

Reversed and Remanded and Memorandum Opinion filed October 21, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00856-CV

LEON OSCAR RAMIREZ, JR., Appellant

V.

SUEZ ENERGY RESOURCES NA, INC., Appellee

**On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 2008-50748**

M E M O R A N D U M O P I N I O N

This appeal challenges the trial court's venue determination. Appellee Suez Energy Resources NA, Inc. ("Suez Energy") sued appellant Leon Oscar Ramirez, Jr. in Harris County for an unpaid balance due on an electricity services contract. Ramirez answered and filed a motion to transfer venue from Harris County to Webb County. The motion was denied, and judgment was ultimately rendered in favor of Suez Energy. In his sole issue, Ramirez contends that the trial court erred by denying his motion to transfer venue. Finding reversible error regarding the venue in this case, we reverse the judgment of the trial court and remand the case with instructions to transfer venue of the case from Harris County to Webb County.

I. BACKGROUND

Ramirez maintains a business in Laredo, Webb County, Texas. In 2007, he contracted with Suez Energy for electricity services for the business. The service contract provided that Suez Energy would supply electricity to the business; in return, Ramirez agreed to pay Suez Energy for the electricity. The “Billing and Payment” section provided that “Payment shall be due to Suez by check, electronic transfer or any other mutually agreed upon payment method within seventeen (17) days after receipt of the invoice.” For several months thereafter, Suez Energy provided electricity. Ramirez, however, only partially paid Suez Energy for the electricity and never paid the entire balance. Suez Energy stopped its electricity services and sued Ramirez to recover the balance due on the contract.

Suez Energy brought suit in Harris County, alleging suit on a sworn account and breach of contract. In its petition, Suez Energy alleged that venue was proper in Harris County because (1) “all or a substantial part of the events or omissions giving rise to the claims” occurred in Harris County, (2) the contract was signed and executed in Harris County, and (3) “payment was to be received in Houston, Harris County.” Ramirez filed an answer denying Suez Energy’s allegations and filed a motion to transfer venue to Webb County. In his motion to transfer venue, Ramirez denied that all or substantial part of the events occurred in Harris County. Specifically, Ramirez claimed that: (1) Suez Energy did not maintain an office or business in Harris County, (2) the electricity contract was signed in Webb County, (3) the electricity was provided in Webb County, and (4) “there was no requirement in the contract that payment [had] to be made in Harris County.” Suez Energy responded to the motion, contending that the contract supported venue in Harris County: payment—performance—was to be made to Suez Energy in Houston, Harris County. Thus, according to Suez Energy, venue was permissive under section 15.035(a) of the Civil Practice and Remedies Code.¹

¹ See Tex. Civ. Prac. & Rem. Code Ann. § 15.035(a) (Vernon 2002).

Initially, the trial court withheld its ruling on the transfer motion because Ramirez had not filed an affidavit or other evidence to support his motion's allegations, namely where payments were made. The trial court granted Ramirez additional time to supplement his motion with an affidavit averring to the place of payment.² After several weeks, Ramirez had not filed an affidavit or any other evidence regarding the place of payment.³ Accordingly, the trial court denied the motion, specifically finding that venue was permissive in Harris County under section 15.035 of the Civil Practice and Remedies Code.⁴ Thereafter, Suez Energy successfully moved for summary judgment on its causes of action. Judgment was rendered in favor of Suez Energy for \$18,005.35; the trial court also awarded attorney's fees to Suez Energy. In a single issue, Ramirez challenges the trial court's venue determination.

II. STANDARD OF REVIEW

We conduct a *de novo* review of the trial court's denial and determine whether there is any probative evidence that venue would have been proper in Harris County. *See Wilson v. Tex. Parks and Wildlife Dep't*, 886 S.W.2d 259, 261–62 (Tex. 1994). If so, we must affirm the trial court's denial of Ramirez's motion to transfer venue to Webb County. *See Bonham State Bank v. Beadle*, 907 S.W.2d 465, 471 (Tex. 1995).

Because venue may be proper in more than one county, the plaintiff is given the first choice to fix venue in a proper county by filing suit in that county. *See In re Team Rocket*, 256 S.W.3d 257, 259 (Tex. 2008); *Cantu v. Howard S. Grossman, P.A.*, 251

² The lower court's docket sheet indicates "Court will withhold ruling until D submits supplemental affidavit regarding where payments were made (Houston or elsewhere). No ruling made. No record."

³ The trial court's docket entry for June 9, 2009 reflects "Court still waiting on evidence of where payments were actually mailed."

⁴ The court's docket entry for June 16, 2007 states "Court will deny motion to transfer venue as no evidence of a location for payments by defendant other than Harris County was adduced by Defendant/movant." After the lower court's ruling, Ramirez filed a motion to reconsider his transfer motion, contending that the trial court had erroneously placed the burden of proof regarding venue on Ramirez and that the electricity agreement did not reflect that payments were in fact sent to Houston, Harris County. There is no ruling on this motion in the record.

S.W.3d 731, 735 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). If the defendant, however, challenges the plaintiff’s venue choice, the plaintiff must present prima facie proof that venue is proper. *See* Tex. R. Civ. P. 87(2)(a), 3(a); *see also* *Wilson*, 886 S.W.2d at 260–61. “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 the facts supporting each pleading.” Tex. R. Civ. P. 87(3)(a). If the plaintiff proves venue facts that support venue, the trial court must maintain the lawsuit in the county where suit was filed unless the motion to transfer is based on an established ground of mandatory venue. Tex. R. Civ. P. 87(3)(c). If the plaintiff does not meet this burden—the defendant brings forth “conclusive evidence” that destroys the plaintiff’s prima facie proof—the trial court “shall transfer the case to another county of proper venue.” *Wilson*, 886 S.W.2d at 260; *Moveforfree.com, Inc. v. David Hetrick, Inc.*, 288 S.W.3d 539, 543 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Furthermore, properly pleaded venue facts shall be taken as true unless specifically denied by the adverse party. Tex. R. Civ. P. 87(3)(a). If the defendant specifically denies any of the venue facts pleaded by the plaintiff, the plaintiff must make prima facie proof of the venue fact denied. Tex. R. Civ. P. 87(2)(a)–(b); *see also* *GeoChem Tech Corp. v. Verseckes*, 962 S.W.2d 541, 543 (Tex. 1998). Specific denial of a venue fact requires that the fact *itself* be denied. *See* *Sanes v. Clark*, 25 S.W.3d 800, 803 (Tex. App.—Waco 2000, pet. denied); *see also* *Maranatha Temple, Inc. v. Enter Prods. Co.*, 833 S.W.2d 736, 740 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

III. TRIAL COURT’S VENUE DETERMINATION

Suez Energy selected venue in Harris County, alleging that (1) “all or a substantial part of the events or omissions giving rise to the claims” occurred in Harris County, (2) the contract was signed and executed in Harris County, and (3) “payment was to be received in Houston, Harris County.” Ramirez then challenged Suez Energy’s choice of venue by filing a motion to transfer venue to Webb County. Ramirez alleged that: (1)

Suez Energy did not maintain an office or business in Harris County, (2) the electricity contract was signed in Webb County, (3) the electricity was provided in Webb County, and (4) “there was no requirement in the contract that payment [had] to be made in Harris County.” Because Ramirez specifically challenged each of Suez Energy’s venue facts, Suez Energy was required to make a prima facie showing that venue was proper in Harris County. *See* Tex. R. Civ. P. 87(2)(a)–(b).

Suez Energy responded to the motion, contending that venue was proper in Harris County pursuant to section 15.035 of the Civil Practice and Remedies Code because the contract required payment—performance—to be made to Suez Energy in Houston, Harris County. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.035(a) (Vernon 2002). The trial court agreed and found that venue was proper in Harris County under section 15.035(a) of the Civil Practice and Remedies Code.

Section 15.035(a) provides in relevant part:

[I]f a person has contracted in writing *to perform an obligation in a particular county, expressly naming the county or a definite place in that county* by that writing, suit on or by reason of the obligations may be brought against him either in that county or in the county in which the defendant has his domicile.

Id. (emphasis added). Under section 15.035(a), venue is permissive if a written contract obligates performance in a particular county. *See id.* Thus, if the contract at issue required Ramirez to make payment in Harris County, venue is permissive under section 15.035.

The “Billing and Payment” section of the contract provides: “Payment shall be due to Suez by check, electronic transfer or any other mutually agreed upon payment method within seventeen (17) days after receipt of the invoice.” There is no requirement that payment be made specifically in Harris County. Suez Energy, however, interprets three sections in the contract, sections 1.3, 2.1, and 4, to require payment in Harris County. Sections 1.3 and 2.1 provide in relevant part:

1.3 Billing and Payment: Payment shall be due to Suez by check, electronic transfer or any other mutually agreed upon payment method within seventeen (17) days after receipt of the invoice.

2.1 Notices. Notices, correspondence, and address changes shall be in writing and delivered by regular or electronic mail, facsimile, or . . . in person. . . . All notices shall be provided to the person and address specified in Section 4

Section 4 identifies Suez Energy with a Houston, Harris County address. According to Suez Energy, these three sections—read together—require payment to be made in Harris County. We disagree. The Billing and Payment section simply requires payment. No place of payment is identified and payment can be made by any mutually agreed upon method, which means payment is not inherently tied to any particular location. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.035(a) (requiring that the contract mandate performance of “an obligation in a particular county, expressly naming the county or a definite place in that county”); *see also* *McCurdy v. King*, 359 S.W.2d 255, 256–57 (Tex. Civ. App.—Eastland 1962, writ dism’d w.o.j.) (finding reversible error in trial court’s venue determination when “the obligation of appellant under the contract was to pay certain specified expenses,” but “no particular place [was] named for the performance of such obligation”).

Furthermore, the notice section requires that *notices, correspondences, and address changes*—not payment—be sent, by regular or electronic mail or facsimile, to Suez Energy in Harris County. The notice section does not require payment to be made in Harris County, and in fact permits notice by electronic mail, which can be received outside of Harris County. Under our *de novo* review, we conclude that Suez Energy has failed to meet its burden of establishing that the contract requires payment in Harris County. The four corners of the contract do not require payment in Harris County, and

there is no other evidence in the record proving that Ramirez was required to send his payments to Harris County.⁵

Accordingly, we hold that the trial court erred in denying Ramirez’s motion to transfer venue and refusing to transfer the case from Harris County to Webb County. We reverse the judgment of the trial court and remand the case to the trial court to issue an order transferring this case from Harris County to Webb County.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Yates and Sullivan.

⁵ We note that the trial court denied the motion because Ramirez failed to produce evidence that payments were in fact sent to Harris County. However, the operative fact that must be present in this particular case for venue under section 15.035(a) is that the ***contract required Ramirez to make payment in Harris County***. See Tex. Civ. Prac. & Rem. Code Ann. § 15.035(a) (“[I]f a person has contracted in writing to perform an obligation in a particular county, expressly naming the county or a definite place in that county by that writing, suit on or by reason of the obligation may be brought against him . . . in that county . . .”).