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.

REPLY BRIEF OF PETITIONER FIREWATER RESTORATION, INC.

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I. STATEMENT REGARDING ORAL ARGUMENT

The Petitioner wishes to incorporate all arguments in its original brief filed in this matter on or about January 5, 2022. Additionally, the Petitioner is not waiving or giving up any argument that was in the original brief but not addressed in this reply brief.

Further, the Petitioner reiterates its request for an oral argument in this matter due to the parties disagreement as to whether the dispositive issues have been authoritatively decided, the Petitioner's belief that this Court's decisional process would benefit from oral argument, and because this case involves the application of settled law to a particular set of operative facts which are not in dispute.

II. ARGUMENT

A. Enforcement of the Forum Selection Clause

i. Enforcement of the Forum Selection Clause is a Jurisdictional Matter That May be Raised For the First Time on Appeal

In his Response Brief, the Respondent argues that this Court must not consider the Petitioner's argument regarding enforcement of the forum selection clause being unreasonable and unjust as the Petitioner is raising this argument for the first time on appeal. *Respondent's Response to Petitioner's Appeal Brief*, pg. 5. Although nonjurisdictional issues generally may not be raised for the first time on appeal, this Court has made it clear that jurisdictional matters may in fact be raised for the first time on appeal. See: *Easterling v. American Optical Corp.*, 207 W.Va. 123, 132, 529 S.E.2d 588, 597 (2000). See also: *Jan–Care Ambulance Serv., Inc. v. Public Serv. Comm'n of West Virginia*, 206 W.Va. 183, 189 n. 4, 522 S.E.2d 912, 918 n. 4 (1999). A forum selection clause in a contract designates the particular state or court as the jurisdiction in which parties may litigate disputes arising out of a contract. Whatever way a court would decide in whether or not to enforce a forum selection clause will dictate the appropriate jurisdiction that matter would be heard in -

making this issue a quintessential jurisdictional matter. As a result, raising an argument against the enforceability of the forum selection clause at issue squarely falls within the jurisdictional matters that may be raised for the first time on appeal.

ii. Enforcement of the forum selection clause is unreasonable and unjust.

The Respondent also cites this Court's decision in *Caperton v. A.T. Masey Coal Co.*, 225 W. Va. 128, 690 S.E. 322 (2009) to argue that the forum selection clause should be considered enforceable and also cites to *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991) to argue the forum selection clause is even presumptively enforceable. See *Respondent's Response to Petitioner's Appeal Brief*, pg. 7. However, the Petitioner has successfully rebutted the presumption of enforceability with a sufficiently strong showing that such enforcement of the forum selection clause would be unreasonable and unjust. The Respondent suggests the Petitioner has requested the Court "throw it a life preserver." *Respondent's Response to Petitioner's Appeal Brief*, pg. 7.

The Petitioner has never stated that the forum selection clause itself is unreasonable and unjust. What the Petitioner has argued and continues to argue is that its enforcement, four (4) years after the commencement of this action and a little over thirty (30) days prior to the third (re-scheduled) bench trial, would be unreasonable and unjust.

In determining whether or not the forum selection clause should be enforced, in its Order granting dismissal, the Circuit Court stated that it "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.

Throughout the pendency of this action in the lower court, the Respondent substantially participated in the litigation and previously adhering to all deadlines contained in the Scheduling

Order. At no point throughout that time did the Respondent seek to enforce the contract's forum selection clause.

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 unreasonable and unjust at the time the defendant files a motion to dismiss based upon the forum selection clause. *Id* at 155, 349.

Enforcement of the forum selection clause after nearly four (4) 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.

The Respondent noted that the forum selection clause of the contract was written by the Petitioner for its "sole benefit...to provide home field advantage." *Respondent's Response to Petitioner's Appeal Brief*, pg. 8. Given that statement, one can only surmise why then the Respondent never sought to enforce the provisions of this clause. The Respondent, at the time of the filing of this action in the Circuit Court was a resident of Ohio County. The residence where the Petitioner performed its work is located in Ohio County. If anything, the waiver of the forum selection clause by the Petitioner was an advantage to the Respondent. Had the Petitioner exercised its right under the clause, the Respondent would have been forced to secure legal counsel in the Commonwealth of Pennsylvania and fight the case outside of the county and state in which he resided. The waiver of this clause by the Petitioner seemed to be a benefit to the Respondent and one he never objected to - until such time that seeking its enforcement would deny the

Petitioner of any remedy whatsoever in this dispute - the exact type of deprivation contemplated by the *Caperton* analysis.

B. Rule 16 of the West Virginia Rules of Civil Procedure and the Deadlines Set Forth in the Circuit Court's Scheduling Order.

In his argument that the Petitioner's position that the Circuit Court erred in granting the Motion to Dismiss which had been filed in violation of the Scheduling Order and in doing so failed to abide by the provisions of Rule 16, the Respondent cites no legal authority whatsoever to support his claim. Instead, he relies merely on conjecture and conclusory statements without pointing to any statute, rule, or court decision to support the basis for his argument.

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

As noted, scheduling orders are controlled by Rule 16. Aside from requiring that scheduling orders be issued by the court, the rule also allows for them to be modified by the court. However, when a court does exercise its authority to do so, its must also 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 requested by either party or 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.

Lastly, the Respondent argues that the Petitioner should be prohibited from bringing this argument up for the first time on appeal. The Petitioner concedes that the Respondent is correct in that the Petitioner did not raise this issue with the lower court. The Petitioner, however, argues that it was deprived of the opportunity to do so.

The Respondent's Motion to Dismiss was filed with the Circuit Court of November 1, 2021. The Petitioner's Response to that Motion was filed on November 3. That same day, the Respondent filed his Reply to Petitioner's Response. The very next day, before the Petitioner could file a surreply or a hearing was held on the matter, the Circuit Court issued its Order granting the dismissal of the case. The expedited fashion in which the Circuit Court issued its order did not give the Petitioner the opportunity to fully argue its positions and their merits to the Court. As a result, this appeal is the only forum in which the Petitioner may do so.

C. The Defense of Improper Venue and Rule 12 of the West Virginia Rules of Civil Procedure.

A party seeking to avail themselves to the protection of the defense of improper venue may do so under the provisions of Rule 12(b)(3) of the West Virginia Rules of Civil Procedure - ***not*** 12(b)(6).

In his argument to the contrary, the Respondent points to the United States Supreme Court decision in *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013). However, a reading of that case shows that it interprets motions of transfer filed in federal court and the federal statute that governs them - and refers only to cases

in the federal court system. The ruling is not applicable to the issue of whether or not a claim of improper venue under a forum selection clause is in all actuality a claim of the defense of failure to state a claim upon which relief can be granted. See: *Oxford Glob. Res., LLC v. Hernandez*, 480 Mass. 462, 475, 106 N.E.3d 556, 569 (2018) ("We are not bound by the Supreme Court's guidance - it interprets the Federal motion to transfer venue statute, and applies only to cases tried in Federal court."). While the Respondent cites the *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10 (1st Cir. 2009), decision from the United States Court of Appeals for the First Circuit, he points to no decisions of the Fourth Circuit which support or adopt the position set forth *Rivera*.[1]

The Petitioner fully read the Respondent's Motion to Dismiss and is aware that it made the claim pursuant to 12(b)(6). However, just because a party's motion improperly identifies the defense it is seeking to assert doesn't make it the correct one.

Confusingly, in his Response, the Respondent cites the *Caperton* decision of this Court when he stated that "[c]ourts generally consider a motion to dismiss, based upon a forum selection clause, as a motion to dismiss for improper venue." *Caperton* citing Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(3)[5], at 376 (2d ed.2006). The Respondent also cites 12(h)(2) in respect to the timeliness of his Motion to Dismiss, but it is important to note that 12(h)(2) applies ***only*** to the defense of failure to state a claim upon which relief can be granted, ***not*** the defense of improper venue - which this matter clearly is - despite whatever it may be labeled as by the Respondent.

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1. Notably, there is caselaw from the Fourth Circuit which casts doubt on the Respondent's interpretation of *Atlantic Marine* and its applicability to the case at bar. See: *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 471 (4th Cir. 2018), as amended (Mar. 27, 2018) ("Although the *Atlantic Marine* Court clarified that the 'appropriate way' to enforce such a forum selection clause is through forum non conveniens, it left open the question of whether a defendant could obtain dismissal under Fed. R. Civ. P. 12(b)(6). 134 S.Ct. at 580 & n.4.").

III. CONCLUSION

The Respondents' brief contains a myriad of other invalid arguments, but they are adequately refuted by the Petitioner's Brief and need not be addressed herein. Hence, for the reasons set forth in both the Petitioner's Brief and this Reply Brief, and for other reasons that may be apparent, this Court should 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 **REPLY BRIEF OF PETITIONER FIREWATER RESTORATION, INC.** was served via U.S. Mail, postage prepaid, this 25th day of March, 2022, to the following:

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