IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0912

FIREWATER RESTORATION, INC.,

Plaintiff Below,
Petitioner,

v.

TONY L. MARONI, JR.,

Defendant Below,
Respondent.

FIREWATER RESTORATION, INC.'S APPEAL BRIEF

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I. ASSIGNMENTS OF ERROR

1. The lower court committed reversable error by granting the Respondent's Motion to Dismiss. In doing so, the Circuit Court relied upon the forum-selection clause test established by this Court in *Caperton v. A.T. Masey Coal Co.* 225 W. Va. 128, 690 S.E.2d 322 (2009). The basis for the Petitioner's argument is whether the lower court conducted a proper analysis of the forum-selection clause of the contract at issue and whether or not enforcement of that clause would be unreasonable and unjust. This Court should review this issue due to the Circuit Court's failure to consider the totality of the elements set forth in the *Caperton* test.

2. The lower court committed reversible error by granting the Respondent's Motion to Dismiss despite that motion being filed with the court months after the passing of the deadline for dispositive motions set forth in the Circuit Court's Scheduling Order. This Court should review this issue due to the Circuit Court's failure to adhere to the deadline established in the matter's Scheduling Order and for not adhering to Rule 16 of the Rules of Civil Procedure when it granted the Respondent's Motion.

3. The lower court committed reversible error by granting the Respondent's Motion to Dismiss which was filed in violation of the requirements set forth in Rule 12 of the West Virginia Rules of Civil Procedure. The basis for Respondent's Motion was on the grounds of improper venue; however, Respondent failed to assert this defense in accordance with the requirements of Rule 12. This Court should review this issue due to the Circuit Court's failure to adhere to the requirements of Rule 12.

II. STATEMENT OF THE CASE

A. Factual Background.

On or about March 11, 2017, the Respondent suffered extensive water damage stemming from a water break at his home located at 306 S. Broadway Street, Wheeling, Ohio County, West Virginia (the "Residence"). On that same date, the parties entered into a contract titled "Work Authorization Agreement" for the Petitioner to provide emergency services and remediation of the initial damage as well as restoration services to put the Residence back into pre-damage condition. The emergency services were then completed by the Petitioner.

On March 31, 2017, the Petitioner provided an estimate for restoration services in the amount of $24,977.46 and began work. On that same date, the Respondent's homeowner's insurance provider furnished him with a breakdown of what would be covered under his policy.

On April 5, 2017, the Respondent submitted his proof of loss and was paid $31,060.03 for both the emergency and restoration services.

On April 14, 2017, the Respondent submitted payment to the Petitioner for the emergency services only.

After the Petitioner had completed a majority of the restoration services, the Respondent stated he was dissatisfied with the work and terminated the contract. Up through the Respondent's termination of the contract, the Petitioner had provided services and materials in the amount of $18,869.44.

Despite having received the funds for the payment of these services and materials under his homeowner's insurance policy, the Respondent failed to make any payments whatsoever to the Petitioner for the same.

B. Procedural Background.

On August 25, 2017, the Petitioner filed a Notice of Mechanic's Lien in the office of the Clerk of the County Commission of Ohio County, West Virginia, to preserve its lien for work performed on Defendant's real estate.[1]

On February 23, 2018, the Complaint in this matter was filed by the Petitioner in the Circuit Court of Ohio County, and the case was assigned to the Honorable Judge Michael Olejasz.[2]

On March 2, 2018, Notice of Lis Pendens was recorded by the Petitioner in the records of said County Clerk.[3]

On October 22, 2020, the Circuit Court issued a Scheduling Order setting forth several deadlines to govern the proceedings in this matter. Of note, that Order stated that any Dispositive Motions of the parties (which includes motions to dismiss) was to be filed no later than January 18, 2021. *Scheduling Order of the Ohio County Circuit Court*, pg. 2.

Also included in that Order was a trial date of February 1, 2021. However, at the request of both parties due to COVID-19 concerns, that trial date was continued on February 1, 2021, and rescheduled for September 20, 2021.

However, as that September trial date approached, the Respondent appeared at a Pretrial Conference seeking a second continuance due to the health concerns of his legal counsel. Despite being prepared for trial, the Petitioner did not object to this continuance. Accordingly, on September 15, 2021, the Circuit Court rescheduled the trial for December 10, 2021.

On November 1, 2021, a Notice of Appearance was filed in this matter by the Respondent's new (current) legal counsel. On that same date, the Respondent filed his Motion to Dismiss

1. Mechanic's Lien Book 14, at page 42.
2. Civil Case No. 18-C-48.
3. Lis Pendens Book 3, at page 719.

Pursuant to 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure or in the Alternative Judgment on the Pleadings Pursuant to Rule 12(C) (the "Motion to Dismiss").

On November 3, the Petitioner filed its Response to that Motion. The Respondent filed his Reply to that Response on that same date.

On November 4, 2021, without allowing for the Petitioner to respond to the Respondent's Reply, the Circuit Court granted the Respondent's Motion to Dismiss.

III. SUMMARY OF ARGUMENT

In granting the Respondent's Motion to Dismiss, the Circuit Court did not conduct a full analysis of the forum selection clause of the contract at issue pursuant to the test established in *Caperton*. The Circuit Court's decision to dismiss this case is inconsistent with that test, and has resulted in the exact type of unreasonable and unjust outcome contemplated in its fourth element - an outcome that has now deprived the Petitioner of its day in court regarding this dispute.

Additionally, the Circuit Court should have never even considered the Respondent's Motion to Dismiss as a result of the circumstances surrounding its filing. In doing so, the lower court ignored both its own scheduling order and the requirements of Rule 16 of the West Virginia Rules of Civil Procedure in modifying that order. Further, the Circuit Court also failed to comply with the requirements of Rule 12 of the West Virginia Rules of Civil Procedure by allowing for the Respondent to file its Motion to Dismiss based upon the grounds of improper venue in conflict with that rule's requirements. For these reasons, the Circuit Court erred when it granted the Respondent's Motion to Dismiss.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this matter because the criteria outlined in Rule 18(a) of the West Virginia Rules of Appellate Procedure do not render oral argument unnecessary: No party

has waived oral argument, this appeal is not frivolous, the parties disagree as to whether the dispositive issues have been authoritatively decided, and this Court's decisional process would benefit from oral argument.

Oral argument should take place pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, as opposed to Rule 20, because this case involves the application of settled law to a particular set of operative facts that are not in dispute.

A memorandum decision is most likely not appropriate in this matter. The Petitioner is seeking reversal, and according to Rule 21(d) of the West Virginia Rules of Appellate Procedure, a memorandum decision reversing the decision of a Circuit Court should only be issued in limited circumstances.

V. ARGUMENT

A. Standard of Review.

"[T]he applicability and enforceability of a forum-selection clause is a question of law, and our review is therefore de novo. *See* Syl. Pt. 2, *Caperton*. See also: *Com. Ltd. P'ship #9213 v. Olivieri, Shousky & Kiss, P.A.*, No. 12-1421, 2013 WL 5418527 (W. Va. Sept. 27, 2013).

B. Enforcement of the Forum Selection Clause at This Late Stage Would Be Unreasonable and Unjust.

In its Order Granting the Motion to Dismiss, the Circuit Court relied upon the forum-selection test set forth in *Caperton*, as grounds for this action's dismissal. This test contains four separate elements, with no element being weighed over the others.[4]

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4. "'The first inquiry is whether the clause was reasonably communicated to the party resisting enforcement....The second step requires [classification of] the clause as mandatory or permissive, i.e., ... whether the parties are required to bring any dispute to the designated forum or [are] simply permitted to do so. [The third query] asks whether the claims and parties involved in the suit are subject to the forum selection clause....If the [forum-selection] clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable....The fourth, and final, step is to ascertain whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that "enforcement would be unreasonable

The element of this test that is most pertinent to the Petitioner's argument is its fourth element and ascertaining whether the Petitioner has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement of a forum-selection clause would be unreasonable and unjust.

In the words of the Circuit Court in its Order, it stated "the Court must consider whether or not the Defendant has waived his right to enforce this provision of the contract by substantially participating in this present litigation." *Circuit Court of Ohio County Order Granting Motion to Dismiss*, Pg. 3.

As previously noted, this suit stems from a contract signed by the parties in March of 2017, with the Complaint having been filed in February of 2018. In the three years and ten months in which this case has been pending, the Respondent has substantially participated in the present litigation by exchanging full discovery with the Petitioner, participating in mediation efforts ordered by the Circuit Court, and previously adhering to all deadlines contained in the Scheduling Order. At no point during what has clearly been substantial participation did the Respondent seek to enforce the forum-selection clause of the contract.

In determining whether or not the enforcement of a forum-selection clause is unreasonable and unjust, a court may consider whether or not the "fundamental unfairness of the chosen law may deprive the plaintiff of a remedy." *Caperton* at pg. 154, 348. Further, a court must also consider whether or not the forum-selection clause was unjust or unreasonable at the time the defendant files a motion to dismiss based upon the forum-selection clause. *Id* at 155, 349.

[and] unjust, or that the clause was invalid for such reasons as fraud or overreaching.'" *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 142 (2009), quoting *Phillips v. Audio Active Limited*, 494 F.3d 378 (2d Cir.2007).

Enforcement of the forum-selection clause after nearly four years of this matter's pendency, by a party who has more than substantially participated in the present litigation, would be unreasonable and unjust - as it would act to deprive the Petitioner of any remedy whatsoever in this dispute.

In the Commonwealth of Pennsylvania, the statute of limitations on an action stemming from a written contract is four (4) years. *42 Pa. Stat. and Cons. Stat. Ann. § 5525.* As a result, on March 17, 2021, the Petitioner became time-barred from pursuing this matter in the Pennsylvania court system.

This matter had been pending before the Circuit Court for nearly four (4) years before the Respondent filed his Motion to Dismiss. If the Respondent had filed his motion prior to March 17, 2021, the Petitioner would have been able to file its case in Pennsylvania - leaving it with at least the potential for a remedy. That, however, is not what occurred. Instead, the Respondent waited to file his Motion after the Pennsylvania statute of limitations had run (and after the Petitioner had previously not objected to Respondent's request to postpone the October trial date). This delay, which has caused the Petitioner to be without any potential remedy other than the case at bar, has made the enforcement of this clause unreasonable and unjust.

For these reasons, the Petitioner has clearly rebutted the presumption of the clause's enforceability.

C. The Respondent Failed to Meet the Deadline for the Filing of Dispositive Motions and the Circuit Court Failed to Adhere to Rule 16 of the West Virginia Rules of Civil Procedure.

The Circuit Court erred in granting the Motion to Dismiss filed in violation of the deadlines set forth in its Scheduling Order and for failing to abide by the requirements of Rule 16 of the West Virginia Rules of Civil Procedure.

The Scheduling Order issued by the Circuit Court on October 22, 2020, clearly states that all dispositive motions were to be filed with the Court no later than January 18, 2021. *Scheduling Order* at Pg. 2.

The Respondent filed his Motion to Dismiss on November 1, 2021, approximately ten (10) months past the deadline for dispositive motions set forth in the Scheduling Order.

A motion to dismiss is clearly a dispositive motion. See: *State ex rel. J.C. ex rel. Michelle C. v. Mazzone*, 235 W. Va. 151, 772 S.E.2d 336 (2015). See also: *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

The Petitioner is aware of a circuit court's broad discretion in the enforcement of the time limits set forth in a scheduling order issued pursuant to Rule 16. However, the stated purpose of such a scheduling order is for "generally guiding the parties toward a prompt, fair and cost-effective resolution of the case." Syl. Pt. 2, *Caruso v. Pearce*, 223 W.Va. 544, 546, 678 S.E.2d 50, 52 (2009).

Allowing the Respondent to file his Motion to Dismiss so long after the deadline set forth in the Scheduling Order has removed all fairness from this matter. Had the Respondent filed his Motion on or before the deadline for dispositive motions, the Petitioner would have had ample opportunity to then file its claim in a Pennsylvania court. By permitting him to file his Motion so long after the passing of this deadline, the Circuit Court has effectively left the Petitioner without the ability to seek any redress whatsoever in this dispute. As a result, the principle of fairness annunciated in *Caruso* has been completely set aside.

In addition to his Motion to Dismiss, on November 1, 2021, a Notice of Appearance was filed by the Respondent's new (and current) legal counsel in this matter. The Respondent's prior counsel had not objected to this case being filed in the Circuit Court of Ohio County due to the

fact that that forum was a local, much more convenient location for the Respondent. It is where the Respondent resides and it is where the property where the work was performed is located.

The Respondent, however, is not entitled to a setting aside of the deadlines set forth in this matter's Scheduling Order simply because he has retained new counsel. See: *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994) ("The mere fact of retaining new counsel, in the absence of incompetent prior representation, does not constitute 'manifest injustice' under Rule 16, WVRCP [1992] such that it entitles Wendy's to relief from the court's previously uncontested deadlines.").

As noted, scheduling orders are controlled by Rule 16. Aside from requiring these types of orders, this rule also allows for them to also be modified by a circuit court. However, when a court does exercise its authority to do so, its must enter an order of this modification. *State ex rel. Crafton v. Burnside*, 207 W. Va. 74, 78, 528 S.E.2d 768, 772 (2000) ("Rule 16(e) specifically provides that a scheduling order controls litigation '***unless modified by a subsequent order*** (emphasis added).'").

In the case at bar, no such order of modification was ever entered by the Circuit Court. By allowing for the Respondent to file his Motion and subsequently granting it without any prior order of modification, the Circuit Court failed to adhere to the requirements of Rule 16.

The granting of the Respondent's Motion to Dismiss has led to an outcome that in no way corresponds with the principal of fairness that is one of the paramount considerations of a scheduling order. Further, the Circuit Court's modification of the Scheduling Order without entering an order doing so is inconsistent with the requirements of Rule 16(e). Accordingly, reversal of the Circuit Court's decision is proper.

D. Respondent Failed to Timely Raise the Defense of Improper Venue Pursuant to Rule 12.

The Circuit Court erred in granting the Motion to Dismiss that had been filed in violation of the requirements set forth in Rule 12 of the West Virginia Rules of Civil Procedure.

As previously stated, the basis for the Respondent's Motion was that this matter should be dismissed due to it not being filed in the proper venue.

Rule 12(b)(3) provides that a defense of improper venue may be made by motion. Rule 12(h)(1) provides that a defense of improper venue is waived "if omitted from a motion in the circumstances described in Rule 12(g)" or "if it is neither made by motion under the rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." *Id.*

In this matter, however, the Respondent failed to assert such a defense in accordance with the requirements of Rule 12.

As a result of this failure to do so, under the provisions of Rule 12(h), the Respondent has waived any ability he may have had to raise this defense. See: *State ex rel. Fairmont State Univ. Bd. of Governors v. Wilson*, 239 W. Va. 870, 875, 806 S.E.2d 794, 799 (2017) ("Furthermore, objections to venue may be waived by the respondent." "Put simply, '[o]rdinarily, [a respondent's] failure to object specifically to venue before pleading to the merits constitutes waiver of the objection.'"). While Rule 12(h) does allow for the preservation of the defense of improper venue, these protection do not apply to the case at bar.

The assertion of the defense of improper venue at this late juncture does not comply with the timeframe for the assertion of such a defense set forth in Rule 12. Accordingly, reversal of the Circuit Court's decision is proper.

VI. CONCLUSION

The Circuit Court's decision should be reversed for three (3) reasons. First, when considering the Respondent's Motion to Dismiss, the Circuit Court failed to consider the totality of the elements set forth in the forum-selection clause test of *Caperton* and whether or not its enforcement would be unreasonable and unjust. Second, by modifying its Scheduling Order and allowing for the Respondent to file his Motion to Dismiss well after the deadline for these motions had passed, the Circuit Court failed to follow the principle of fairness that must be a part of a court's scheduling order. Additionally, the Circuit Court failed to enter an order of modification of its scheduling order as required by Rule 16(e). Finally, the Circuit Court permitted the Respondent to assert the defense of improper venue despite the fact that he failed to timely raise this defense pursuant to Rule 12.

WHEREFORE, Firewater Restoration, Inc. respectfully requests that this Honorable Court find that the Circuit Court committed the aforementioned reversible errors, and accordingly, ***reverse*** the Circuit Court's decision to dismiss the case from its docket and ***remand*** this matter back the Circuit Court of Ohio County for further proceedings.

Respectfully submitted,

FIREWATER RESTORATION, INC.

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CERTIFICATE OF SERVICE

I, Ryan W. Weld, hereby certify that a copy of the foregoing **FIREWATER RESTORATION, INC.'S APPEAL BRIEF** was served via U.S. Mail, postage prepaid, this 4th day of January, 2022, to the following:

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