NO. 12-17-00370-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE: RIGNEY CONSTRUCTION	***§***	
& DEVELOPMENT, LLC,	***§***	***ORIGINAL PROCEEDING***
RELATOR	***§***	

MEMORANDUM OPINION

Rigney Construction and Development, LLC seeks mandamus relief from the trial court's orders refusing to transfer venue and severing the case against Brooks County Independent School District (BCISD).[1] We deny the writ.

BACKGROUND

In 2014, Rigney entered into a contract (the general contract) with BCISD to construct a new school building, known as the Lasater project. This general contract contained a mandatory venue provision that required any "action" resulting from the contract be brought in the county where BCISD's administrative offices are located. Acting in its capacity as general contractor, Rigney entered into a subcontract (the subcontract) with Red Dot Building Systems for construction of a steel building. Rigney contends that the subcontract incorporated by reference the mandatory venue provision from the general contract.

On January 5, 2015, Red Dot sued Rigney in Henderson County alleging Rigney breached the subcontract by failing to pay Red Dot for its materials and work on BCISD's steel building. On February 6, Rigney sued Red Dot in Hidalgo County alleging Red Dot breached the subcontract. Red Dot and Rigney each filed motions to transfer venue. Rigney maintained that

[1] The Respondent is the Honorable Dan Moore, Judge of the 173rd Judicial District Court, Henderson County, Texas. The underlying proceeding is trial court cause number CV15-0009-173, styled ***Red Dot Bldg. Sys., Inc. v. Rigney Constr. & Dev., LLC v. Brooks Cty. I.S.D.***

the Henderson County lawsuit should be transferred to Brooks County or, alternatively, to Hidalgo County. On October 22, the Henderson County court overruled Rigney's motion. The Hidalgo County court also denied Red Dot's motion to transfer venue to Henderson County. Following a petition for writ of mandamus, on December 2, 2016, the Texas Supreme Court determined that Henderson County was the court of dominant jurisdiction, and the Hidalgo County lawsuit was abated.[2]

In January 2016, Rigney filed a third-party petition against BCISD in the Henderson County lawsuit. The third-party petition alleged that BCISD breached the general contract by providing vague plans and specifications for construction of the school. Rigney also asserted a counterclaim against Red Dot for violations of the Deceptive Trade Practices Act, breach of contract, and accord and satisfaction.

BCISD filed a motion to transfer venue, plea to the jurisdiction, and original answer. In its motion to transfer, BCISD sought transfer of the case to Brooks County under the mandatory venue provision found in section 15.0151 of the Texas Civil Practice and Remedies Code and the terms of the general contract. BCISD argued that "Brooks County is the mandatory venue for any cause of action arising out of the Lasater Project and the parties' AIA Contracts." In the alternative, BCISD requested the third party action be severed and transferred to Brooks County.

In September 2017, the trial court granted BCISD's motion to transfer with respect to Rigney's claims against BCISD and ordered that the third party action against BCISD be severed and transferred to Brooks County. In its order on BCISD's motion to transfer, the trial court stated, "this order transferring venue in no way affects Plaintiff Red Dot Building System, Inc.'s cause of action against Defendant Rigney Construction & Development, LLC, which action shall remain in this Court under the existing cause number." This original proceeding followed.

AVAILABILITY OF MANDAMUS

Mandamus will issue only to correct a clear abuse of discretion for which the relator has no adequate remedy by appeal. ***In re Prudential Ins. Co. of Am.***, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A trial court has no discretion in determining what the law is or applying the law to the facts. ***Walker v. Packer***, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). A trial court abuses its discretion by failing to analyze or apply the law correctly.

[2] *See* ***In re Red Dot Bldg. Sys., Inc.***, 504 S.W.3d 320 (Tex. 2016) (orig. proceeding).

Id. As the party seeking relief, the relator bears the burden of demonstrating entitlement to mandamus relief. ***Id***. at 837.

An appellate remedy is adequate when any benefits to mandamus review are outweighed by the detriments. ***In re Prudential,*** 148 S.W.3d at 136. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate. ***Id.*** This determination is not "abstract or formulaic," but rather is a practical and prudential determination. ***Id***. Flexibility is the principal virtue of mandamus relief and rigid rules are "necessarily inconsistent" with that flexibility. ***Id***. Thus, the supreme court has held that "an appellate remedy is not inadequate merely because it may involve more expense or delay" than a writ of mandamus, however, the word "merely" must be carefully considered. ***Id***. Appeal is not an adequate remedy when the denial of mandamus relief would result in an "irreversible waste of judicial and public resources." ***Id***. at 137. The decision whether there is an adequate remedy on appeal "depends heavily on the circumstances presented." ***Id***. The decision is not confined to the private concerns of the parties but can extend to the impact on the legal system. ***Id***.

MOTION TO TRANSFER VENUE

In its first issue, Rigney contends the trial court abused its discretion when it refused to transfer the entire lawsuit, including the claims by and against Red Dot, to Brooks County.[3] Rigney argues that transfer to Brooks County is required under the terms of the mandatory venue provision in the general contract and incorporated in the subcontract.[4]

Applicable Law

Rule 87 of the Texas Rules of Civil Procedure, which governs motions to transfer venue, provides that if venue has been sustained against a motion to transfer, no further motions shall be considered unless the new motion is based on a mandatory venue provision. TEX. R. CIV. P. 87(5). Therefore, the general rule is that only one venue determination may be made in a single proceeding in the same trial court. ***Van Es v. Frazier***, 230 S.W.3d 770, 775 (Tex. App.—Waco

[3] Although the issues presented section of Rigney's brief identifies eight questions, Rigney divides its discussion into essentially two issues; thus, we construe the brief as presenting two issues for our review.

[4] Rigney also maintains that venue is mandatory in Brooks County under section 15.0151 of the civil practice and remedies code because BCISD is a political subdivision. However, the claims involving Red Dot do not constitute an "an action against a political subdivision." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0151(a) (West 2017), § 15.0151(b) (West 2017) (a "political subdivision" means a governmental entity in this state, other than a county, that is not a state agency, and includes a municipality, school or junior college district, hospital district, or any other special purpose district or authority).

2007, pet. denied); *see also* ***Fincher v. Wright***, 141 S.W.3d 255, 263–64 (Tex. App.—Fort Worth 2004, no pet.); ***In re Shell Oil Co.***, 128 S.W.3d 694, 696 (Tex. App.—Beaumont 2004, orig. proceeding); ***Marathon Corp. v. Pitzner***, 55 S.W.3d 114, 137 n.6 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds,* 106 S.W.3d 724 (Tex. 2003) (per curiam). In addition, a subsequent motion to transfer venue asserting a claim of mandatory venue is not permitted unless that claim was not available to the original movant. *See* TEX. R. CIV. P. 87(5); ***Frazier***, 230 S.W.3d at 775.

A party may petition for a writ of mandamus with an appellate court to enforce mandatory venue provisions. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (West 2017); *see also* ***In re Hannah***, 431 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2014, orig. proceeding) (per curiam). A party seeking to enforce a mandatory venue provision is not required to prove the lack of an adequate appellate remedy, but is required only to show that the trial court abused its discretion. ***In re Mo. Pac. R.R. Co.***, 998 S.W.2d 212, 216 (Tex. 1999).

A forum-selection clause provides parties with an opportunity to contractually preselect the jurisdiction for dispute resolution. ***Pinto Tech. Ventures, L.P. v. Sheldon***, 526 S.W.3d 428, 436 (Tex. 2017) (citing ***In re AIU Ins. Co.***, 148 S.W.3d 109, 111 (Tex. 2004) (orig. proceeding)). Forum-selection clauses are generally enforceable and presumptively valid. ***In re Laibe Corp.***, 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding) (per curiam); ***In re Int'l Profit Assocs., Inc.***, 274 S.W.3d 672, 675 (Tex. 2009) (orig. proceeding) (per curiam). Failing to give effect to contractual forum-selection clauses and forcing a party to litigate in a forum other than the contractually chosen one amounts to "'clear harassment' . . . injecting inefficiency by enabling forum-shopping, wasting judicial resources, delaying adjudication on the merits, and skewing settlement dynamics...." ***In re Lisa Laser USA, Inc.***, 310 S.W.3d 880, 883 (Tex. 2010) (orig. proceeding) (quoting ***In re AutoNation, Inc.***, 228 S.W.3d 663, 667–68 (Tex. 2007) (orig. proceeding)). A party attempting to show that such a clause should not be enforced bears a heavy burden. ***In re Lyon Fin. Servs., Inc.***, 257 S.W.3d 228, 232 (Tex. 2008) (orig. proceeding) (per curiam) (citing ***In re AIU Ins. Co.***, 148 S.W.3d at 113); ***In re Laibe Corp.***, 307 S.W.3d at 316; ***In re ADM Inv. Servs., Inc.***, 304 S.W.3d 371, 375 (Tex. 2010) (orig. proceeding). A trial court abuses its discretion in refusing to enforce a forum-selection clause unless the party opposing enforcement meets its heavy burden of showing that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would

contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. ***In re ADM Inv. Servs., Inc.***, 304 S.W.3d at 375; ***M/S Bremen v. Zapata Off–Shore Co***., 407 U.S. 1, 15-17, 92 S. Ct. 1907, 1916-17, 32 L. Ed. 2d 513 (1972). Mandamus relief is available to enforce forum-selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute. ***In re Int'l Profit Assocs., Inc.***, 274 S.W.3d at 675.

However, although the terms are not always used with precision, forum and venue are not synonymous. Forum pertains to the jurisdiction, generally a nation or State, where suit may be brought. *See, e.g.,* ***Michiana Easy Livin' Country, Inc. v. Holten****,* 168 S.W.3d 777, 784 (Tex. 2005) (explaining that before a defendant is subject to specific jurisdiction in a particular state, the defendant must purposefully avail itself "of the privilege of conducting activities within *the forum State. ...*") (emphasis added). In contrast, venue concerns the geographic location within the forum where the case may be tried. *See, e.g.,* ***Boyle v. State****,* 820 S.W.2d 122, 139-40 (Tex. Crim. App. 1989) (en banc) (stating that venue "concerns the geographic location *within the State* where the case may be tried.") (emphasis added); ***Gordon v. Jones***, 196 S.W.3d 376, 383 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("Venue may and generally does refer to a particular county, but may also refer to a particular court[]") (internal citations omitted); ***Liu v. CiCi Enters., L.P.***, No. 14-05-00827-CV, 2007 WL 43816, at *2 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (mem. op.).

The distinction between a forum selection clause and a venue selection clause is critical. Under Texas law, forum selection clauses are enforceable unless shown to be unreasonable, and may be enforced through a motion to dismiss. *See* ***M/S Bremen****,* 407 U.S. at 10, 92 S. Ct. at 1913 (stating that forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances"); ***Holten****,* 168 S.W.3d at 793 (emphasizing that "enforcement of a forum-selection clause is mandatory absent a showing that 'enforcement would be unreasonable and unjust, or that the clause was invalid due to fraud or overreaching.'") (quoting ***In re Automated Collection Techs., Inc.****,* 156 S.W.3d 557, 559 (Tex. 2004)); ***Automated Collection Techs., Inc.****,* 156 S.W.3d at 559-60 (granting petition for writ of mandamus and directing trial court to grant defendant's motion to dismiss based on a contractual forum selection clause). In contrast, venue selection

cannot be the subject of a private contract unless otherwise provided by statute. ***Fleming v. Ahumada***, 193 S.W.3d 704, 712-13 (Tex. App.—Corpus Christi 2006, no pet.) (citing ***Fidelity Union Life Ins. Co. v. Evans***, 477 S.W.2d 535, 537 (Tex. 1972)); ***Bristol-Myers Squibb Co. v. Goldston***, 957 S.W.2d 671, 674 (Tex. App.—Fort Worth 1997, pet. denied) ("Because venue is fixed by law, any agreement or contract whereby the parties try to extend or restrict venue is void as against public policy.").

An action arising from a major transaction, such as the contract at issue in this case, is a circumstance in which contractual determination of mandatory venue is permitted by statute.[5] TEX. CIV. PRAC. & REM. CODE ANN. § 15.020(a) (West 2017) (defining "major transaction" as one "evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million[]"), § 15.020(b) (West 2017) ("[a]n action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county[]"); *see* ***In re Group 1 Realty, Inc.***, 441 S.W.3d 469, 472 (Tex. App.—El Paso 2014, no pet.). Venue must be challenged by a motion to transfer filed before or concurrently with the defendant's answer. TEX. CIV. PRAC. & REM. CODE ANN. § 15.063 (West 2017). Absent a timely filed motion to transfer venue, the defendant's objection to improper venue is waived. TEX. R. CIV. P. 86(1); ***Wilson v. Tex. Parks & Wildlife Dep't***, 886 S.W.2d 259, 260 (Tex.1994), *overruled in part on other grounds,* ***Golden Eagle Archery, Inc. v. Jackson***, 24 S.W.3d 362, 372 (Tex. 2000).

Analysis

We first address whether Rigney is entitled to challenge the trial court's denial of BCISD's motion to transfer the entire case, as opposed to only the claims against BCISD, to Brooks County. Although BCISD, not Rigney, was the movant, Rigney is a party to the proceedings and Rigney's rights are affected by the trial court's ruling. *See* ***Terrazas v. Ramirez***, 829 S.W.2d 712, 723 (Tex. 1991) (to be entitled to mandamus, relator must have justiciable interest in underlying controversy); ***In re Lakeside Realty, Inc.***, No. 12-05-00078-CV, 2005 WL 1177228, at *2 (Tex. App.—Tyler May 18, 2005, orig. proceeding) (mem. op.) (relator participated in trial court proceedings and was affected by the order it sought to challenge; therefore, it had standing to seek mandamus relief). Accordingly, we conclude that Rigney may

[5] Per the general contract, BCISD agreed to pay Rigney $5,350,000.00.

challenge the denial of BCISD's motion to transfer the entire case in this original proceeding.[6] *See* ***In re Yancey***, No. 12-17-00235-CV, 2017 WL 4020664, at *2 (Tex. App.—Tyler Sept. 13, 2017, orig. proceeding) (mem. op.) (holding that Yancey could pursue mandamus regarding denial of Attorney General's motion to transfer because she was a party to that proceeding and her rights were affected by the trial court's denial). Because we so conclude, we must now determine whether Rigney has shown an actual entitlement to mandamus relief.

According to Rigney, venue should be transferred to Brooks County because of the following provision found in the general contract:

> Exclusive venue for any action arising out of the Project or the Contract Documents is in the state courts of the county in which the Owner's administrative offices are located.

Rigney classifies this provision as a forum selection clause and contends that the provision was incorporated into the subcontract. To support this contention, Rigney points to the following clause in subsection A of section 1.00, entitled "coordination," of a document regarding pre-engineered metal buildings:

> The General Conditions of the Contract for Construction and the Supplementary Conditions to the General Conditions of the Contract for Construction shall be considered as part of this section of the specifications.

Assuming, without deciding, that the subcontract incorporated the general contract's venue provision, we disagree with Rigney's classification of the provision as a forum selection clause. By its express language, the clause clearly addresses the geographic location within the forum where the case may be tried. *See, e.g.*, ***Boyle***, 820 S.W.2d at 139-40; ***Gordon***, 196 S.W.3d at 383; ***Liu***, 2007 WL 43816, at *2. Because the provision refers to the county in which suit should be brought, it is a venue selection clause and not a forum selection clause. *See* ***In re Medical Carbon Research Institute, L.L.C.***, No. 14-07-00935-CV, 2008 WL 220366, at *1-2 (Tex. App.—Houston [14th Dist.] Jan. 29, 2008, orig. proceeding) (mem. op.) (holding that contractual provision referring to the county where suit should be brought is a venue selection clause, not a forum selection clause).

[6] Red Dot contends that Rigney's petition for writ of mandamus is untimely because Rigney originally moved for transfer in 2015. We reject this argument because, as discussed, Rigney challenges the denial of BCISD's motion to transfer and is entitled to do so.

Additionally, a venue selection clause is subject to Rule 87(5), which generally does not permit more than one venue determination unless the claim was not available to the original movant. TEX. R. CIV. P. 87(5); ***In re Med. Research Inst.***, 2008 WL 220366, at *1; ***Frazier***, 230 S.W.3d at 775. In this case, there has already been a prior venue determination with respect to the lawsuit involving Red Dot. The trial court denied Rigney's original motion to transfer venue in 2015, and the Texas Supreme Court determined that Henderson County had dominant jurisdiction. *See* ***In re Red Dot Bldg. Sys., Inc.***, 504 S.W.3d 320, 323-24 (Tex. 2016) (orig. proceeding). That Rigney filed a third-party petition against BCISD is of no moment, as it is the main action between Rigney and Red Dot that determines venue, not the third-party action. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.062(a) (West 2017) ("[v]enue of the main action shall establish venue of a counterclaim, cross claim, or third-party claim properly joined under the Texas Rules of Civil Procedure or any applicable statute[]"); *see also* ***In re Perryman***, No. 14-13-00131-CV, 2013 WL 1384914, at *2 (Tex. App.—Houston [14th Dist.] Apr. 4, 2013, orig. proceeding) (mem. op.) (holding that plain language of section 15.062(a) "requires that the main action between plaintiffs and defendants establishes venue, not third-party actions[]").

Furthermore, this is not a case in which the venue claim was previously unavailable to Rigney. *See* TEX. R. CIV. P. 87(5). Rigney's claim is based on the subcontract between itself and Red Dot, which Rigney contends incorporated the general contract's mandatory venue provision. Consequently, Rigney's claim that venue is mandatory in Brooks County, and the entire case must be transferred there, has been available to it since the institution of the lawsuit. Thus, because there has been a prior venue determination and the claim that venue is mandatory in Brooks County has always been available to Rigney, Rigney is not entitled to a subsequent venue determination and it would have been improper for the trial court to make a subsequent venue determination.[7] *See* TEX. R. CIV. P. 87(5); ***Frazier***, 230 S.W.3d at 775. Accordingly, we conclude that Rigney has failed to show that the trial court abused its discretion by refusing to transfer the Red Dot claims to Brooks County. *See* ***In re Mo. Pac. R.R. Co.***, 998 S.W.2d at 216; *see also* ***Frazier***, 230 S.W.3d at 775.

[7] Because we so conclude, we need not address Rigney's challenge to the timeliness of Red Dot's response to the motion to transfer. *See* TEX R. CIV. P. 47.1.

SEVERANCE

In its second issue, Rigney argues that the trial court abused its discretion by severing the case against BCISD and transferring that portion of the case to Brooks County.

Texas Rule of Civil Procedure 41 provides that "[a]ny claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. A claim is severable if (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. ***Guar. Fed. Sav. Bank v. Horseshoe Operating Co.***, 793 S.W.2d 652, 658 (Tex. 1990); ***Paradigm Oil, Inc. v. Retamco Operating, Inc.***, 161 S.W.3d 531, 540 (Tex. App.—San Antonio 2004, pet. denied). A trial court has broad discretion in the severance of causes of action. ***Morgan v. Compugraphic Corp.***, 675 S.W.2d 729, 734 (Tex. 1984). Severance is appropriate if a controversy involves two or more separate and distinct causes of action, each of which might constitute a complete lawsuit. ***Rodarte v. Cox***, 828 S.W.2d 65, 71 (Tex. App.—Tyler 1991, writ denied). "The controlling reasons for a severance are to do justice, avoid prejudice and further convenience." ***Guar. Fed. Sav. Bank***, 793 S.W.2d at 658.

In this case, Rigney claims that the third element, whether the severed claim is so interwoven with the remaining action that they involve the same facts and issues, has not been met. Rigney identifies the following issues that pertain to both the case against Red Dot in Henderson County and the case against BCISD in Brooks County:

> What plans and specifications were required for the pre-engineered metal building;
> BCISD's, Rigney's, and Red Dot's obligations under the contracts;
> What Red Dot actually delivered;
> Whether what Red Dot delivered complied with plans and specifications and, if not, whether Red Dot, Rigney, or BCISD is at fault;
> The damages suffered if what Red Dot delivered complied with plans and specifications and if BCISD is responsible for those damages;
> The damages suffered if what Red Dot delivered did not comply with plans and specifications; and
> Whether Red Dot, Rigney, or BCISD is entitled to the approximately $100,000 retained by BCISD.

Rigney also points to the following items of evidence as demonstrating that element three is not satisfied in this case:

> The initial contract between BCISD and Rigney (containing plans and specifications), and the contract between Rigney and Red Dot;

> Evidence of what each contract required;
> Pictures and evidence of what Red Dot provided;
> Evidence of whether the goods, materials and services provided by Red Dot complied with the general contract, the subcontract, and bidding requirements;
> The difference in value between the goods, materials and services Red Dot provided, and those required by the general contract and the subcontract; and
> The project architect's conclusions that Red Dot was not entitled to additional money and was obligated to provide certain items per plans and specifications.

Additionally, Rigney contends that the claims are so interwoven that severance may result in inconsistent verdicts, its contribution claim against BCISD cannot be tried separately, and the severance violates the concept of judicial economy.

Regarding Rigney's assertion that it alleged a contribution claim against BCISD that cannot be severed, Rigney's third-party petition states as follows:

> Brooks ISD had a duty and responsibility to provide Rigney plans and specifications that were free of errors and omissions. Brooks ISD has breached that duty by being negligent in providing plans and specifications with errors and omissions which have caused Rigney damages, losses, loss of income, attorneys fees, and other undetermined losses. Rigney therefore is seeking contribution from BCISD for the damages claimed by Red Dot.

While couched as a contribution claim, the substance of Rigney's claim is based in contract to which a contribution claim is inapplicable. *See* ***Jones v. Landry's Seafood Inn & Oyster Bar-Galveston, Inc.***, 328 S.W.3d 909, 913 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("a court considers the substance, not the label, of a claim to determine its nature[]"); *see also* ***CBI NA-CON, Inc. v. UOP Inc.***, 961 S.W.2d 336, (Tex. App.—Houston [1st Dist.] 1997, pet. denied) ("breach of contract claim is not a basis for contribution under chapter 33 of the Texas Civil Practice and Remedies Code[]"); TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.011-.017 (West 2015), § 33.002(a) (West 2015) (Chapter 33 applies to tort and Deceptive Trade Practices Act claims). Accordingly, Rigney's contention that its claim against BCISD could not be severed lacks merit.

We also disagree with Rigney's contention that the severed claim against BCISD is so interwoven with the remaining claims involving Red Dot so as to preclude severance and violate notions of judicial economy. At issue in this case are two distinct contracts and their respective breach of contract claims. Red Dot sued Rigney alleging it breached the subcontract by failing to pay money owed to Red Dot. Rigney's claims against Red Dot revolve around whether Red Dot (1) complied with its agreement to timely provide a pre-engineered metal building per plans and

specifications; and (2) acquiesced to a deduction in the contract amount, the payment of which resulted in accord and satisfaction. Rigney sued BCISD alleging it breached the general contract. No contract exists between Red Dot and BCISD.

In construction contracts, in the absence of an express agreement to the contrary, a subcontractor is not in privity with the owner and thus looks to the general contractor alone for payment. ***Hite v. Ark-La-Tex Elec., Inc.***, No. 12-17-00072-CV, 2017 WL 5622931, at *2 (Tex. App.—Tyler Nov. 22, 2017, no pet. h.) (mem. op.). Persons performing services or providing materials to a general contractor are paid by the general contractor, not the owner, even if the work is done under the direction of and in accordance with the plans furnished by the owner. ***Id***. Accordingly, Rigney, as general contractor, was directly liable to Red Dot, as subcontractor. *See* ***id***. Thus, whether BCISD breached its duties under the general contract to provide "plans and specifications that were free of errors and omissions" is a wholly different fact issue than whether Rigney breached its contract with Red Dot by failing to pay or Red Dot satisfied its own obligations under the subcontract. Therefore, the legal issues raised for these separate claims are not identical, Rigney could have brought suit against BCISD independently, and the cause of action could be tried as if it were the only claim in controversy. *See* ***Guar. Fed. Sav. Bank***, 793 S.W.2d at 658; *see also* ***Paradigm Oil***, 161 S.W.3d at 540; ***Rodarte***, 828 S.W.2d at 71. As the Texas Supreme Court has stated, severance of a claim is proper under these circumstances. *See* ***Guar. Fed. Sav. Bank v***, 793 S.W.2d at 658.

Accordingly, we conclude that the trial court did not abuse its discretion by severing Rigney's breach of contract claim against BCISD. *See* ***Morgan***, 675 S.W.2d at 733-34; ***Paradigm Oil***, 161 S.W.3d at 540. And because the action against BCISD must be brought in Brooks County under the general contract's venue provision, the trial court did not abuse its discretion in transferring Rigney's case against BCISD to Brooks County once the claim was severed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.0151 (West 2017). Absent an abuse of discretion, Rigney has failed to satisfy the mandamus standard. *See* ***Walker***, 827 S.W.2d at 840.

DISPOSITION

For the reasons discussed above, Rigney has not shown its entitlement to mandamus relief. We ***deny*** its petition for writ of mandamus.

JAMES T. WORTHEN
Chief Justice

Opinion delivered February 6, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

FEBRUARY 6, 2018

NO. 12-17-00370-CV

RIGNEY CONSTRUCTION & DEVELOPMENT, LLC,
Relator
V.

HON. DAN MOORE,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by Rigney Construction & Development, LLC; who is the relator in Cause No. CV15-0009-173, pending on the docket of the 173rd Judicial District Court of Henderson County, Texas. Said petition for writ of mandamus having been filed herein on November 28, 2017, and the same having been duly considered, it is the opinion of this Court that a writ of mandamus should not issue, it is therefore CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is, hereby **DENIED**.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.