

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JCM MACHINERY, INC.,

Appellant

v.

A&P LAMINATIONS, INC.

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1613 MDA 2012

Appeal from the Order Dated June 4, 2012
In the Court of Common Pleas of Berks County
Civil Division at No(s): 11-26366

BEFORE: BOWES, J., GANTMAN, J., and OLSON, J.

MEMORANDUM BY GANTMAN, J.:

FILED MAY 24, 2013

Appellant, JCM Machinery, Inc. ("JCM"), appeals from the order entered in the Berks County Court of Common Pleas, which sustained the preliminary objections to venue as improper, filed on behalf of Appellee, A&P Laminations, Inc. ("A&P"), and transferred the case to Philadelphia County. We affirm.

The relevant facts and procedural history of this case are as follows. JCM is a Pennsylvania corporation that specializes in industrial and commercial electrical contracting. Jonathan Vorcheimer is JCM's President. From 1990 to 2010, JCM operated in Bucks County. Sometime in 2010, Mr. Vorcheimer leased a house in Berks County. At the same time, however, JCM's invoices and service reports continued to display a Post Office Box

number in Doylestown, Bucks County, as the company address. Phone records for JCM were sent to the same Doylestown address.

A&P is a Pennsylvania corporation located in Philadelphia. In June 2011, A&P's Steven DeTheodore placed a telephone call to JCM's Jonathan Vorcheimer and asked him to troubleshoot and possibly repair a used A&P compressor in Philadelphia. Mr. Vorcheimer happened to answer the call on his cell phone at the home he rents in Berks County. Mr. Vorcheimer went to A&P's location in Philadelphia, estimated and performed repair work on the compressor in Philadelphia over the course of three days. The record contains a three-page service report/invoice (one for each day on the job); with a JCM heading denoting its address as "Doylestown, PA 18901," identifying JCM's principal address in Bucks County; describing the service performed in Philadelphia; the materials/parts utilized; the hours of service; and signed as "Accepted By" Mr. DeTheodore on each day, at A&P's location in Philadelphia. A&P allegedly did not pay the invoice balance due in the amount of \$3,595.66. In October 2011, JCM obtained a judgment against A&P in the Berks County Magisterial District Court for \$3,769.47, representing the amount allegedly due for services rendered, plus interests and costs.

A&P timely appealed the judgment. JCM filed its complaint, in the Berks County Court of Common Pleas, for breach of contract and unjust enrichment. Attached to the complaint as Exhibit A were three pages of

service report/invoices. In paragraph 2 of the complaint, JCM identifies itself as a Berks County corporation. (**See** JCM's Complaint at 1; R.R. at 1a.) In paragraph 5 of the complaint, JCM identifies "the Agreement" sued upon as "A&P agreed to pay JCM for his services on a discounted time and materials basis. (**See id.** at 2; R.R. at 2a.)

A&P filed preliminary objections raising, *inter alia*, improper venue in Berks County, indicating that all of the exhibits attached to JCM's complaint identified JCM's principal place of business in Bucks County and that the entire "transaction" took place at A&P's place of business in Philadelphia. (**See** A&P's Preliminary Objections at 3; R.R. at 11a.)

Expedited discovery followed with the depositions of both Mr. Vorcheimer and Mr. DeTheodore. After receiving briefs from the parties, the court entered an order on June 4, 2012, sustaining A&P's preliminary objections on the basis of improper venue and transferring the case to Philadelphia County.

On June 25, 2012, JCM timely filed a notice of appeal. The court ordered JCM to file a concise statement of errors complained on appeal pursuant to Pa.R.A.P. 1925(b); JCM timely complied.

JCM raises one issue for our review:

WHETHER, UNDER PENNSYLVANIA LAW, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT VENUE WAS IMPROPER IN BERKS COUNTY, PENNSYLVANIA, IN A BREACH OF CONTRACT ACTION WHEREIN THE WORDS OF ACCEPTANCE FORMING THE CONTRACT AT ISSUE WERE SPOKEN OVER THE

TELEPHONE AND THE SPEAKER OF SUCH WORDS OF ACCEPTANCE WAS LOCATED IN BERKS COUNTY, PENNSYLVANIA AT THE TIME OF SUCH ACCEPTANCE?

(JCM's Brief at 1-2).

JCM argues the interplay of basic contract principles and Pennsylvania Rule of Civil Procedure 2179(a)(4) (regarding "transaction or occurrence" venue for corporations), by first reiterating the general proposition that a contract is formed upon acceptance. Then JCM asserts the Rule 2179(a)(4) "transaction" took place in Berks County because Mr. Vorcheimer was in Berks County when he answered A&P's initial phone call and "agreed" to do work for A&P. JCM also claims its only place of business is in Berks County. Based on JCM's premise that the parties' contract was formed over the phone in Berks County, JCM concludes venue was proper in Berks County; and the court erred when it sustained A&P's preliminary objections on the basis of improper venue and transferred the case to Philadelphia County. We disagree.

Generally, we review an order sustaining preliminary objections based on improper venue for an abuse of discretion or legal error. ***Lugo v. Farmers Pride, Inc.***, 967 A.2d 963 (Pa.Super. 2009), *appeal denied*, 602 Pa. 668, 980 A.2d 609 (2009). A trial court's decision to transfer a case for improper venue will not be disturbed if the decision is reasonable in light of the facts. ***McMillan v. First Nat. Bank of Berwick***, 978 A.2d 370 (Pa.Super. 2009). If any proper basis exists for the court's decision to

transfer venue, that decision must stand. **Schultz v. MMI Products, Inc.**, 30 A.3d 1224 (Pa.Super. 2011); **Goodman v. Fonslick**, 844 A.2d 1252 (Pa.Super. 2004). Each case depends on its own unique facts. **Zampana-Barry v. Donaghue**, 921 A.2d 500, 504 (Pa.Super. 2007), *appeal denied*, 596 Pa. 709, 940 A.2d 366 (2007).

A defendant can challenge the chosen forum as “improper,” typically through a preliminary objection to the complaint. Pa.R.C.P. 1028(a)(1). **But see Cid v. Erie Ins. Group**, 2013 PA Super 22 (filed Feb 15, 2013) (holding Erie properly raised and preserved its challenge to venue as improper in its response to plaintiff’s petition to appoint arbitrator and compel arbitration, notwithstanding common rule that improper venue must be raised *via* preliminary objection, where plaintiff’s filing was not “pleading”; instead, plaintiff’s filing implicated rules governing petition practice and procedure, which make no provision for raising preliminary objections).

Corporations have a constitutional right to seek a change of venue. **PECO Energy Co. v. Philadelphia Suburban Water Co.**, 802 A.2d 666 (Pa.Super. 2002). Pennsylvania Rule of Civil Procedure 2179 governs proper venue for actions against corporations in relevant part as follows:

Rule 2179. Venue

(a) Except as otherwise provided by an Act of Assembly, by Rule 1006(a.1) or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in

- (1) the county where its registered office or principal place of business is located;
- (2) a county where it regularly conducts business;
- (3) the county where the cause of action arose;
- (4) a county where a transaction or occurrence took place out of which the cause of action arose, or
- (5) a county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.

* * *

Pa.R.C.P. 2179(a). These prerequisites to venue are stated in the disjunctive, so acts triggering any one subsection are sufficient to attach venue. ***Deyarmin v. Consolidated Rail Corp.***, 931 A.2d 1 (Pa.Super. 2007), *appeal denied*, 597 Pa. 706, 948 A.2d 805 (2008). Ordinarily, the plaintiff's choice of forum carries great weight, but it is not absolute or unassailable. ***Fritz v. Glen Mills Schools***, 840 A.2d 1021 (Pa.Super. 2003). The presumption in favor of the plaintiff's choice of forum, however, has no application to the question of whether venue is proper in the plaintiff's chosen forum; venue "either is or is not proper." ***Kring v. University of Pittsburgh***, 829 A.2d 673, 676 (Pa.Super. 2003), *appeal denied*, 577 Pa. 689, 844 A.2d 553 (2004).

When a plaintiff premises the choice of venue on Rule 2179(a)(4) (a county where a transaction or occurrence took place out of which the cause

of action arose), "Pennsylvania courts have interpreted 'a transaction or occurrence' to require that a transaction...and not merely some part of the transaction, takes place in the county where venue is laid.... ... Therefore, parties cannot avoid the 'transaction' requirement by characterizing 'a part of a transaction' as an 'occurrence.'" **Id.** at 678 (internal citations and some quotation marks omitted). "The making of a contract for whose breach an action is brought constitutes a 'transaction'" for purposes of Rule 2179(a)(4). **Craig v. W.J. Thiele & Sons, Inc.**, 395 Pa. 129, 133, 149 A.2d 35, 37 (1959). The place where one of several steps was taken in the formation of a contract is generally insufficient to establish the "contract" as the "transaction or occurrence" required under Rule 2179(a)(4). **Id.** at 133-34, 149 A.2d at 37. The framers of the Pennsylvania venue rules intended venue in this context to lie in the county where the contract, not merely some part of it, was completed. **Id.** at 134, 149 A.2d at 37. In other words, negotiations leading up to a contract do not make venue proper in the county where those negotiations took place. **Burdett Oxygen Co. v. I.R. Wolfe & Sons, Inc.**, 433 Pa. 291, 296, 249 A.2d 299, 302 (1969). In this context, we inquire where the parties entered into an enforceable contract or whether the event that purportedly grounds venue in a particular county was just a "first step" or a mere "facet" in a complex transaction. **Deyarmin, supra** at 11.

General contract law states a contract is made where an offer is accepted. ***Lynn v. Employers Reinsurance Corp.***, 392 Pa. 58, 61-62, 139 A.2d 638, 640 (1958). Pennsylvania law makes clear that a contract is created where there is mutual assent to its essential terms by parties with the capacity to contract. ***Hartman v. Baker***, 766 A.2d 347, 351 (Pa.Super. 2000), *appeal denied*, 564 Pa. 712, 764 A.2d 1070 (2000). Contract formation is a question of law for the court to decide, and whether particular conduct expresses an offer and acceptance depends on the surrounding circumstances. ***Temple University Hosp., Inc. v. Healthcare Management Alternatives, Inc.***, 764 A.2d 587, 593 (Pa.Super. 2000), *appeal denied*, 566 Pa. 647, 781 A.2d 147 (2001).

In the present case, the parties agree that Rule 2179(a)(4) (a county where a transaction or occurrence took place out of which the cause of action arose) is the venue rule subsection at issue. The record shows the following facts relevant to this particular venue question. In June 2011, Mr. DeTheodore of A&P called Mr. Vorcheimer of JCM on the telephone, which happened to be Mr. Vorcheimer's cell phone. Billing records indicate a Bucks County address for the cell phone; JCM's corporate records and invoices similarly display the Bucks County address. When Mr. Vorcheimer took the call, however, he was in Berks County, in a house he had recently rented. JCM's complaint summarized the content of the phone call as follows: "On or about June 14, 2011, A&P summoned JCM to make repairs to a used

compressor. A&P agreed to pay JCM for [its] services on a discounted time and materials basis.” (**See** JCM’s Complaint at 2; R.R. at 2a.) Mr. Vorcheimer went to A&P’s location in Philadelphia, estimated and performed repair work on the compressor in Philadelphia over the course of three days. The record contains a three-page service report/invoice (one for each day on the job); with a JCM heading denoting its address as “Doylestown, PA 18901,” identifying JCM’s principal address in Bucks County; describing the service performed in Philadelphia; the materials/parts utilized; the hours of service; and signed as “Accepted By” Mr. DeTheodore on each day at A&P’s location in Philadelphia. A&P allegedly did not pay the invoice balance due in the amount of \$3,595.66.

Beyond JCM’s bald assertion that contract formation occurred over a phone call Mr. Vorcheimer answered in Berks County, JCM has presented no genuine facts to support that legal conclusion. Although contract formation can occur through acceptance over the phone, the facts and circumstances surrounding this phone call do not support JCM’s conclusion that the parties’ contract was finalized over the phone. Instead, the record more reasonably shows that the initial call involved preliminary discussions about a service inspection and possible repair. That discussion formed part of the transaction, but it did not create the contract. **See Craig, supra.** The conversation invited Mr. Vorcheimer to come to Philadelphia and examine the malfunctioning compressor.

At the A&P facility, JCM performed the work and presented A&P with written invoices, which A&P accepted, and JCM attached to its complaint as the parties' written agreement.¹ We reject JCM's consistent characterization of the initial phone call as decisively establishing that Mr. Vorcheimer accepted a contract offer over the phone. JCM's use of the phrases "agreement" and "acceptance" lack the conclusive effect JCM imports. The facts and circumstances of this case include a written document signed as accepted in Philadelphia, where all the relevant repair work was performed. Those facts support the conclusion that the parties finalized their agreement in Philadelphia, when they understood and agreed to its essential terms and conditions. ***See Hartman, supra.*** Thus, A&P's initial service call to JCM was only a proposition for a contract, and absent mutual assent to any essential terms, JCM's response did not create an obligatory or enforceable agreement between the parties over the phone in Berks County. ***See Temple University Hosp., Inc., supra.***

In contrast, the only ground for venue in Berks County was Mr. Vorcheimer's actions in answering his cell phone while he was in Berks County. Under the circumstances of this case, A&P's initial phone call, which

¹ ***See generally*** Pa.R.C.P. 1019(h)-(i) (providing: (h) "When any claim...is based on an agreement, the pleading shall state specifically if the agreement is oral or written. *Note:* If the agreement is in writing, it must be attached to the pleading. ... (i) When any claim...is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof...").

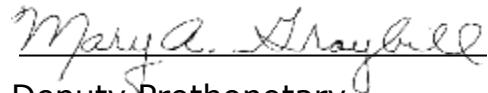
JCM answered in Berks County, was plainly insufficient to establish that an enforceable contract was made in Berks County for purposes of satisfying a "transaction or occurrence" under Rule 2179(a)(4). **See Craig, supra.** Instead, that event was pure happenstance and alone is not a basis for proper venue in Berks County. Thus, we conclude the court properly sustained A&P's preliminary objections to venue as improper and transferred the case to Philadelphia County. **See McMillan, supra.** Accordingly, we affirm.

Order affirmed.

*JUDGE OLSON CONCURS IN THE RESULT.

**JUDGE BOWES FILES A DISSENTING MEMORANDUM.

Judgment Entered.


Deputy Prothonotary

Date: 5/24/2013