[Cite as *Arrow Uniform Rental LP v. Wills, Inc.*, 2013-Ohio-1829.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Arrow Uniform Rental LP	Court of Appeals No. WD-12-057
Appellee	Trial Court No. CVF 1101761
v.	
Wills, Inc.	**DECISION AND JUDGMENT**
Appellant	Decided: May 3, 2013

* * * * *

Timothy N. Toma and Stephen S. Ellsesser, for appellee.

Mark A. Davis, for appellant.

* * * * *

JENSEN, J.

{¶ 1} In this breach of contract action, defendant-appellant, Wills, Inc., doing business as ServPro West, Southwest, and East Toledo ("ServPro"), appeals the October 10, 2012 judgment entry of the Perrysburg Municipal Court in favor of plaintiff-appellee, Arrow Uniform Rental, LP. Appellant assigns the following errors for our review.

Assignment of Error No. 1: The trial court erred when it failed to dismiss and/or transfer plaintiff's case for improper venue.

Assignment of Error No. 2: The trial court erred when it granted judgment for appellee.

Assignment of Error No. 3: The trial court erred by awarding excessive attorneys fees.

{¶ 2} For the reasons that follow, we affirm the trial court's judgment.

I. Background

{¶ 3} In May 2010, ServPro entered into a 60-month agreement with Arrow Uniform Rental under which Arrow leased uniform shirts and pants to appellant. Under the agreement, Arrow would deliver clean uniforms to ServPro on Tuesdays and would pick up dirty uniforms to be cleaned. The account was billed weekly and required payment within 10 days of the invoice. The amount charged for the uniforms selected by ServPro averaged around $23.68 per week. Arrow contends that ServPro quickly fell behind in its payments, forcing Arrow to suspend service. It claims that ServPro made a couple of payments to catch up on the overdue account and Arrow resumed service for a short period but ServPro once again failed to make payments. Because of ServPro's nonpayment, Arrow ceased delivering uniforms and eventually treated the agreement as terminated after several months of nonpayment and after exchanging correspondence with ServPro. Arrow insists that despite its efforts to reclaim the uniforms, ServPro has failed to return them.

{¶ 4} Arrow filed this lawsuit seeking to enforce the parties' agreement which it claims entitles it to damages of the greater of 50 percent of the average weekly charges to ServPro multiplied by the number of weeks remaining in the term of the agreement, or replacement value of the uniforms, together with all accrued liabilities and all applicable charges, attorneys fees, costs, and interest.

{¶ 5} As a preliminary matter, ServPro denies that venue in Perrysburg Municipal Court was proper because appellant is located in Lucas County, the alleged breach occurred in Lucas County, payments were sent to Taylor, Michigan, and Arrow moved its local office from Perrysburg (Wood County) to Maumee (Lucas County). ServPro also claims that Arrow's delivery person came every week, but failed to drop off clean uniforms and repeatedly refused to take the used uniforms. ServPro maintains that it was Arrow—not ServPro—that breached the agreement.

{¶ 6} The case proceeded to a bench trial on August 30, 2012. Arrow employees, Jay Yager and Gene Miller, testified. ServPro employees, Teri Tracy, Angela Fisher, and William Wills, also testified. The parties introduced exhibits including the service agreement, a summary of outstanding invoices, correspondence between Arrow and ServPro, Arrow's damages calculation, Arrow's attorney's invoices, Arrow's aging accounts receivables summary, and ServPro's summaries of payments remitted.

{¶ 7} Several factual disputes arose at trial. The main points of contention were (1) the status of ServPro's account at various periods during the term of the agreement;

(2) the point at which delivery of clean uniforms ceased; (3) who cancelled the agreement and when; and (4) whether ServPro refused to surrender used uniforms in its possession.

{¶ 8} As to the status of the account and the point at which delivery ceased, ServPro testified that it made two payments—one for $173.76 on January 28, 2011 and one for $697.59 on March 8, 2011. ServPro claimed that these payments brought its account current. Arrow claimed—and appellant's exhibits B and D corroborate— that the January 28, 2011 payment was for past due invoices for the period of September 7, 2010 through October 5, 2010. The March 8, 2011 payment was for past due invoices for the period of October 12, 2010 through January 11, 2011. No payments were made between January 28, 2011 and March 8, 2011 or after March 8, 2011. Arrow's employees testified that between February 15, 2011 and April 26, 2011, there were eight unpaid invoices and it suspended service in April of 2011 for this reason. Arrow identified the portions of the agreement that permitted it to suspend service when a customer becomes delinquent in payment. Conversely, ServPro maintained that the account was current and claimed that Arrow stopped service in February of 2011, but continued to send its delivery person to ServPro's office weekly. ServPro acknowledged that it signed invoices indicating receipt of uniforms during the February to April time period, but denied that clean uniforms were delivered after February.

{¶ 9} As to the date the account was terminated, Arrow claimed that on August 30, 2011, the account was assigned a "quit code" because of the failure to reach an agreement with ServPro for payment of past due invoices. On September 27, 2011, Arrow issued

final invoices for the unreturned uniforms and unpaid invoices. ServPro, on the other hand, claimed that it believed Arrow terminated the agreement in February. Its executive assistant acknowledged, however, that on April 26, 2011, she wrote a letter to Arrow purporting to cancel the agreement and complaining about ServPro's threats to reclaim its uniforms even though payment arrangements were being discussed. At trial, Arrow identified provisions in the service agreement explaining the procedure and circumstances under which a customer could cancel the agreement. Arrow claimed that ServPro did not present circumstances or follow procedures which would have allowed it to cancel the agreement. ServPro asserted that it was Arrow—not ServPro—that cancelled the agreement.

{¶ 10} As to reclaiming the uniforms, Arrow stated that for several weeks between July and August of 2011, it sent its driver to ServPro to try to reclaim its uniforms, but ServPro did not relinquish the uniforms. ServPro claimed that Arrow's driver came to ServPro every Tuesday, did not deliver clean uniforms, and refused to pick up the used uniforms.

{¶ 11} After hearing the testimony and reviewing the exhibits, the trial court determined that ServPro, in fact, breached the agreement and granted judgment to Arrow in the amount of $8,342.62 plus costs and interest from the date of judgment. This amount represents 50 percent of the average weekly service charge ($11.84) multiplied by the number of weeks left in the agreement (196), equaling $2,320; unpaid invoices of $1,492.62; and attorneys fees at a rate of $150 per hour for 30.2 hours, equaling $4,530.

II. Law and Analysis

Assignment of Error No. 1: The trial court erred when it failed to dismiss and/or transfer plaintiff's case for improper venue.

{¶ 12} Under Civ.R. 3(B),

> an action may be venued, commenced, and decided in any court in any county. * * * Proper venue lies in any one or more of the following counties:
>
> (1) The county in which the defendant resides;
>
> (2) The county in which the defendant has his or her principal place of business;
>
> (3) A county in which the defendant conducted activity that gave rise to the claim for relief;
>
> * * *
>
> (5) A county in which the property, or any part of the property, is situated if the subject of the action is real property or tangible personal property;
>
> (6) The county in which all or part of the claim for relief arose;
>
> * * *.

{¶ 13} The defense of improper venue must be made at the inception of the suit or it is waived. *Citibank (S. Dakota) N.A. v. Fischer*, 6th Dist. No. S-06-038, 2007-Ohio-1322, ¶ 22, citing Civ.R. 12(B) and (H) and *Nicholson v. Landis*, 27 Ohio App.3d 107,

109, 499 N.E.2d 1260 (10th Dist.1985). A review of the record establishes that ServPro failed to raise the defense of improper venue in its initial responsive pleading. Appellant filed its answer on November 22, 2011, without asserting the defense and filed its motion objecting to venue almost three months later on February 10, 2012. Appellant, therefore, waived its venue defense by failing to raise it at the inception of the lawsuit.

{¶ 14} Appellant's first assignment of error is found not well-taken.

Assignment of Error No. 2: The trial court erred when it granted judgment for appellee.

{¶ 15} The standard of review in an action for breach of contract is whether the trial court erred as a matter of law. *Lee's Granite, LLC v. Lavelle*, 6th Dist. No. E-08-039, 2009-Ohio-1532, ¶ 13. Accordingly, we "must determine whether the trial court's order is based on an erroneous standard or a misconstruction of the law." *Id*., citing *Continental W. Condo. Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502, 660 N.E.2d 431 (1996). We must nonetheless keep in mind that "an appellate court gives due deference to the trial court's findings of fact, so long as they are supported by competent, credible evidence." *The Four Howards, Ltd. v. J & F Wenz Road Invest., L.L.C.*, 179 Ohio App.3d 399, 2008-Ohio-6174, 902 N.E.2d 63, ¶ 63 (6th Dist.), citing *State v. Clements*, 5th Dist. No. 08 CA 31, 2008-Ohio-5549, ¶ 11.

{¶ 16} "A contract is a promise or a set of promises, the breach of which the law provides a remedy." *Lee's Granite, LLC at* ¶ 14, citing *Cleveland Builders Supply Co. v. Farmers Ins. Group of Cos.*, 102 Ohio App.3d 708, 712, 657 N.E.2d 851 (8th Dist.1995).

A plaintiff must present evidence establishing the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *Id.*, citing *Donor v. Snapp*, 98 Ohio App.3d 597, 600, 649 N.E.2d 42 (2d Dist.1994).

{¶ 17} The service agreement provided that the "Company [Arrow] shall not be required to provide service if Customer [ServPro] becomes delinquent in payment * * * ." It also provided the means and circumstances under which ServPro could terminate the agreement:

> Customer may discontinue services of Company if Company is given prompt written notice, by registered mail to the Company address specified on the reverse side, of a specified material deficiency and the Company fails to correct the deficiencies within 21 days of receipt of such notice. If Customer does not provide Company a written notice within 10 days thereafter that it is dissatisfied with the cure, and specifying the reasons, by registered letter then it is conclusively presumed that there was a satisfactory cure and no right to terminate.

{¶ 18} The trial court properly applied the law and it made factual findings that we will not disturb absent a lack of competent, credible evidence to support its findings. It found that appellant persistently failed to pay Arrow's invoices, justifying appellee's discontinuation of services and termination of the agreement. It also found that ServPro failed to terminate the contract in the manner and under the circumstances provided for in the agreement. Thus, there was competent, credible evidence establishing that Arrow

performed its obligations under the contract and that ServPro breached the agreement by its persistent failure to pay invoices.

{¶ 19} Appellant's second assignment of error is found not well-taken.

Assignment of Error No. 3: The trial court erred by awarding excessive attorneys fees.

{¶ 20} An award of attorneys fees is a matter within the sound discretion of the trial court which will not be reversed absent an abuse of that discretion. *Julian v. Creekside Health Ctr.*, 7th Dist. No. 03MA21, 2004-Ohio-3197, ¶ 86, citing *Swanson v. Swanson*, 48 Ohio App.2d 85, 90, 355 N.E.2d 894 (8th Dist.1976). An "abuse of discretion" connotes "an unreasonable, arbitrary or unconscionable attitude upon the part of the court." *Kaffeman v. Maclin*, 150 Ohio App.3d 403, 2002-Ohio-6479, 781 N.E.2d 1050, ¶ 19 (8th Dist.). Here, it is also an enforceable term in the parties' agreement.

{¶ 21} Appellee requested attorneys fees of $5,253.59 for 30.2 hours of work at $195 per hour. The trial court accepted the number of hours sought by appellee but decreased the hourly rate to $150, awarding a total of $4,530. Appellant concedes that $195 per hour is a reasonable rate but argues that 30.2 hours was excessive. Given that appellee's counsel had to meet with his client, draft pleadings, engage in motion practice, and prepare for trial, we do not find the time billed to be unreasonable. And it was within the trial court's discretion to award an hourly rate less than what was requested. We do not find the trial court's award to be unreasonable, arbitrary or unconscionable.

{¶ 22} Appellant's third assignment of error is found not well-taken.

III. Conclusion

{¶ 23} For the reasons explained above, we affirm the October 10, 2012 judgment of the Perrysburg Municipal Court. The costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE