NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

SONA HARRISBURG, LLC, D/B/A MONARCH MED SPA, Appellant v. OLS PARTNERS, LP, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1369 EDA 2012

Appeal from the Order April 25, 2012
In the Court of Common Pleas of Montgomery County
Civil Division at No.: 2011-30669

BEFORE: MUNDY, J., OTT, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: January 3, 2013

Appellant, Sona Harrisburg, LLC, d/b/a Monarch Med Spa, appeals from the order sustaining the preliminary objections of Appellee, OLS Partners, LP, and transferring this matter to Dauphin County. We affirm.

The court aptly set forth the procedural history of this case, as follows:

> On November 4, 2011, [Appellant] filed a Complaint against [Appellee] seeking to, among other things, establish its rights as a lessee under a commercial lease. [Appellee] filed Preliminary Objections to the Complaint challenging, *inter alia*, venue. [Appellee] cited the following provision of the parties' written agreement:
>
> > Lessee hereby consents to the jurisdiction and venue of the Courts of Common Pleas of Dauphin County, Pennsylvania and/or the United States District Court

* Retired Senior Judge assigned to the Superior Court.

> for the Middle District of Pennsylvania in any and all actions or proceedings arising from this Lease. . . .
>
> [Appellant] responded with Preliminary Objection to the Preliminary Objections, raising technical challenges to certain procedural deficiencies in [Appellee's] Preliminary Objections. On February 27, 2012, [Appellant] filed a brief in support of its own Preliminary Objections. That same day, [Appellant] filed a separate brief in which it argued extensively that the venue provision in the parties' written agreement should be considered permissive rather than mandatory, and that venue may be held in Montgomery County.
>
> Oral argument was scheduled on both sets of Preliminary Objections for April 17, 2012. The Court Administrator's Office subsequently issued a scheduling memorandum indicating that oral argument would be held only on [Appellant's] Preliminary Objections. Nevertheless, when the parties appeared for oral argument, counsel agreed to have both set[s] of Preliminary Objections heard. [Appellant] had thoroughly briefed both its own Preliminary Objections and the venue issue, and the attorneys who appeared on behalf of the parties did not object to having the venue issue addressed.
>
> On April 24, 2012,[[1]] the court issued an Order sustaining [Appellee's] Preliminary Objection to venue and transferring the matter to Dauphin County. The Order also dismissed without prejudice any other Preliminary Objections [Appellee] may have raised and overruled [Appellant's] Preliminary Objections.
>
> On May 4, 2012, [Appellant] filed a Motion for Reconsideration. That same day, [Appellant] filed a Notice of Appeal with the Superior Court.

(Trial Court Opinion, 6/26/12, at 1-2 (footnote omitted)). Appellant filed a timely Rule 1925(b) statement on May 29, 2012. The court filed a Rule 1925(a) opinion on June 26, 2012. ***See*** Pa.R.A.P. 1925.

[1] The order was filed on April 25, 2012.

Appellant raises two inter-related issues for this Court's review that we summarize as follows: Did the trial court err when it sustained Appellee's preliminary objections on the basis that the forum selection clause in the lease agreement mandates that venue in this matter lies in Dauphin County? (***See*** Appellant's Brief, at 4).[2]

"Generally, this Court reviews a trial court order sustaining preliminary objections based upon improper venue for an abuse of discretion or legal error." ***Autochoice Unlimited, Inc. v. Avangard Auto Finance, Inc.***, 9 A.3d 1207, 1211 (Pa. Super. 2010) (citation omitted). Here, because the issues involve the interpretation of the forum selection provision of the lease agreement between the parties our standard of review is *de novo* and our scope of review is plenary. ***See id.*** "If there exists any proper basis for the trial court's decision to grant the petition to transfer venue, the decision must stand." ***Singley v. Flier***, 851 A.2d 200, 201 (Pa. Super. 2004) (citation omitted).

Appellant claims that the court erred in finding that the forum selection clause of the lease was mandatory, rather than permissive. (***See*** Appellant's Brief, at 9-16). Specifically, Appellant argues that, because the parties did not agree that venue "shall" be in Dauphin County, but merely that Appellant consented to such venue, the forum selection clause was

[2] Appellant has abandoned the issues in his Rule 1925(b) statement related to the court's procedure. (***See*** Appellant's Concise Statement of [Errors] Complained of on Appeal, 5/29/12, at 1-2; Appellant's Brief, at 4).

permissive. (***Id.*** at 10, 13, 15; ***see id.*** at 10-15). Appellant's issue lacks merit.

It is well-settled that "a forum selection clause in a commercial contract between business entities is presumptively valid." ***Patriot Commercial Leasing Co., Inc. v. Kremer Rest. Enters., LLC***, 915 A.2d 647, 651 (Pa. Super. 2006), *appeal denied*, *sub nom.* ***Susquehanna Patriot Commercial Leasing Co., Inc. v. Beaver Dam Golf Mgmt., Inc.***, 951 A.2d 1166 (Pa. 2008) (relying on principles set forth in ***Cent. Contracting Co. v. C.E. Youngdahl & Co.***, 209 A.2d 810 (Pa. 1965)). Forum selection clauses should be enforced where "the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation." ***Cent. Contracting***, ***supra*** at 816. Further, "a forum selection clause will be considered unreasonable only where its enforcement would, under all circumstances existing at the time of litigation, seriously impair [a party's] ability to pursue his cause of action." ***Patriot Commercial Leasing***, ***supra*** at 650 (citing ***Cent. Contracting***, ***supra*** at 816) (internal quotation marks omitted). Finally,

> [m]ere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that [the party] received under the contract consideration for these things. If the agreed upon forum is available to [a party] and said forum can do substantial justice to the cause of action[,] then [that party] should be bound by his agreement.

Cent. Contracting, ***supra*** at 816.

In reviewing the language of the forum selection clause, the trial court found that:

> [a] plain reading of the forum selection clause in the parties' written agreement leads to the simple conclusion that [Appellant] and [Appellee] agreed to have the instant landlord/tenant dispute heard in Dauphin County. [Appellant] cannot now suggest that Dauphin County is []either unavailable to it []or unable to do substantial justice to the cause of action. Litigating this case in Dauphin County will not seriously impair [Appellant's] ability to pursue its cause of action; indeed, doing so will honor the parties' express written agreement.

(Trial Ct. Op., 6/26/12, at 5). We agree.

The forum selection clause states that "[Appellant] hereby consents to the jurisdiction and venue of the Courts of Common Pleas of Dauphin County, Pennsylvania . . . in any and all actions or proceedings arising from this Lease . . . ." (Complaint, 11/04/11, Exhibit A, at 10). We conclude that this unambiguous language reflects that the parties intended the forum selection clause to be mandatory. Additionally, Appellee is a Pennsylvania Limited Partnership with an address in Dauphin County, Appellant conducts business in Dauphin County, and the premises involved in the litigation are located in Dauphin County. (***See id.*** at 1 ¶2, 2 ¶¶ 6, 10). Accordingly, enforcement in Dauphin County is not unreasonable. ***See Cent. Contracting***, ***supra*** at 816. Therefore, the court properly sustained Appellees' preliminary objections and transferred venue to Dauphin County on the basis of the mandatory forum selection clause. ***See id.***

Moreover, we note that Appellant fails to provide any legally persuasive authority in support of its argument that a forum selection clause must contain "shall" in order to be mandatory or that use of the word, "consent," makes a clause permissive. (***See*** Appellant's Brief, at 10-16). For example, Appellant relies on ***A.D. v. M.A.B.***, 989 A.2d 32 (Pa. Super. 2010). (***See id.*** at 10-11). However, ***A.D.*** involved a custody agreement, not a presumptively valid commercial contract between business entities. ***See A.D.***, ***supra*** at 37; ***see also Patriot Commercial Leasing***, ***supra*** at 651. In fact, this Court found that the custody agreement did not have a forum selection clause. ***See A.D.***, ***supra*** at 37. Although this Court was able to interpret a paragraph as speaking to venue, it declined to find that the parties intended Pennsylvania to be the only forum for all litigation where the paragraph stated only that "if Father wished to petition to see Child, he may do so in Philadelphia." ***Id.*** (internal citation marks omitted). This Court did not consider whether use of the word, "shall," is required to make a forum selection clause mandatory, particularly in a commercial agreement. ***See id.*** at 37-38. Therefore, we do not find this case legally persuasive.

Additionally, Appellant discusses ***Hurley v. Inland Finance Co.***, 34 Pa. D. & C.3d 336 (Cumberland C.P. 1984), and lists unpublished federal

district court decisions[3] *seriatim* in support of his argument that the forum selection clause language here was permissive, rather than mandatory. (***See*** Appellant's Brief, at 13-14). However, none of these cases have precedential value for this Court. ***See Discover Bank v. Stucka***, 33 A.3d 82, 87-88 (Pa. Super. 2011) (noting that Court of Common Pleas decisions are not binding precedent on Superior Court); ***Commonwealth v. Phinn***, 761 A.2d 176, 179 (Pa. Super. 2000), *appeal denied*, 785 A.2d 89 (Pa. 2001) (observing that Superior Court is not bound by unpublished decisions). Accordingly, we conclude that Appellant's argument that the parties' use of the word, "consent," rather than "shall" renders the clause permissive lacks merit.

Finally, even assuming *arguendo* that the forum selection clause is permissive, Dauphin County is the only appropriate venue pursuant to Pennsylvania Rule of Civil Procedure 2130. ***See*** Pa.R.C.P. 2130. Rule 2130 provides in pertinent part that:

> an action against a partnership may be brought in and only in a county where the partnership regularly conducts business, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of actions arose or in the county where the property or a part of the property which is the subject matter of the action is located

[3] Appellant does include one published district court decision from New Jersey. However, this decision is not binding on this Court. (***See*** Appellant's Brief, at 14-15); ***see also Reeser v. NGK North American, Inc.***, 14 A.3d 896, 899 n.3 (Pa. Super. 2011) (noting district court decisions are not binding precedent on Superior Court).

> provided that equitable relief is sought with respect to the property.[4]

Pa.R.C.P. 2130(a). Appellant's complaint states that Appellee "is a Pennsylvania Limited Partnership with an address" in Dauphin County and that the subject "[l]ease pertains to premises located" in Dauphin County. (Complaint, 11/04/11, at 1 ¶ 2 ¶ 6). The complaint does not assert that Appellee regularly conducts business in Montgomery County or that any transaction or occurrence leading to the cause of action occurred there. (***See id.*** at 1-11). Accordingly, even if this Court were to read the forum selection clause as being permissive rather than mandatory, Rule 2130 mandates that Dauphin County is the only proper venue for litigation of this matter.

Order affirmed.

Mundy, J., concurs in the result.

[4] Appellant's complaint includes a declaratory judgment claim, which "follow[s] the practice and procedure of an action in equity." ***Nationwide Mut. Ins. Co. v. Catalini***, 18 A.3d 1206, 1209 (Pa. Super. 2011); (***see*** Complaint, 11/04/11, at 4-5).