

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37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

DISSENTING MEMORANDUM BY BOWES, J:

FILED MAY 24, 2013

I respectfully disagree with the majority's decision to affirm in this matter. The question involved on appeal is whether the trial court erred in sustaining the preliminary objections filed by the defendant-Appellee A & P Laminations, Inc. Those objections raised the position that venue was improper in Berks County. Our standard of review in this setting is as follows:

It is well established that a trial court's decision to transfer venue will not be disturbed absent an abuse of discretion. A Plaintiff's choice of forum is to be given great weight, and the burden is on the party challenging the choice to show it was improper. However, a plaintiff's choice of venue is not absolute or unassailable. Indeed, if there exists any proper basis for the trial court's decision to grant a petition to transfer venue, the decision must stand.

Wimble v. Parx Casino and Greenwood Gaming & Entertainment, Inc., 40 A.3d 174, 177 (Pa.Super. 2012).

Venue against a corporation, such as Appellee herein, must be obtained based upon application of Pa.R.C.P. 2179. Herein, Appellant JCM Machinery, Inc. invokes Pa.R.C.P. 2179(a)(4) to sustain venue over Appellee. That rule states that an action against such an entity may be brought: in “a county where the transaction or occurrence took place out of which the cause of action arose[.]” Pa.R.C.P. 2179(a)(4).

The present action instituted by Appellant is a breach of contract cause of action, and its premised venue in Berks County upon the position that the contract was formed in Berks County. Controlling precedent provides that “an acceptance by telephone is effective, and a contract is created at the place where the acceptor speaks.” ***Linn v. Employers Reinsurance Corp.***, 139 A.2d 638, 640 (Pa. 1958). Furthermore: “The making of a contract for whose breach action is brought would undoubtedly constitute a ‘transaction’ within the meaning of” Pa.R.C.P. 2179 (a)(4). ***Craig v. W. J. Thiele & Sons, Inc.***, 149 A.2d 35, 36 (Pa. 1959). In that case, the Supreme Court also repeated the precept, “The place of making a contract is not where the offer is made but where it is accepted.” ***Id.*** at 37. ***See also Telstar Corp. v. Berman***, 422 A.2d 551, 555 (Pa.Super. 1980) (“*situs* of contract formation is a ‘transaction or occurrence’ which will invoke venue”).

My review of the record confirms Appellant's position that the contract was accepted over the telephone while the offeree was located in Berks County. Specifically, Jonathan Vorchheimer, an employee and owner of Appellant, testified as follows. He was located in Berks County when he received a telephone call on June 14, 2011, from Steven DeTheodore, manager and part owner of Appellant, regarding a malfunctioning Ingersoll Rand compressor. Mr. Vorchheimer related that Mr. DeTheodore "asked me to fix or try to fix a compressor that he had that was not working." Deposition of Jonathan Vorchheimer, 2/21/12, at 20. Mr. Vorchheimer agreed to perform the repairs the following day. He arrived at Appellee's location on June 15, 2011, performed the repairs over the next three days, and billed Appellee for his services. He was never paid, which was the basis for this breach-of-contract action. Appellant presented a telephone bill confirming that Mr. Vorchheimer was located in Berks County when he agreed to repair Appellee's broken compressor.

Mr. DeTheodore confirmed the contents of the June 14, 2011 telephone conversation. He testified that he called Mr. Vorchheimer and stated, "I purchased a used Ingersoll Rand compressor, it's not running, you need to come down and take a look." Deposition of Steven DeTheodore, 2/21/12, at 11. Mr. DeTheodore agreed that "[d]uring that telephone call,"

he “described the scope of work that [he] was requesting [Mr. Vorchheimer] to do[.]” ***Id.*** at 11-12.

The record confirms that there were no further negotiations or discussions. Mr. Vorchheimer was asked to repair the compressor, agreed to do so while in Berks County, performed that action, and billed for his services. The agreement was simply for the repair of the compressor. Mr. Vorchheimer, who had performed work for Appellee in the past, simply agreed while located in Berks County to fix the broken item. That was the entire scope of the contract, which thus was formed under controlling precedent in Berks County. The law therefore provides that venue properly lies in Berks County under Pa.R.C.P. 2179(a)(4).

While the majority recites a good deal of facts related to the conduct of Appellant’s business, no facts are pertinent to the application of Pa.R.C.P. 2179(a)(4) other than where the offer was accepted. Furthermore, my review of the record fails to substantiate the majority’s position that further negotiations and discussions regarding contractual provisions occurred in Philadelphia. Since the cause of action arose in Berks County, venue was proper therein, and the trial court abused its discretion in finding otherwise. Since the order should be reversed, I dissent.