

NOTICE
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2013 IL App (5th) 120422-U
NO. 5-12-0422
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

PUTNAM ENERGY, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Crawford County.
)	
v.)	No. 11-L-9
)	
SUPERIOR WELL SERVICES, INC.,)	Honorable
)	Kimbara Harrell,
Defendant-Appellee.)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant did not waive its right to enforce the forum-selection clause included in its contract with the plaintiff, and the circuit court properly granted the defendant's motion to dismiss the plaintiff's amended complaint.

¶ 2 BACKGROUND

¶ 3 In October 2011, the plaintiff, Putnam Energy, LLC (Putnam), an Indiana-based power company whose principal office is in Westmont, Illinois, filed a complaint for breach of contract against the defendant, Superior Well Services, Inc. (Superior), a Delaware corporation headquartered in Indiana, Pennsylvania. Putnam's complaint alleged that from 2008 through 2010, the parties had entered into a series of contracts by which Superior had provided services to several of Putnam's natural gas wells in Crawford County. The complaint further alleged that Superior had materially breached the contracts with respect to two wells that had been experiencing problems since 2010. The complaint stated that venue was proper in Crawford County "because a substantial part of the events giving rise

to the claim occurred within Crawford County where Putnam's gas reservoirs are located." Notably, the complaint did not include copies of the contracts that Superior had allegedly breached, nor did it recite any of the contracts' terms and conditions.

¶ 4 In December 2011, Superior filed a motion to dismiss Putnam's complaint for breach of contract. The motion alleged, *inter alia*, that Putnam had failed to comply with section 2-606 of the Code of Civil Procedure (735 ILCS 5/2-606 (West 2010)), which in pertinent part states:

"If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her."

¶ 5 In January 2012, Putnam filed a response to Superior's motion to dismiss and an accompanying affidavit from Putnam's "majority owner and managing member." The affidavit stated that the contracts in question had been destroyed in a fire, and the response requested that the affidavit be filed *instanter* to "correct any deficiency in Putnam's complaint." Following a hearing, the circuit court entered an order dismissing Putnam's complaint with leave to file an amended complaint within 21 days. Putnam subsequently filed an amended complaint with the aforementioned affidavit attached.

¶ 6 In February 2012, Superior filed a motion to dismiss Putnam's amended complaint for failure to state a cognizable breach-of-contract claim. Acknowledging that Putnam's copies of the contracts in question had apparently been destroyed in a fire, Superior argued that "in order to support any allegations of failure or breach," Putnam nevertheless needed to "allege the operative terms of the contracts between the parties." See *Kalkounos v. Four K's, Inc.*, 94 Ill. App. 3d 1011, 1012 (1981) ("The law is clear in Illinois that it is essential in pleading the existence of a valid contract for the pleader to allege facts sufficient to

indicate the terms of the contract."). Superior's motion to dismiss thus characterized Putnam's amended complaint as "couched in terms of tort, as opposed to contract."

¶ 7 In April 2012, Putnam filed a response to Superior's motion to dismiss its amended complaint. The response alleged, *inter alia*, that because Putnam did not have copies of the contracts in question, it was "impossible" for Putnam to allege their specific terms. The response further alleged that the facts set forth in the amended complaint were "enough to establish a breach of contract claim."

¶ 8 In May 2012, the circuit court entered an order denying Superior's motion to dismiss Putnam's amended complaint. The court opined that Superior's objections regarding Putnam's failure to allege the terms and conditions of the contracts could be remedied through a bill of particulars. See 735 ILCS 5/2-607(a) (West 2010) (providing that a responding party may obtain a bill of particulars where the allegations in a pleading are "so wanting in details that the responding party should be entitled to a bill of particulars"). The court's order also gave Superior additional time to file an answer "or otherwise plead."

¶ 9 In June 2012, Superior filed a motion for summary judgment or, in the alternative, for a dismissal without prejudice. The motion indicated that Superior had recently obtained true and correct copies of the contracts in question and that each contained the following provision:

"The terms and conditions of this agreement shall be interpreted and construed in accordance with the law of the Commonwealth of Pennsylvania and any litigation arising from this agreement or the provision of product by Superior to customer shall be filed and tried in the Court of Common Pleas of Indiana County, Pennsylvania and in no other jurisdiction."

The motion thus alleged that as a matter of law, Pennsylvania was the only appropriate forum and venue for Putnam's cause of action and that Putnam's amended complaint should

accordingly be dismissed "without prejudice to filing suit in the State of Pennsylvania." Copies of the contracts were attached to the motion, along with an affidavit attesting to their authenticity.

¶ 10 In August 2012, Superior filed a brief in support of its motion for summary judgment or dismissal. In its brief, Superior argued that the forum-selection clause included in its contracts with Putnam was both valid and enforceable under Illinois law. Thereafter, Putnam filed a response to Superior's motion, arguing that Superior's claim that venue was not proper in Crawford County was "untimely" brought pursuant to section 2-104 of the Code of Civil Procedure (735 ILCS 5/2-104 (West 2010)). Putnam maintained that Superior had thus waived its right to enforce the forum-selection clause.

¶ 11 At a subsequent hearing on Superior's motion for summary judgment or dismissal, Superior indicated that it would have moved to enforce the forum-selection clause in the parties' contracts sooner had the contracts been readily available. Superior further argued that its contractual right to enforce the clause was not "a venue issue." Suggesting that Superior should have raised its forum-selection claim at an earlier time, Putnam reiterated its position that Superior had waived its "venue argument" pursuant to section 2-104. Putnam also maintained that Superior had waived its right to enforce the forum-selection clause under general principles of contract law.

¶ 12 After taking the matter under advisement, the circuit court entered a written order dismissing Putnam's amended complaint "without prejudice." Reciting the terms of the forum-selection clause included in the parties' contracts, the court held that Superior was entitled to have any claims arising from the contracts "brought in the State of Pennsylvania and decided under the laws of the State of Pennsylvania." On Putnam's motion, the court later entered an order clarifying that its judgment of dismissal "without prejudice" meant "without prejudice to [Putnam's] ability to file its claims in the Court of Common Pleas of

Indiana County, Pennsylvania." In September 2012, Putnam filed a timely notice of appeal.

¶ 13

DISCUSSION

¶ 14 Putnam contends that the circuit court erred in dismissing its amended complaint, because "a party must assert lack of proper venue and lack of jurisdiction at the beginning of a case," and Superior failed to do so. Putnam argues that whether the issue is evaluated in light of Illinois's "venue and jurisdiction statutes" or under general principles of contract law, the "result is the same." We disagree. We also note that Putnam raises its jurisdictional argument for the first time on appeal.

¶ 15 "The dismissal of a complaint is reviewed *de novo*." *Maddux v. Blagojevich*, 233 Ill. 2d 508, 513 (2009). "*De novo* review does not require deference to the judgment of the circuit court, but the facts and law are considered *ab initio* to determine whether the decision was correct." *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 285 Ill. App. 3d 201, 209 (1996).

¶ 16 Putnam argues that Superior waived all objections to venue pursuant to section 2-104, which in pertinent part states:

"All objections of improper venue are waived by a defendant unless a motion to transfer to a proper venue is made by the defendant on or before the date upon which he or she is required to appear or within any further time that may be granted him or her to answer or move with respect to the complaint ***." 735 ILCS 5/2-104(b) (West 2010).

Putnam further argues that Superior waived all objections to jurisdiction pursuant to section 2-301 of the Code of Civil Procedure (735 ILCS 5/2-301 (West 2010)), which governs waivers of objections to jurisdiction over "the party's person." 735 ILCS 5/2-301(a), (a-5) (West 2010).

¶ 17 Conceding that statutory "venue clearly lies in Crawford County because the contract[s] [were] performed there," Superior does not challenge that Putnam could commence an action in Crawford County pursuant to Illinois's venue statute. See 735 ILCS 5/2-101 (West 2010) ("Generally," venue is proper "in the county in which the transaction or some part thereof occurred out of which the cause of action arose."); *Doe v. Supreme Lodge of Loyal Order of Moose*, 249 Ill. App. 3d 707, 710 (1993) ("It is well settled that under the 'transactional venue' arm of section 2-101 the place where a contract is signed and executed is the proper forum for litigation concerning a breach of contract claim."). Noting that it never sought to transfer the case from one Illinois county to another pursuant to Illinois's statutory transfer provisions, however (see 735 ILCS 5/2-104(c), 2-106 (West 2010)), Superior argues that its right to enforce the forum-selection clause in the parties' contracts is distinct from its right to object to venue pursuant to section 2-104, which is thus inapplicable. Conceding that it cannot contest that personal jurisdiction exists under Illinois law because it transacts business in Illinois (see 735 ILCS 5/2-209(a)(1) (West 2010)), Superior similarly argues that section 2-301 and its "concomitant waiver provisions" are equally inapplicable. We agree.

¶ 18 A valid forum-selection clause does not "'oust' " a court of its inherent jurisdiction to review a given case but rather presents "a legitimate reason to refrain from exercising that jurisdiction." *Manrique v. Fabbri*, 493 So. 2d 437, 439-40 (Fla. 1986) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972)); see also *American International Group Europe S.A. (Italy) v. Franco Vago International, Inc.*, 756 F. Supp. 2d 369, 379 (S.D.N.Y. 2010) ("[A] mandatory and exclusive forum selection clause does not oust the court of its jurisdiction over the parties or the claims, it merely prompts the court to answer the threshold question of 'whether that court should ... exercise[] its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated

agreement, by specifically enforcing the forum clause.' " (quoting *Zapata Off-Shore Co.*, 407 U.S. at 12)). "A choice of forum, which is made during an arm's-length negotiation between experienced and sophisticated businessmen, should be honored by the parties and enforced by the courts, absent some 'compelling and countervailing reason' why it should not be enforced." *Calanca v. D&S Manufacturing Co.*, 157 Ill. App. 3d 85, 88 (1987) (quoting *Zapata Off-Shore Co.*, 407 U.S. at 12). Moreover, "Illinois will not 'interfere with the rights of two parties to contract with one another if they freely and knowingly enter into the agreement' [citation]." *Hussein v. L.A. Fitness International, L.L.C.*, 2013 IL App (1st) 121426, ¶ 13. "The right to contract, the right to do business[,] and the right to labor freely and without restraint are all constitutional rights equally sacred, and statutory enactments must be construed, if possible, so as to avoid infringing such rights." *Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago*, No. 753, 371 Ill. 377, 385 (1939).

¶ 19 Here, whether Crawford County is a statutorily authorized venue under Illinois law is not the underlying issue, and Superior did not abandon its contractual right to enforce the forum-selection clause by failing to raise an objection pursuant to section 2-104. Section 2-104 clearly contemplates the filing of a motion to transfer (see *Memorial Medical Center v. Matthews*, 128 Ill. App. 3d 820, 822 (1984) ("The statutory language is direct and clear: objections of improper venue are waived unless a proper motion to transfer is made on or before a defendant is required to appear or any extension granted for appearance and moving with respect to a complaint.")), but Illinois's statutory transfer provisions "apply only to transfers within the State of Illinois" (*Nemanich v. Dollar Rent-A-Car Services, Inc.*, 90 Ill. App. 3d 484, 486 (1980)) and "contemplate only horizontal transfers of venue from one circuit court to another" (*Hardee's Food Systems, Inc. v. Illinois Human Rights Comm'n.*, 155 Ill. App. 3d 173, 179 (1987)). Section 2-104 is thus inapplicable. Cf. *Walker v. Iowa Marine Repair Corp.*, 132 Ill. App. 3d 621, 626-29 (1985) (holding that a party's right to

seek a transfer on the grounds of *forum non conveniens* is not waived by its failure to object to venue pursuant to section 2-104). Likewise, personal jurisdiction under Illinois law is not an issue, and Superior did not abandon its right to enforce the clause by failing to file a motion pursuant to section 2-301. Contractual rights are distinct from statutory rights (*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974); *O'Brien v. Town of Agawam*, 350 F.3d 279, 285 (1st Cir. 2003)), and pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), a party may seek a dismissal of a complaint on grounds that "the court does not have jurisdiction of the subject matter of the action" or "the claim asserted against [the] defendant is barred by other affirmative matter." 735 ILCS 5/2-619(a)(1), (a)(9) (West 2010). As Superior notes on appeal, by filing a motion to dismiss Putnam's amended complaint on the basis of the forum-selection clause included in the parties' contracts, Superior properly followed "the path regularly trod by like defendants in similar cases." See *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 130 (2008); *Yamada Corp. v. Yasuda Fire & Marine Insurance Co.*, 305 Ill. App. 3d 362, 365, 374 (1999); *Dace International, Inc. v. Apple Computer, Inc.*, 275 Ill. App. 3d 234, 236-37 (1995); *Calanca*, 157 Ill. App. 3d at 86-87.

¶ 20 Putnam's contention that Superior waived its right to enforce the forum-selection clause under general contract principles is also without merit. "Parties to a contract have the power to waive provisions placed in the contract for their benefit and such a waiver may be established by conduct indicating that strict compliance with the contractual provisions will not be required." *In re Liquidation of Inter-American Insurance Co. of Illinois*, 329 Ill. App. 3d 606, 618 (2002). "An implied waiver of a legal right may arise when conduct of the person against whom waiver is asserted is inconsistent with any other intention than to waive it." *Id.*

¶ 21 Here, Putnam maintains that Superior's "continued participation" in the proceedings

below "was inconsistent with any intention other than to waive its right to enforce a forum[-] selection clause or any other clause that would necessitate a dismissal of this case by an Illinois court." This argument ignores, however, that other than engaging in discovery, Superior's participation prior to filing its motion for summary judgment or dismissal was directed at ascertaining the operative terms of the contracts at issue. Moreover, Putnam's cause of action had yet to be firmly framed, so it cannot be said that the timing of Superior's motion resulted in unfair prejudice. See *Woods v. Patterson Law Firm, P.C.*, 381 Ill. App. 3d 989, 994-95 (2008) (noting that when determining whether a party has waived its contractual right to compel arbitration, "Illinois courts also consider the delay in a party's assertion of its right to arbitrate and any prejudice the delay caused the plaintiff"). We also note that at the hearing on its motion for summary judgment or dismissal, Superior indicated that it would have moved to enforce the forum-selection clause in the parties' contracts sooner had the contracts been available sooner. Under the circumstances, Superior did not demonstrate conduct constituting an implied waiver of its right to enforce the forum-selection clause contained in the parties' contracts, and we accordingly affirm the circuit court's judgment dismissing Putnam's amended complaint without prejudice to filing suit in Pennsylvania.

¶ 22

CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of Crawford County is hereby affirmed.

¶ 24 Affirmed.