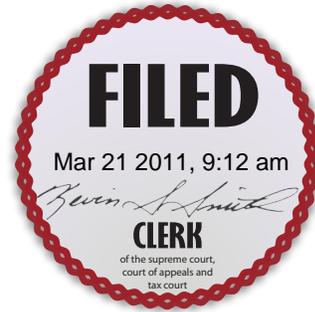


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CARNIVAL CRUISE LINES, INC.,)
)
Appellant,)
)
vs.) No. 45A04-1009-SC-529
)
DORIS BEARD,)
)
Appellee.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Calvin Hawkins, Judge
Cause No. 45D02-1002-SC-1

March 21, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

In this interlocutory appeal, Carnival Cruise Lines, Inc. (“Carnival”), appeals the small claims court’s denial of its motion to dismiss a claim filed by Doris Beard. We reverse.

Issues

Carnival raises two issues, one of which we find dispositive and restate as whether the small claims court erred by denying Carnival’s motion to dismiss under Indiana Trial Rule 12(B)(3) for incorrect venue.

Facts

On August 13, 2009, Beard filed a small claims notice against Carnival in Lake County, Indiana. Beard claimed that “due to the speed of the ship I became very sick, my body swayed terrible on the ship I had bleeding, which I had not has [sic] in three years. The ship was moving so fast everyone on board became sick, even the workers.” App. p. 9. Carnival filed a motion to dismiss under Indiana Trial Rules 12(B)(3) and 12(B)(6), claiming that the terms and conditions of the cruise contract contained a forum selection clause requiring venue in Florida and that Beard had failed to file her claim against Carnival within the one-year statute of limitations provided for in the cruise contract. At a hearing on Carnival’s motion, the small claims court denied the motion because “this is a small claims action” Tr. p. 10.

Analysis

Carnival argues that the small claims court abused its discretion by denying its motion to dismiss for incorrect venue under Indiana Trial Rule 12(B)(3). We first

observe that Beard has not filed an appellee’s brief. “Under that circumstance, we do not undertake to develop an argument on the appellee’s behalf, but rather may reverse upon an appellant’s prima facie showing of reversible error.” Button v. James, 909 N.E.2d 1007, 1008-09 (Ind. Ct. App. 2009) (quoting Morton v. Ivacic, 898 N.E.2d 1196, 1199 (Ind. 2008)). “Prima facie error in this context is defined as, ‘at first sight, on first appearance, or on the face it.’” Id. at 1009 (quoting Morton, 898 N.E.2d at 1199).

When we review a trial court’s order on a motion to dismiss for incorrect venue under Indiana Trial Rule 12(B)(3), our standard is abuse of discretion. Banjo Corp. v. Pembor, 715 N.E.2d 430, 431 (Ind. Ct. App. 1999). We will find an abuse of discretion if the trial court’s decision is “clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law.” Id.

Venue is generally governed by Indiana Trial Rule 75. However, “when parties consent to venue in a contract, that agreement overrides the preferred venue analysis set forth in Trial Rule 75.” Indianapolis-Marion County Pub. Library v. Shook, LLC, 835 N.E.2d 533, 540 (Ind. Ct. App. 2005). “[C]ontractual provisions, even those occurring in form contracts, that seek to limit the litigation of future actions to particular courts or places are enforceable if they are reasonable and just under the circumstances and there is no evidence of fraud or overreaching such that the agreeing party, for all practical purposes, would be deprived of a day in court.” Mechanics Laundry & Supply, Inc. v. Wilder Oil Co., Inc., 596 N.E.2d 248, 252 (Ind. Ct. App. 1992), trans. denied. “In the usual case, no public policy reason exists to preclude parties from establishing venue by a contractual provision.” Id. “Under the reasonableness standard, the trial court retains the

discretion to change venue when justice so requires.” Id. “While the policy considerations governing contractual provisions concerning personal jurisdiction are far stronger than those which would govern venue selection, it is well established that personal jurisdiction may be contracted.”¹ Id. Generally, the forum selection clause “must have been freely negotiated.” Farm Bureau Gen. Ins. Co. of Michigan v. Sloman, 871 N.E.2d 324, 329 (Ind. Ct. App. 2007), trans. denied.

When Beard booked her cruise, she received electronic documents, including a cruise ticket contract. Beard used Carnival’s FUNPASS Advance Registration System to execute her cruise ticket contract electronically before the cruise. The cruise ticket contract provided, in part:

12. JURISDICTION, VENUE, ARBITRATION AND TIME LIMITS FOR CLAIMS

* * * * *

(c) . . . it is agreed by and between the Guest and Carnival that all disputes and matters whatsoever arising under, in connection with or incident to this Contract or the Guest’s cruise, including travel to and from the vessel shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A. to the exclusion of the Courts of any other county, state or country.

Appellant’s App. p. 36.

¹ Some cases have addressed this issue in the context of venue, while others have addressed it in the context of personal jurisdiction. Regardless, we conclude that the small claims court erred by denying Carnival’s motion to dismiss.

Carnival argues that an almost identical forum selection clause in its cruise contract was upheld in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S. Ct. 1522 (1991). In Shute, the cruise contract contained the following forum selection clause:

It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.

Shute, 449 U.S. at 587-88, 111 S. Ct. at 1524. The passenger was injured on the cruise when she slipped and fell. She filed an action against Carnival in federal court in the Western District of Washington rather than in Florida.

Noting that this was an admiralty case governed by federal law, the United States Supreme Court held:

[I]t would be entirely unreasonable for us to assume that respondents-or any other cruise passenger-would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.

Id. at 593, 111 S. Ct. at 1527. The Court concluded that the inclusion of a reasonable forum clause in a form contract of this kind well may be permissible for several reasons.

First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. Additionally, a clause

establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.

Id. at 593-94, 111 S. Ct. at 1527 (internal citations omitted). The Court also noted that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness. Id. at 595, 111 S. Ct. at 1528. However, there was no indication that the forum selection clause was a means of discouraging cruise passengers from pursuing legitimate claims, that there was a bad faith motive, that the forum clause was obtained by fraud or overreaching, or that the passenger was not given notice of the forum selection clause. Id., 111 S. Ct. at 1528. Thus, the Court held that the forum selection clause was enforceable.

Here, Carnival has made a prima facie showing of reversible error. Given Shute, we conclude that the forum selection clause in the cruise contract is enforceable. Venue of this action lies in Florida, not Indiana. We hold that the small claims court erred by denying Carnival's motion to dismiss.²

² We need not address Carnival's argument regarding its motion to dismiss under Indiana Trial Rule 12(B)(6). However, we note that, under Indiana Trial Rule 12(B), if a party files a motion to dismiss under Indiana Trial Rule 12(B)(6), and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Ind. Trial Rule 12(B). "In such case, all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Id.; see also West v. Wadlington, 933 N.E.2d

Conclusion

The small claims court erred by denying Carnival's motion to dismiss. We reverse.

Reversed.

BAKER, J., and VAIDIK, J., concur.

1274, 1277 (Ind. 2010) (reversing where the trial court did not exclude matters outside the pleadings and did not treat the matter as a motion for summary judgment).