

ABC ADVISORS, INC., V. MARIAN STRAUSSER d/b/a
MARIAN'S QUALITY PRINTING, C.P. Franklin County
Branch, A.D. 1994-448.

Defendant is not entitled to a change in venue in an action for breach of contract for failure to pay when venue may also lie where the action was brought as it is the place where payment was to be made. Defendant does not waive venue by appearing before a district justice nor is venue waived by ruling plaintiff to file a complaint.

1. An action against an individual may be brought in and only in a magisterial district where (1) he may be served, or (2) the cause of action arose, or (3) a transaction or occurrence took place out of which the cause of action arose.
2. An action against an individual may be brought in and only in a county in which he may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law unless otherwise provided for in the Rules.
3. Simply because venue may lie in one county within the Commonwealth does not mean that venue may not also lie elsewhere.
4. In the absence of agreement to the contrary, payment is due at the residence or place of business of the provider of a service, and venue is proper there in a breach of contract action alleging failure to make payment.
5. The above rule applies when a contract does not specifically provide for the place of payment.
6. As plaintiff's business is located in Franklin County and plaintiff provided a service to defendant, payment was due in Franklin County absent agreement otherwise; therefore venue is proper in Franklin County.
7. An appearance of a defendant in person or by representative or the filing by him of a claim in the case shall be deemed a waiver of any defect in service but not a waiver of a defect in venue.
8. An objection to venue can not be waived through the obtainment of a rule to file a complaint, as the only way for a defendant to raise an objection to improper venue is through preliminary objections which can only be filed after a complaint has been filed.

Thomas J. Finucane, Esquire, Attorney for Plaintiff

Stanley J. Brassington, Esquire, Attorney for Defendant

OPINION AND ORDER

JOHN R. WALKER, P.J., March 27, 1995.

FINDINGS OF FACT

During December 1993, the plaintiff, ABC Advisors, Inc., and defendant, Marian Strausser d/b/a Marian's Quality Printing, conversed on the telephone.

ABC Advisors, Inc. is located in Chambersburg, Pennsylvania. Defendant operates a small printing business in the Borough of Schuylkill Haven, Schuylkill County, Pennsylvania. After half a dozen telephone conversations through the month of December 1993 and January 1994, a contract was sent to the defendant at her place of business in Schuylkill Haven. Defendant signed the contract and mailed it to the plaintiff.

During the period of time from December 1993 through March 1994, the defendant bid on one government printing office proposal and signed a contract for that in Schuylkill County.

Plaintiff never visited defendant's place of business in Schuylkill County. Defendant never visited plaintiff's place of business in Chambersburg, Franklin County, Pennsylvania.

This was a contract for services from plaintiff, ABC Advisors, Inc., that was negotiated over the telephone and a contract mailed to defendant's place of business. Defendant signed it at the place of business and returned it to the plaintiff. The plaintiff apparently sent out requests for government printing and defendant submitted a bid on one government contract for printing in the amount of three hundred (\$300) dollars.

Plaintiff filed a complaint before District Magistrate Gary Carter in Chambersburg, Pennsylvania. District Justice Carter entered a verdict in favor of the plaintiff, and defendant appealed to the Court of Common Pleas and required the plaintiff to file a complaint in the Court of Common Pleas. Then defendant filed preliminary objections raising several matters. At the time of argument, the only matter still in dispute was the venue objection, and the court is going to consider any other issue raised in preliminary objections as being waived.

DISCUSSION

The court is going to note that neither party requested a factual hearing in front of the court but was willing to proceed on briefs and argument. The court notes that the facts discussed previously are what the court deciphered from the briefs of the parties and the oral argument. The court notes that it could be in error since neither party requested a factual hearing.

Plaintiff argues that the defendant appeared before District Magistrate Carter, thereby conceding that venue lay in Franklin County, Pennsylvania. The plaintiff directs the court to Pa.R.C.P. 302 of the District Justice Rules dealing with venue, which provides as follows:

A. An action against an individual may be brought in and only in a magisterial district where:

(1) he may be served, or

(2) the cause of action arose, or

(3) a transaction or occurrence took place out of which the cause of action arose.

Pa.R.C.P. 302A.

The plaintiff in his brief does not argue how venue lay under Rule 302 of the District Justice Rules. However, plaintiff argues that since defendant appeared at the hearing that he acquiesced to Franklin County's jurisdiction. In addition, plaintiff argues that by appealing and requiring the plaintiff to file a complaint in Franklin County that defendant has acquiesced to Franklin County's jurisdiction.

The defense counsel directs the court's attention to Pennsylvania Rule of Civil Procedure 1006:

(a) Except as otherwise provided by Subdivisions (b) and (c) of this rule, an action against an individual may be brought in and only in a county in which he may be served or in which the cause of action arose or where a transaction or

occurrence took place out of which the cause of action arose or in any other county authorized by law.

Pa.R.C.P. 1006(a)

Defense counsel then directs the court's attention to Pa.R.C.P. 2179(a):

(a) Except as otherwise provided by an Act of Assembly or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in

(1) the county where its registered office or principal place of business is located,

(2) a county where it regularly conducts business;

(3) the county where the cause of action arose; or

(4) a county where a transaction or occurrence took place out of which the cause of action arose.

Pa.R.C.P. 2179.

The court must at this point state that Pa.R.C.P. 2179 would appear to be a rule regarding venue against a corporation or similar entity, and since this is an individual conducting business, the court does not feel that Pa.R.C.P. 2179 has any application to this case and will decide the case on Pa.R.C.P. 1006 which specifically states that it defines venue against an individual.

Although this court is of the opinion that venue in this case could lie in Schuylkill County, that does not mean that venue does not also lie elsewhere. Plaintiff's place of business is situated in Franklin County. As an entity engaged in the business of collecting bids from independent printers for government contracts, they contract with the independent bidder for a fee for their services. Defendant engaged plaintiff's services and made a bid on a government contract through plaintiff. Plaintiff has alleged that defendant has failed to make payment to plaintiff for such services. This court is of the belief that the occurrence for which this cause of action arose took place in Franklin County.

In jurisdictions with a venue provision similar to Pennsylvania's, the rule is universal in the absence of agreement to the contrary, that payment is due at the plaintiff's residence or place of business, and venue is proper there in a breach of contract action alleging failure to make payment.

Lucas Enterprises v. Paul C. Harmon Co., 417 A.2d 720, 721, 723 Pa.Super. 422, 425 (1980); citing *Gorham Construction Co. v. Superior Fertilizer & Chemical Co.*, 218 So.2d 516 (Fla. 1969). *State ex rel. Industrial Supply Co. v. Circuit Court for Multnomah County*, 221 Or. 309, 351 P.2d 39 (1960), *Conservative Life Insurance Co. v. Alexander*, 114 W.Va. 451, 172 S.E. 520 (1933); *Clark v. Policyholders' Life Insurance Association*, 138 Cal.App. 505, 32 P.2d 653 (1934). The *Lucas* court further held that this same rule applies when a contract does not specifically provide for the place of payment. *Id.*; see also *Pennsylvania Higher Education Assistance Agency v. Devore* 406 A.2d 343, 267 Pa.Super 74 (1979) rearg. den'd. As plaintiff's business is located in Franklin County, payment was due in Franklin County absent agreement otherwise; therefore, venue is proper in Franklin County.

Although this court is of the opinion that venue is proper in Franklin County, it feels the need to discuss plaintiff's assertion that defendant conceded to venue in Franklin County.

By statute, "an appearance of a defendant in person or by representative or the filing by him of a claim in the case shall be deemed a waiver of any defect in service but not a waiver of a defect in venue." Pa.R.C.P.D.J., Rule 314(c), 42 Pa.C.S.A. Furthermore, an objection to venue can not be waived through the obtainment of a rule to file a complaint, as the only way for defendant to raise an objection to improper venue are through preliminary objections which can only be filed after a complaint has been filed. Pa.R.C.P. 1028, 1032; *Monaco v. Montgomery Cab Co.*, 208 A.2d 252, 417 Pa. 135 (1965).

CONCLUSION

As plaintiff's place of business was the place where payment

was due, venue properly lies in Franklin County. Neither defendant's actions by appearing for a hearing at the district justice level nor defendant's issuing a rule against plaintiff to file a complaint constituted a waiver of venue.

ORDER OF COURT

March 27, 1995, defendant's preliminary objection as to venue in Franklin County is denied.