IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-913

Filed: 7 April 2015

A&D ENVIRONMENTAL SERVICES, INC.,

Plaintiff,

v.

JOEL E. MILLER,

Defendant.

Guilford County

No. 14 CVS 6328

Appeal by Defendant from order entered 6 June 2014 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 8 January 2015.

Graebe Hanna & Sullivan, PLLC, by M. Todd Sullivan and Mark R. Sigmon for Defendant-Appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II, and Andrew L. Rodenbough for Plaintiff-Appellee.

DILLON, Judge.

Joel E. Miller ("Defendant") appeals from an order denying his motion to dismiss for improper venue pursuant to Rule 12(b)(3) of the Rules of Civil Procedure.[1] For the following reasons, we affirm.

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[1] Defendant also filed two notices of appeal regarding certain orders pertaining to a bond set by the trial court. However, Defendant has abandoned those appeals.

I. Background

Plaintiff A&D Environmental Services, Inc., is a North Carolina corporation with its principal place of business in Guilford County. Plaintiff provides environmental services to clients throughout North Carolina and other states.

Defendant, a resident of Orange County, was hired by Plaintiff in 2011. As a condition of employment, Defendant signed a non-compete, non-solicitation, confidentiality agreement (the "Agreement"). The Agreement contained a clause entitled "Applicable Law, Exclusive Venue, Consent to Jurisdiction" which contained the following language:

> . . . . Moreover, any litigation under this Agreement shall be brought by either party exclusively in Mecklenburg County, North Carolina. . . . As such, the Parties irrevocably consent to the jurisdiction of the courts of Mecklenburg County, North Carolina (whether federal or state) for all disputes related to this Agreement. . . .

In 2014, Defendant resigned from Plaintiff and announced he was going to work for one of Plaintiff's competitors.

Within a month of Defendant's resignation, Plaintiff commenced this action in Guilford County Superior County to enforce its rights under the Agreement. Thereafter, Defendant moved to dismiss the action for improper venue pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2013), arguing that the Agreement required any action to be maintained in Mecklenburg County. Defendant's motion was denied by the trial court. Defendant timely filed a notice of appeal from the order.

II. Jurisdiction

This appeal is interlocutory. However, as this Court has held that a denial of a motion to enforce a contract clause providing for exclusive venue affects a substantial right, *see, e.g.*, *Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002) (stating "North Carolina case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right"), this appeal is properly before this Court.

III. Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his Rule 12(b)(3) motion to dismiss the action. For the reasons stated below, we hold that based on our Supreme Court's opinion in *Gaither v. Charlotte Motor Car Co.*, 182 N.C. 498, 109 S.E. 362 (1921), we are compelled to affirm the decision of the trial court.

In *Gaither*, the plaintiff filed a breach of contract suit in Richmond County, his county of residence. *Id.* at 498, 109 S.E. at 363. The defendant moved to transfer the action to Mecklenburg County based on a clause in the contract providing that any action "shall be brought in the city of Charlotte." *Id.* Our Supreme Court affirmed an order of the trial court denying the defendant's motion to transfer venue, stating that "the general policy of the courts is to disregard contractual provisions to the effect that an action shall be brought either in a designated court or a designated

county to the exclusion of another court or another county in which the action, by virtue of a statute, might properly be maintained." *Id.* at 499, 109 S.E. at 363. The Supreme Court based its holding on two separate grounds: First, the regulation of venue in North Carolina "is a matter within the discretion of the Legislature." *Id.* That is, it is within the province of the Legislature to decide in which county or counties an action brought in North Carolina must be maintained; and parties cannot by stipulation strip the Legislature of this power. *Id.* at 500, 109 S.E. at 363-64. Second, parties cannot by stipulation strip a particular superior court of its *jurisdiction* – or legal right – to determine a particular action. *Id.*

In 1992, our Supreme Court affirmed the holding in *Gaither* based on the first ground described above – that parties could not by stipulation strip the Legislature of its power to determine which counties in North Carolina would be proper to maintain an action - stating that "[t]he *Gaither* decision is correct on its facts[.]" *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 143, 423 S.E.2d 780, 782 (1992). However, the Court disavowed *Gaither* to the extent that it could be read "to condemn forum selection clauses as depriving North Carolina courts of jurisdiction[.]" *Id.* at 144, 423 S.E.2d at 783. In holding that a forum selection clause which favored a court *in another State* was enforceable, our Supreme Court stated that its holding was not at odds with *Gaither*, but that *Gaither* was distinguishable: "There is a difference between attempting to fix the venue by contract within the State of North Carolina, where the North Carolina legislature provides for venue for all cases . . . , and

attempting to fix the venue by contract in another state." *Id.* at 143, 423 S.E.2d at 782.

In sum, our Supreme Court in *Perkins* recognized that its holding in *Gaither* is still good law. *Id.* (holding that "[t]he *Gaither* decision is correct on its facts"). Specifically, our Supreme Court in *Perkins* continued to recognize that parties may not strip our Legislature of its power to determine in which county or counties that actions maintained *in this State* must be prosecuted. Neither party cites, nor has our research uncovered, a case in which our Supreme Court has overruled its holding in *Gaither* as distinguished in *Perkins*. Therefore, we hold that a forum selection clause which requires lawsuits to be prosecuted in a certain North Carolina county is enforceable *only if* our Legislature has provided that said North Carolina county is a proper venue.

In the present action, Defendant seeks to enforce a contract provision requiring that lawsuits arising thereunder be prosecuted in Mecklenburg County. In this case, our Legislature has provided that this contract dispute "*must* be tried in the county in which the [Plaintiff] or [Defendant] . . . reside[s.]" N.C. Gen. Stat. § 1-82 (2013) (emphasis added). However, there is nothing in the record which shows that either party is a resident of Mecklenburg County for venue purposes. Regarding Defendant, the record discloses that he is a resident of Orange County. Regarding Plaintiff corporation, there is nothing in the record showing that it is a resident - for venue purposes - of Mecklenburg County. As a domestic corporation, Plaintiff is considered

a resident of the county where it maintains its "registered or principal office" and also any county where it "maintains a place of business[.]" N.C. Gen. Stat. § 1-79(a)(1) and (2) (2013). Here, Defendant fails to point to any evidence in the record – and our search through the record has failed to find any such evidence – showing that Plaintiff maintains a place of business in Mecklenburg County; and, further, Defendant did not dispute Plaintiff's assertion in its verified complaint that its principal place of business is in Guilford County. Therefore, we conclude that the trial court did not err in denying Defendant's motion to dismiss based on improper venue.

AFFIRMED.

Judges BRYANT and STEPHENS concur.