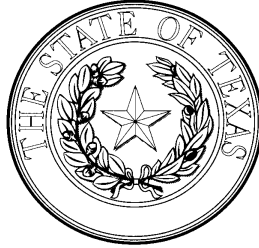


Opinion issued August 4, 2020



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-19-00797-CV

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**LANDCO ENTERPRISES, INC. AND CURTIS ELLISON, Appellants**  
V.  
**JINDAL SAW USA, LLC AND JINDAL SAW LTD., Appellees**

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**On Appeal from the 61st District Court**  
**Harris County, Texas**  
**Trial Court Case No. 2017-02901**

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**MEMORANDUM OPINION**

Landco Enterprises, Inc. and Curtis Ellison appeal the denial of their motion to transfer venue in this multi-plaintiff suit in which Jindal Saw USA, LLC and Jindal Saw Ltd. asserted breach-of-contract claims against them. In a single issue, Landco and Ellison contend the trial court erred in denying their transfer motion

because each plaintiff was required, yet failed, to establish that venue was proper in their chosen county of venue. Because neither affidavit filed in support of the Jindal entities' venue choice met the requirements of an admissible affidavit and no other evidence met the prima-facie-proof burden to establish their venue choice, we reverse.

### **Background**

According to their petition, one or both Jindal entities contracted to sell special-order pipes and other goods to Landco at a cost of over \$14 million. The Jindal entities allege that Landco and Ellison breached three-fourths of these contracts “by either returning the purchased special ordered goods, or by failing to pay the agreed upon amount for the goods.” The Jindal entities assert that venue is proper in Harris County, where they filed suit, “because all or a substantial part of the events and/or omissions made [the] basis of [the] suit occurred in Harris County, Texas.” In describing the parties, the Jindal entities note that Landco is a Texas corporation “doing business in Harris County.”

The Jindal entities do not allege that they have principal places of business in Harris County. Nor do they allege that Landco has a principal place of business in Harris County or that Ellison resides in Harris County. They rely only on their assertion that a “substantial part of the events” occurred within the chosen county. *See* TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1) (with some exceptions, a lawsuit

may be brought “in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred”).

Landco and Ellison moved to transfer venue to Hill County, where Ellison resides and Landco has a principal place of business. Landco specifically denied that all or a substantial part of the events or omissions giving rise to the lawsuit took place in Harris County and asserted, instead, that all or a substantial part took place in Hill County. According to Landco and Ellison, all dealings between the parties took place in Hill County. Their venue motion was supported by an affidavit from William Wragge, Landco’s office manager, who averred that the Jindal entities’ representative, Debashish Roychowdhury, always met with Landco and Ellison in Hill County and never met with them in Harris County.

The Jindal entities filed a response and attached an unsigned document purporting to be the affidavit of Pramod Manapure, but, because it was not signed, the document did not qualify as an affidavit. *See Metro. Transit Auth. of Harris Cty. v. Williams*, No. 01-17-00724-CV, 2018 WL 541932, at \*3 (Tex. App.—Houston [1st Dist.] Jan. 25, 2018, pet. denied) (mem. op.) (unsigned affidavit has no legal effect and constitutes no evidence).

Landco and Ellison amended their motion to transfer venue. They again specifically denied that all or a substantial part of the events or omissions giving rise to the suit occurred in Harris County and pleaded that Ellison’s residence and

Landco's principal place of business are in Hill County. Citing Sections 15.002 and 15.003 of the Civil Practice and Remedies Code, they requested transfer of the suit to Hill County, Texas. *See* TEX. CIV. PRAC. & REM. CODE §§ 15.002–15.003. In support of their amended motion, they filed a second affidavit from Wragge. Wragge averred that the meetings with the Jindal representatives had occurred in Hill County and that payment for goods had been by wire transfer from Hill County to a bank account in India belonging to Jindal Saw Ltd.

Later, the Jindal entities filed a document purporting to be an affidavit from Vijay Joshi, a corporate representative and custodian of records for Jindal Saw Ltd., the Indian entity. That document, though, did not contain the typical affidavit assertion that all matters stated therein are within the affiant's personal knowledge; instead, the document stated, "The statements in this affidavit are *true and correct based upon my information and belief*, and review of the documents attached hereto as the custodian of records and corporate representative of Jindal Saw LTD." (Emphasis added.) The appellate record does not include any documents as attachments to the Joshi filing.

The trial court issued an order that (1) granted the Jindal entities' request to late file the Joshi affidavit, (2) granted Landco and Ellison's request to maintain the pre-scheduled hearing date, and (3) denied Landco and Ellison's amended motion to transfer venue.

Landco and Ellison appealed, seeking reversal of the venue order. The Jindal entities filed an appellate brief in support of maintaining venue in Harris County. Later, the parties attempted to obtain transfer to Hill County by agreement. We denied their motion because the particular disposition they sought was not one of the options authorized by Rule 42.1 of the Texas Rules of Appellate Procedure. The parties then requested that their appeal be resolved on the merits and the matter was submitted for resolution.<sup>1</sup>

### **Transfer of Venue**

In a single issue, Landco and Ellison contend the trial court erred in determining that the record contains prima facie proof that venue is proper in Harris County as to both Jindal entities to overcome Landco and Ellison's venue challenge.

#### **A. Appellate jurisdiction**

As an initial matter, we note that we have appellate jurisdiction over the denial of a venue motion in this multi-plaintiff suit. The denial of a venue motion generally is not subject to interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 15.064(a). However, when, as here, a defendant challenges venue a suit involving multiple plaintiffs, the defendant may obtain interlocutory appellate review of whether each plaintiff independently established that venue was proper in the chosen county. *See*

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<sup>1</sup> Our resolution of the appeal is consistent with the parties' evolved position, seeking transfer to Hill County.

*Venator Materials PLC v. Macomb Cty. Emps.' Ret. Sys.*, No. 05-19-01177-CV, 2020 WL 289296, at \*3 (Tex. App.—Dallas Jan. 21, 2020, no pet.) (mem. op.); *Pellegrini v. Six Pines Expl., LLC*, No. 03-18-00774-CV, 2019 WL 6223348, at \*2 (Tex. App.—Austin Nov. 22, 2019, no pet.) (mem. op.); *see also* TEX. CIV. PRAC. & REM. CODE § 15.003(b)(1).

**B. Rules regarding venue selection and challenges**

When venue options exist, a plaintiff is given the first choice of selecting a venue for the litigation. *GeoChem Tech Corp. v. Verseches*, 962 S.W.2d 541, 544 (Tex. 1998). A defendant may move to transfer venue if the plaintiff's chosen venue is not a proper county of venue. TEX. R. CIV. P. 86.

The general venue rule provides that, in the absence of another specific venue provision, all lawsuits shall be brought in one of the following venues:

- (1) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
- (2) in the county of defendant's residence at the time the cause of action accrued if defendant is a natural person;
- (3) in the county of the defendant's principal office in this state, if the defendant is not a natural person; or
- (4) if none of the above apply, in the county in which the plaintiff resided at the time of the accrual of the cause of action.

TEX. CIV. PRAC. & REM. CODE § 15.002(a).

Section 15.003 further requires that each plaintiff establish venue independently of any other plaintiff. *Id.* § 15.003. This provision was enacted as part of the Texas Legislature’s 1995 tort reform efforts to address derivative venue in the context of co-plaintiffs. *Polaris Inv. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860, 862 (Tex. 1995) (per curiam). For any plaintiff who is unable to establish venue independently but wants to maintain their venue choice, that plaintiff must establish, among other things, that joinder is proper under the requirements of Section 15.003(a). TEX. CIV. PRAC. & REM. CODE § 15.003(a).<sup>2</sup>

Rule 87 provides that the plaintiff bears the burden to prove that venue is proper in the county where it filed suit and that the defendant has the burden to prove that venue is proper in the county to which it seeks transfer. TEX. R. CIV. P. 87(2)(a). Rule 87 also sets forth the proof required. TEX. R. CIV. P. 87(3)(a).

A plaintiff’s pleaded venue facts are taken as true unless specifically denied by the defendant. *Id.* If the defendant specifically denies the plaintiff’s venue facts, the plaintiff must establish prima facie proof of its venue facts. *Id.* “Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth facts supporting such pleading.” *Id.*

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<sup>2</sup> No party argued venue under a joinder theory or provided evidence in support of any Section 15.003(a) factors.

Rule 87 includes specific requirements for the affidavit filed as part of the plaintiff's prima facie proof: "Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify." *Id.* An affidavit that is not made on personal knowledge is inadmissible and inappropriate venue evidence. *In re Mo. Pac. R. Co.*, 970 S.W.2d 47, 52 (Tex. App.—Tyler 1998, no pet.).

The plaintiff's prima facie proof is not subject to rebuttal, cross-examination, impeachment, or disproof. *In re Mo. Pac. R. Co.*, 998 S.W.2d 212, 216 (Tex. 1999) (orig. proceeding). Thus, if a plaintiff produces prima facie proof in support of its venue choice, the motion to transfer venue should be denied. TEX. R. CIV. P. 87(3)(c). If the plaintiff does not produce prima facie proof, then other venue options should be considered.

**C. After their venue facts were specifically denied, the Jindal entities did not meet their prima facie burden to maintain venue in Harris County**

The Jindal entities pleaded that all or a substantial part of the events underlying their suit occurred in Harris County. Landco and Ellison specifically denied the assertion, thus requiring the Jindal entities to make a prima facie showing. The Jindal entities filed two documents they titled as affidavits. The Manapure document was unsigned and, thus, not a qualifying affidavit. *See Williams*, 2018 WL 541932, at \*3. The Joshi document stated that all assertions therein "are true and correct based upon my information and belief." It did not assert personal knowledge



of the stated facts. Thus, the factual assertions in that document do not qualify as averred statements or prima facie proof in support of a venue choice. *See* TEX. R. CIV. P. 87(3)(a); *In re Mo. Pac. R. Co.*, 970 S.W.2d at 52. Rule 87(3)(a) specifically requires an affidavit in support of venue to be “made on personal knowledge.” TEX. R. CIV. P. 87(3)(a).

Without any affidavit, neither Jindal entity met the prima facie standard to establish that all or a substantial part of the events or omissions giving rise to its claim occurred in Harris County. *See* TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1). Because both Jindal entities failed to meet their burden to establish proper venue in Harris County, the ability to select venue passed to Landco and Ellison, should they successfully establish that venue is maintainable in Hill County, where they sought to have the lawsuit transferred. *Wilson v. Tex. Parks and Wildlife Dept.*, 886 S.W.2d 259, 260 & n.1 (Tex. 1994); *Devon Energy Corp. v. Iona Energy, L.P.*, No. 02-19-00343-CV, 2020 WL 98138, at \*8 (Tex. App.—Fort Worth Jan. 9, 2020, pet. filed) (mem. op.). The burden, when it shifted to Landco and Ellison, remained a prima-facie-proof standard. TEX. R. CIV. P. 87(2)(a); *Devon*, 2020 WL 98138; *Garza v. State and Cty. Mut. Fire Ins. Co.*, No. 02-06-00202-CV, 2007 WL 1168468, at \*4–5 (Tex. App.—Fort Worth April 19, 2007, pet. denied) (mem. op.).

### **Landco and Ellison met their burden for transfer to Hill County**

Landco and Ellison sought transfer to Hill County, arguing that all or a substantial part of the acts or omissions underlying the suit against them occurred in Hill County. They rely on their pleadings and the affidavits of William Wragge, Landco's office manager. Their pleading states that Landco's principal place of business is in Hill County and that Ellison's residence is in Hill County. Wragge averred that all parties met in person in Hill County, they negotiated and agreed to the terms of the disputed transactions in Hill County, Landco initiated payment for the contractual goods in Hill County, and "[a]ll dealings between Plaintiffs and Defendants took place in Hill County."

With this evidence, Landco and Ellison met their burden to establish with prima facie proof that all or a substantial part of the acts or omissions underlying the breach-of-contract suit occurred in Hill County, where the defendants were located, the contracts were negotiated, and payment or nonpayment occurred. *See* TEX. CIV. PRAC. & REM. CODE § 15.002(a)(1).<sup>3</sup>

Because the Jindal entities failed to meet their burden and, when the burden shifted, Landco and Ellison met their burden, we conclude the trial court erred in

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<sup>3</sup> Landco and Ellison argued venue based on Section 15.002(a)(1). Because we agree that they met their burden to establish venue on that basis, we do not resolve whether venue otherwise would have been maintainable under Section 15.002(a)(2).

denying the motion to transfer venue to Hill County. Accordingly, we reverse the trial court's order and remand to the trial court for transfer to Hill County.

**Conclusion**

We reverse and remand for transfer to Hill County.

Sarah Beth Landau  
Justice

Panel consists of Justices Keyes, Kelly and Landau.