

[Cite as *Middletown Park Realty, L.L.C. v. Bar BQ Junction*, 2010-Ohio-2171.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

MIDDLETOWN PARK REALTY, LLC :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-10-258
 :
 - vs - : OPINION
 : 5/17/2010
 :
 BAR BQ JUNCTION, INC., :
 :
 Defendant-Appellant. :

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-01-0342

Frost, Brown, Todd, LLC, Joseph W. Walker, 9277 Centre Pointe Drive, Suite 300, West Chester, Ohio 45069, Frost, Brown, Todd, LLC, Amy L. Gordin (Combs), 220 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202, for plaintiff-appellee

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YOUNG, J.

{¶1} Defendant-appellant, Bar BQ Junction, Inc. (BBQ Junction), appeals the Butler County Common Pleas Court's decision dismissing its counterclaim against plaintiff-appellee, Middletown Park Realty, LLC (MPR).

{¶2} On July 6, 2007, BBQ Junction entered into a five-year lease

agreement with MPR to lease a space for a restaurant in the Park East Shopping Center in Middletown, Ohio. Among the lease provisions was the following forum selection clause:

{¶3} "Governing Law. The laws of the State of Indiana shall govern the validity, construction, performance and enforcement of this Lease. Should either party institute legal action to enforce any obligation contained herein, it is agreed that the venue of such suit or action shall be Marion County, Indiana, or such other place where Lessor may from time to time properly designate. Lessee expressly consenting to Lessor designating the venue of any such suit or action, and each party waives the right to a jury in any action, claim proceeding or counterclaim brought by either of them against the other on any matters whatsoever arising under this Lease, or their relationship as Landlord and Tenant, or Lessee's use or occupancy of the Leased Premises or the Shopping Center * * *."

{¶4} On December 15, 2008, MPR sent a "Notice to Leave Premises," on or before December 18, 2008, to BBQ Junction for "[f]ailure to pay rent and other charges due and owing in accordance with the Indenture of Lease relating to the * * * property." BBQ Junction failed to comply, and MPR filed a complaint for forcible entry and detainer on December 19, 2008 in the Middletown Municipal Court. The complaint alleged BBQ Junction was in default of the lease agreement and had remained in the premises without MPR's consent. MPR's complaint also stated the following:

{¶5} "Venue is proper under Civ.R. 3(B) because the Leased Premises is located in Butler County, Middletown, Ohio, and because the subject lease was negotiated, executed and performed in Butler County. In addition, the parties agreed

that the Lessor would designate the venue for all such actions arising under the subject lease."

{¶16} On January 15, 2009, BBQ Junction filed its answer, and seven counterclaims for monetary damages. Because BBQ Junction's damages demand exceeded the municipal court's jurisdiction, BBQ Junction moved to transfer the case to the common pleas court. After a hearing on the matter, the municipal court transferred the case on January 20, 2009. At some point after the transfer, BBQ Junction vacated the leased premises, and the matter proceeded solely on BBQ Junction's counterclaims for damages.

{¶17} On May 6, 2009, MPR moved to stay the action or in the alternative dismiss BBQ Junction's counterclaim for improper venue. BBQ Junction filed a motion in opposition arguing MPR waived its rights under the forum selection clause when it chose to file the forcible entry and detainer action in Ohio. On July 1, 2009, the trial court granted MPR's motion to dismiss the counterclaim, but issued a 60-day stay. The trial court found no "legal authority" existed to "prevent[] plaintiff from first filing a [forcible entry and detainer] action in one venue, where the property is located, and then choosing a different venue in which to pursue and/or defend monetary claims." The trial court also determined the forum selection clause was freely bargained for, valid, and enforceable. After the 60-day stay, the trial court issued a final appealable order dismissing the suit. BBQ Junction filed an appeal raising a single assignment of error.

{¶18} "THE TRIAL COURT ERRED IN HOLDING THAT INDIANA HAD JURISDICTION OF THE APPELLANT'S COUNTERCLAIM AFTER APPELLEE WAIVED LITIGATING ISSUES OF THE TENANCY IN INDIANA WHEN APPELLEE

INSTITUTED LEGAL PROCEEDINGS IN OHIO."

{¶9} In its sole assignment of error, BBQ Junction argues MPR waived any rights it had to venue in Indiana when it chose to assert its rights under the lease in Ohio. We do not agree.

{¶10} Before addressing BBQ Junction's assignment of error, we observe that the only argument made by BBQ Junction is whether the forum selection clause was waived when MPR filed the forcible entry and detainer action. BBQ Junction does not maintain that the clause is either invalid or otherwise unenforceable. Because BBQ Junction has not challenged the enforceability of the clause, we find that the forum selection clause in the parties' lease is both valid and enforceable. See *Discount Bridal Serv., Inc. v. Kovacs* (1998), 127 Ohio App.3d 373, 376-77.

{¶11} Our standard of review of the trial court's decision granting MPR's motion to dismiss is de novo. *WashPro Express, L.L.C. v. VERwater Environmental, L.L.C.*, Butler App. No. CA2006-03-069, 2007-Ohio-910, ¶8; *Bohl v. Hauke*, 180 Ohio App.3d 526, 2009-Ohio-150, ¶9.

{¶12} In Ohio, R.C. Chapter 1923 governs forcible entry and detainer actions. R.C. 1923.01(A) vests authority for these proceedings in "any judge of a county or municipal court or a court of common pleas, *within the judge's proper area of jurisdiction.*" (Emphasis added.) In addition, a municipal court has original jurisdiction over any action of forcible entry and detainer *within its territory*. R.C. 1901.18(A)(8).

{¶13} "A forcible entry and detainer action is a summary proceeding 'provided by statute and intended to affect only the question of the present right to possess real property.'" *Hamilton Brownfields Redevelopment, LLC v. Duro Tire & Wheel*, 156

Ohio App.3d 525, 2004-Ohio-1365, ¶14, quoting *Cuyahoga Metro. Hous. Auth. v. Jackson* (1981), 67 Ohio St.2d 129, 130-131 (superseded on other grounds by statute as stated in *Miele v. Ribovich* [1990], 90 Ohio St.3d 439). Because the subject of a forcible entry and detainer proceeding is real property, venue is necessarily "fixed in the county in which the property, or any part thereof, is situated." 92 Ohio Jurisprudence 3d (2009) 257, Venue, Section 14. Thus, because the subject property is located in Middletown, Ohio, MPR was required to file the forcible entry and detainer action in Middletown, Ohio. In fact, MPR could not have elected to file an eviction proceeding against BBQ Junction in Marion County, Indiana, pursuant to the parties' forum selection clause, as an Indiana court would be unable to enforce any such action.

{¶14} Waiver is a "voluntary relinquishment of a known right" including the rights and privileges conferred by contract. *Glidden Co. v. Lumbersmens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, ¶49. BBQ Junction maintains that by voluntarily submitting to Ohio's jurisdiction by filing the forcible entry and detainer action, MPR has waived its right to enforce the forum selection clause. BBQ Junction relies on *Bldg. Servs. Inst. v. Kirk Williams Servs. Co., LLC*, Franklin App. No. 07AP-686, 2008-Ohio-1284, to support its position.¹

{¶15} In *Bldg. Servs.* the parties entered into a service agreement which contained a forum selection clause naming New Hampshire as the proper forum. *Id.* at ¶5. Building Services Institute (BSI), a New Hampshire corporation, filed suit

1. BBQ Junction also cites to several cases from both federal and other state courts, which have also found waiver of forum selection clauses. See, e.g., *Bldg. Constr. Ent., Inc. v. Gary Meadows Constr. Co.* (Apr. 4, 2007), E.D.Ark. No. 3:06-CV-00092 GTE, 2007 WL 1041003, at *4; *Unity Creations, Inc. v. Trafcon Indus., Inc.* (E.D.N.Y.2007), 137 F.Supp.2d 108, 111; *In Re Rationis Ent., Inc. of Panama* (Jan. 7, 1999), S.D.N.Y. No. 97 CV 9052(RO), 1999 WL 6364, at *2; *Dart v. Balaam* (Tex.App.1997), 953 S.W.2d 478, 481-82.

against Kirk Williams Services Co, LLC (KWS), an Ohio limited liability company, in Franklin County, Ohio to enforce the agreement. *Id.* at ¶2-4. In turn, KWS asserted counterclaims against BSI. *Id.* at ¶4. BSI then moved to dismiss its complaint and KWS's counterclaims pursuant to the forum selection clause. *Id.* at ¶5. Despite KWS's argument that BSI waived the clause by filing suit in Franklin County, Ohio, the trial court granted BSI's motion. On appeal, the Tenth Appellate District disagreed with the trial court and found that BSI waived enforcement of the forum selection clause when the company "voluntarily and intentionally" filed in Franklin County, Ohio, despite the "mandate of the forum selection clause." *Id.* at ¶11.

{¶16} In the instant case, the trial court found *Bldg. Servs.* distinguishable for two reasons. First, the suit in *Bldg Servs.* was instituted as a monetary damages claim rather than a forcible entry and detainer action. Second, the clause in *Bldg. Servs.* only listed New Hampshire as the proper forum; whereas the clause in this case allowed MPR to file in Indiana or "wherever else it chooses."

{¶17} We agree that *Bldg. Servs.* is distinguishable. Had MPR filed both a forcible entry and detainer action as well as a claim for damages in an Ohio court, MPR would have waived the forum selection clause – in accordance with the holding in *Bldg. Servs.* –by voluntarily submitting to venue in this state. However, in this case, the only matter MPR presented before the Ohio court was the forcible entry and detainer action to gain possession of its property. In fact, MPR's complaint expressly stated that it "reserve[d] the right to make a claim for damages arising under the Lease after [BBQ Junction] vacate[d] the Leased Premises," which is permissible under Ohio law. See R.C. 1923.03; *Dennis v. Morgan*, 89 Ohio St.3d 417, 2000-Ohio-211, at 4.

{¶18} We find that MPR did not waive its choice of forum because the company was obligated to bring the forcible entry and detainer action in Ohio. This was not a "voluntary relinquishment" of MPR's contractual right; it was a requirement, by the state of Ohio, in order for MPR to repossess its property. MPR should not now be forced to remain in Ohio to litigate issues arising from the lease when the forum selection clause, to which BBQ Junction agreed, clearly states that such matters are to be brought in Marion County, Indiana. Therefore, we overrule BBQ Junction's assignment of error.

{¶19} Judgment affirmed.

POWELL and HENDRICKSON, JJ., concur.