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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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**Ex parte Liberty National Life Insurance Company
and Marcus Rich**

PETITION FOR WRIT OF MANDAMUS

(In re: Kenny Girdner and Margie Girdner

v.

Liberty National Life Insurance Company and Marcus Rich)

(Montgomery Circuit Court, CV-18-901639)

STEWART, Justice.

Liberty National Life Insurance Company and Marcus Rich petition this Court for a writ of mandamus directing the Montgomery Circuit Court ("the trial court") to vacate its

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order denying their motions to transfer an action filed against them by Kenny Girdner and Margie Girdner to Elmore County and to enter an order transferring the action. We grant the petition and issue the writ.

Facts and Procedural History

According to the allegations in the Girdners' complaint, in May 2017 two Liberty National agents from the Mark Woodruff Liberty National Agency in Wetumpka came to their house in Wetumpka and offered to restructure their existing Liberty National life-insurance policies; the restructuring, they said, could save the Girdners money. The Girdners alleged that, during that meeting, one agent telephoned Rich, another Liberty National agent with Woodruff's agency, for instructions on how to convert the Girdners' term-life policies into whole-life policies. The Girdners alleged that the policies were restructured under the assurances that their premiums would not increase substantially.

In January 2018, a Liberty National agent again contacted the Girdners to offer them an improved cancer policy, and, based on that agent's alleged representations, the Girdners eventually agreed to restructure their cancer policy and to

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cancel two other policies. The Girdners asserted that they submitted a check for a portion of their premiums to Rich and that they were assured that their premiums had been waived for a certain period. Shortly thereafter, the Girdners were informed by a letter that their new cancer policy had been denied and they also learned that the premium payment that they had submitted to Rich had not been received by Liberty National. Rich, however, repeatedly assured the Girdners that everything was "fine."

In late March 2018, three Liberty National agents met with the Girdners at their house to discuss fixing the "mess" they indicated Rich had created with their policies. Apparently, some of the Girdners' insurance policies had lapsed. The Girdners alleged that they were given information at that meeting that indicated either that Rich did not know what he was doing or that Rich had intentionally allowed their policies to lapse in order to gain additional commission when new policies were issued. The Girdners again agreed to restructure the policies as the three agents recommended to have their policies reinstated.

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On September 6, 2018, after Liberty National had failed to reinstate their insurance policies, the Girdners sued Liberty National and Rich alleging misrepresentation, suppression, deceit, unjust enrichment, negligent and/or wanton hiring, supervision, and training, breach of contract, conversion, and "negligent/wanton service." In their complaint, the Girdners asserted that venue was proper in Montgomery County under § 6-3-7(a)(1) and (3), Ala. Code 1975. The Girdners also stated in their complaint, however, that Liberty National has a registered agent in Wetumpka, which is in Elmore County, and that Rich is a resident of Butler County.

On October 10, 2018, Liberty National filed a motion to transfer the action to Elmore County pursuant to § 6-3-7(a)(1) and (3) because, it asserted, the acts or omissions complained of occurred in Elmore County and because the Girdners are residents of Elmore County. Liberty National supported its motion with an affidavit from Rich. Rich testified that he was an "[a]gency [d]irector with the Mark Woodruff Liberty National Agency based in Wetumpka." Rich testified that all the transactions and all of his personal dealings with the

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Girdners occurred in Elmore County. Liberty National also submitted documents that were signed during the alleged transactions that showed that they were signed in Wetumpka.

On October 11, 2018, Rich filed a motion joining in Liberty National's motion for a change of venue. Rich also argued that, under § 6-3-2, Ala. Code 1975, venue in Montgomery County was not proper as to him because he does not reside in Montgomery County and the alleged act or omission did not occur in Montgomery County.

The Girdners filed a response to the motions for a change of venue in which they asserted that venue in Montgomery County was proper because, they argued, they purchased and signed what they called "the policies at issue" in Montgomery County. To their response, the Girdners attached an insurance application related to a policy for the Girdners' daughter dated October 2003 that identified the city and state where the policy was executed as Montgomery, Alabama.

The trial court held a hearing on the motions for a change of venue on November 15, 2018, at which it heard arguments from counsel for Liberty National and the Girdners. Liberty National asserted that the Girdners' reliance on the 2003 policy was misplaced because in their complaint the

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Girdners did not allege any wrongful actions with regard to the purchase of that policy. Their claims, instead, involved actions and omissions occurring in 2017 and 2018 when agents with Liberty National contacted them to restructure their existing policies. The Girdners argued that they did not receive the benefit of their original policies, which were purchased in Montgomery County, and that "Montgomery has a sufficient nexus to make it a proper venue."

On April 24, 2019, the trial court entered an order denying Liberty National and Rich's motions for a change of venue finding that substantial events giving rise to the claims occurred in Montgomery County and that Liberty National and Rich conduct sufficient business in Montgomery County to make venue proper there. Liberty National and Rich timely filed a petition for a writ of mandamus in this Court.

Standard of Review

"The proper method for obtaining review of a denial of a motion for a change of venue in a civil action is to petition for the writ of mandamus.' Ex parte Alabama Great Southern R.R., 788 So. 2d 886, 888 (Ala. 2000). 'Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.' Ex

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parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). Moreover, our review is limited to those facts that were before the trial court. Ex parte National Sec. Ins. Co., 727 So. 2d 788, 789 (Ala. 1998).

"'The burden of proving improper venue is on the party raising the issue and on review of an order transferring or refusing to transfer, a writ of mandamus will not be granted unless there is a clear showing of error on the part of the trial judge.' Ex parte Finance America Corp., 507 So. 2d 458, 460 (Ala. 1987). ..."

Ex parte Pike Fabrication, Inc., 859 So. 2d 1089, 1091 (Ala. 2002).

Discussion

Liberty National and Rich argue that venue in Montgomery County is improper and that the trial court should have transferred the action to Elmore County pursuant to § 6-3-7 and § 6-3-2, Ala. Code 1975. Section 6-3-7, which governs the venue of actions against foreign and domestic corporations, provides:

"(a) All civil actions against corporations may be brought in any of the following counties:

"(1) In the county in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of real property that is the subject of the action is situated; or

"(2) In the county of the corporation's principal office in this state; or

"(3) In the county in which the plaintiff resided, or if the plaintiff is an entity other than an individual, where the plaintiff had its principal office in this state, at the time of the accrual of the cause of action, if such corporation does business by agent in the county of the plaintiff's residence; or

"(4) If subdivisions (1), (2), or (3) do not apply, in any county in which the corporation was doing business by agent at the time of the accrual of the cause of action."

"Once venue has been shown to be improper, transfer of the action is mandatory." Ex parte Wright Bros. Constr. Co., 88 So. 3d 817, 821 (Ala. 2012) (citing Ex parte Parker, 413 So. 2d 1105, 1106 (Ala. 1982)). See also Ex parte Perfection Siding, Inc., 882 So. 2d 307, 309 (Ala. 2003) ("If venue is improper at the outset, then upon motion of the defendant, the court must transfer the case to a court where venue is proper." (citing Ex parte Pike Fabrication, 859 So. 2d at 1091)).

The parties' dispute is over whether, under § 6-3-7(a)(1), "a substantial part of the events or omissions giving rise" to the Girdners' claims against Liberty National and

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Rich occurred in Montgomery County or in Elmore County. In determining whether the trial court was required to transfer the action, we must first determine whether venue is proper in Montgomery County under any of the provisions in § 6-3-7(a). It is undisputed that venue would not be proper in Montgomery County under § 6-3-7(a)(2) because Liberty National is a foreign corporation with its principal place of business in Texas and with no principal office in Alabama. Venue in Montgomery County would also not be proper under § 6-3-7(a)(3), because the Girdners are residents of Elmore County. The catchall provision of § 6-3-7(a)(4) would not apply to render venue proper in Montgomery County if venue is proper in Elmore County pursuant to any of the other subsections.

The Girdners, in their three-page response brief, argue that venue is proper in Montgomery County because they "first purchased and signed their insurance policies, which are at the very heart of this case, in Montgomery County." The Girdners also assert that a plaintiff's choice of venue should be given great deference.

Liberty National and Rich argue that the Girdners' claims are not related to the execution of the insurance application in 2003 in Montgomery County and that the Girdners have not

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asserted any claims related to the purchase or execution of their original insurance policies. Liberty National and Rich further argue that the alleged events or omissions giving rise to the Girdners' claims involve Liberty National and Rich's alleged interactions with and representations made to the Girdners that occurred exclusively in Elmore County in 2017 and 2018.

The Girdners have asserted claims based on fraud, negligence, and breach of contract. In Ex parte Pikeville Country Club, 844 So. 2d 1186, 1189 (Ala. 2002), which involved fraud claims, this Court explained that "'the events or omissions giving rise to the claim'" denoted in § 6-3-7(a)(1) are "a clear reference to the wrongful acts or omissions of the corporate defendant," and, applying Ex parte SouthTrust Bank of Tuscaloosa County, N.A., 619 So. 2d 1356 (Ala. 1993), this Court explained that venue is proper in the county where the corporate defendant's alleged wrongful act or omission occurred, not where the injury or damage resulted. In a case involving negligence claims, Ex parte Suzuki Mobile, Inc., 940 So. 2d 1007, 1009-10 (Ala. 2006), this Court noted that, under § 6-3-7, "the inquiry is not the location of the injury, but the location of the events or omissions giving

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rise to the claim." See also Ex parte Smith Wrecker Serv., Inc., 987 So. 2d 534, 538 (Ala. 2007).

In Vulcan Materials Co. v. Alabama Insurance Guaranty Ass'n, 985 So. 2d 376, 382 (Ala. 2007), on which Liberty National and Rich rely, this Court stated: "[U]nder the law of Alabama, a breach-of-contract claim ... arises where the contract was breached, rather than where the contract was entered into." Liberty National and Rich also rely on Ex parte International Refining & Manufacturing Co., 67 So. 3d 870, 875 (Ala. 2011), in which this Court, discussing Vulcan, expressed the principle that "venue in that action was established in the forum of the site of the underlying tort."

Liberty National submitted an affidavit in support of its motion for a change of venue that demonstrated that all the alleged acts and omissions of Liberty National and its agents that form the basis of the Girdners' claims occurred in Elmore County. Further, it is undisputed that the Girdners are residents of Elmore County. Once Liberty National made a prima facie showing that venue was proper in Elmore County, and not in Montgomery County, the burden then shifted to the Girdners to rebut Liberty National's showing. Ex parte Alabama Med. Ctr., 109 So. 3d 1114, 1116 (Ala. 2012) (citing Ex parte Movie

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Gallery, Inc., 31 So. 3d 104, 109 (Ala. 2009)). The Girdners supported their response to Liberty National's motion for a change of venue with an insurance policy that is not relevant to the claims they have asserted against Liberty National. All the evidence indicates that the alleged wrongful events and omissions occurred in Elmore County; therefore, venue is not proper in Montgomery County under § 6-3-7(a) (1). See Pikeville Country Club, 844 So. 2d at 1189; and Guarantee Ins. Co., 133 So. 3d at 870-71.

With regard to the proper venue for the Girdners' claims against Rich, venue of an action against an individual is governed by § 6-3-2, Ala. Code 1975. The applicable portions of that statute provide:

"2) All actions on contracts, except as may be otherwise provided, must be commenced in the county in which the defendant or one of the defendants resides if such defendant has within the state a permanent residence.

"(3) All other personal actions, if the defendant or one of the defendants has within the state a permanent residence, may be commenced in the county of such residence or in the county in which the act or omission complained of may have been done or may have occurred."

Rich testified in his affidavit that he resided in Butler County and that all of his dealings with the Girdners occurred

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in Elmore County. The Girdners did not present any evidence or argument in response to Rich's evidence. Accordingly, pursuant to § 6-3-2(a)(2) and (3), venue would be proper in either Butler County, where Rich resides, or in Elmore County, where "the act or omission" occurred, but not in Montgomery County. See Ex parte Hampton Ins. Agency, 85 So. 3d 347 (Ala. 2011). Accordingly, the trial court should have transferred the action on that basis as well. See Rule 82(d)(1), Ala. R. Civ. P. ("When an action is commenced laying venue in the wrong county, the court, on timely motion of any defendant, shall transfer the action to the court in which the action might have been properly filed").

Conclusion

Because Liberty National and Rich have demonstrated that venue is improper in Montgomery County and is proper in Elmore County under § 6-3-7(a)(1) and § 6-3-2(a)(3), they have demonstrated a clear legal right to have the underlying action transferred to Elmore County.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and Mendheim, JJ., concur.

Mitchell, J., recuses himself.