action May Be Brought," 31 A.L.R.4th 404 (1984) (discussing *Furbee v. Vantage Press, Inc.,* 464 F.2d 835, 837 (D.C. Cir. 1972)).

Plunkett dealt with oil and gas leases to two tracts of land in Jackson County, Kentucky. Prudential had a contract with Plunkett allowing Prudential to operate oil wells on both tracts with an option to purchase the leases held by Plunkett. A question arose as to whether Prudential's option to buy had expired. Prudential filed suit in Jackson Circuit Court, even though a venue clause in the contract specified all disputes would be resolved in Dallas County, Texas. Citing the venue clause, Jackson Circuit Court found Dallas was a convenient forum for both parties and dismissed the complaint. A panel of this Court affirmed the trial court, writing in part:

> Prudential argues that forcing it to bring its action in Dallas, Texas, would be unreasonable under the circumstances of this case. The primary factors which Prudential has presented to show unreasonableness relate

> to the difficulty of developing proof outside Kentucky, of the delay of the park service in issuing permits, and of the harsh winter weather conditions of 1977 and 1978. While many of the witnesses who would testify as to the late permits and the weather probably reside in Kentucky, the location of these witnesses would not unduly burden institution of the action in Texas. Weighing the credibility of these witnesses would not be an important aspect of the sort of information that Prudential would hope to elicit from them. Prudential could gather evidence as to the closing of roads and as to why it took a certain amount of time to receive a permit, by deposition, without incurring any disadvantage because the witnesses did not appear personally. A Texas court can accord Prudential an effective remedy.
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> . . .
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> We do not have a situation here of overreaching by Plunkett. Prudential engaged in the business of extracting oil and gas. Plunkett dealt with Prudential at arms [sic] length from Dallas and they entered into a sophisticated drilling contract. We see no disparity of bargaining power. Prudential, at the time it executed the contract, expressed its approval of Dallas as a site to litigate any contract controversy, although it must have realized that an event which might trigger the force majeure clause would in all likelihood occur in Kentucky. Prudential has not supplied us with an adequate explanation as to why it should escape its promise as to the appropriate forum when it had knowledge all along that a legal dispute might center on facts which happened in Kentucky. [*Fite & Warmath Const. Co., Inc. v. MYS Corp.*, 559 S.W.2d 729, 735 (Ky. 1977)].

Plunkett, 583 S.W.2d at 99-100.

In dismissing Aries' complaint—without prejudice—the Harlan Circuit Court made five findings: PRAHA is a non-resident; PRAHA had not "'transacted business' in Kentucky under KRS 454.210"; PRAHA did not have "'minimum contacts' with Kentucky"; Kentucky "has only a minimal interest in this action"; and, a "'single transaction' between [Aries] and [PRAHA] does not rise to the level of 'transacting business in this Commonwealth[.]'" Thus, the trial court mentioned only one item, minimal state interest, in declining to enforce the venue clause as being "unreasonable," but offered no basis for its conclusion.

We disagree with the trial court for three significant reasons. First, KRS 454.210 is one vehicle by which a Kentucky court may acquire jurisdiction over a party, but it is by no means the only vehicle. PRAHA states it is not subject to Kentucky's long-arm statute—a position with which we agree—but PRAHA consented to Harlan Circuit Court's exercise of jurisdiction by contracting with Aries, one of many talent agents in the United States representing performers. PRAHA admits the contracts signed on its behalf contained the choice of forum clause when executed. Because PRAHA has not alleged it requested the language be altered or deleted, nor has it alleged Garofalo was tricked into signing on the dotted line, we must conclude PRAHA was aware of its inclusion at the time of execution and willingly agreed to it. When jurisdiction is achieved under a choice of forum clause, citation to KRS 454.210 is unnecessary.

Second, Kentucky has a strong public interest in ensuring parties abide by their bargains. Aries, a Kentucky corporation, chose to include language in the four personal service contracts designating Harlan Circuit Court as venue for any disputes and submitted it to PRAHA for approval. PRAHA accepted the language and executed the four contracts containing the clause. Only in hindsight—now that a dispute has arisen—does PRAHA argue the clause is unfair and unreasonable. It is not the trial court's role to save a party from what—after the fact—it perceives to be a bad bargain. As noted previously in this Opinion, at the time of signing, PRAHA knew any dispute could require travel to Kentucky and time spent in a Kentucky courthouse. PRAHA did nothing to address that possibility when a change could be made. Moreover, if the choice of forum was a deal-breaker, PRAHA could have contracted with a talent agent closer to home.

Third, PRAHA argues none of the witnesses to the fundraiser resides in Kentucky and not all witnesses may be subject to subpoena in Kentucky. PRAHA should have realized this before signing the contract. Witnesses can be deposed, however, eliminating expensive travel to a foreign courtroom. Wherever this case is heard, someone will be inconvenienced—a fact we reiterate PRAHA knew before executing the contract and accepted with open eyes. We see no reason to require Aries to prosecute its complaint in a forum other than the one specified in the contracts to which both parties agreed. We reiterate the test under

Plunkett and *Prezocki* is ultimately whether the chosen forum is "unfair or unreasonable," not whether it is merely inconvenient. While inconvenience is a factor to be considered under *Prezocki*, 938 S.W.2d at 889, it must be "so serious as to deprive [the complainant] of [his] opportunity for a day in court." *Wilder v. Absorption Corp.*, 107 S.W.3d 181, 185 (Ky. 2003). In fact,

> 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.

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18, 92 S.Ct. 1907, 1917, 32 L.Ed.2d 513 (1972). Based on the record before us, PRAHA has not made a sufficient showing.

In reading the trial court's one-page order of dismissal, we note the use of disparate terms in an attempt to merge the test required by Kentucky's long-arm statute with the test used to enforce a choice of forum clause contained in a contract. The two approaches are distinct. Satisfying KRS 454.210 is one way to invoke jurisdiction over a party, but it is not the only way to acquire jurisdiction and it has no applicability when a plaintiff asserts jurisdiction under a choice of forum clause. The long-arm statute applies only when a defendant "has not consented" to suit occurring in the Commonwealth. *See Hinners v. Robey*, 336

S.W.3d 891, 897 (Ky. 2011). By signing four separate personal service contracts, each containing a choice of forum clause specifying Harlan Circuit Court would resolve any contract dispute using Kentucky law, PRAHA consented to being sued in Harlan Circuit Court using Kentucky law. Signing the contracts containing the choice of forum clauses gave PRAHA "fair warning" it could be haled into a Kentucky courtroom. *Id.* Compliance with KRS 454.210 was not mandatory and the trial court's reliance on it was error.

For reasons explained above, we reverse and remand the order of dismissal entered by the Harlan Circuit Court on June 19, 2018. The court is directed to convene an evidentiary hearing after which it shall make findings consistent with *Plunkett* and *Prezocki* to persist in its dismissal of the complaint without prejudice or enforce the choice of forum clause contained in the four personal appearance contracts.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Danny Lee Lunsford, Jr. Harlan, Kentucky	Keith A. Nagle Middlesboro, Kentucky