[Cite as *Renacci v. Evans*, 2009-Ohio-5154.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

JAMES B. RENACCI	C. A. No. 09CA0004-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
GARY EVANS	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellant	CASE No. 08CIV0222

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Gary Evans, appeals from the decision of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} On January 31, 2008, Appellee, James Renacci, filed a complaint in the Medina County Court of Common Pleas against Appellant, Gary Evans, alleging breach of contract and fraud. The claims arose out of a Shareholder Stock Buy-Sell Agreement the parties entered into in 2004 concerning a company known as Garco Enterprises, a Florida Corporation. With regard to the breach of contract claim, Renacci asserted that Evans breached the Agreement by failing to immediately reimburse Renacci for any and all losses he suffered as a result of his provision of funding to Garco. The case was assigned to Judge Kimbler.

{¶3} On February 28, 2008, Evans filed a motion to change venue in which he alleged, among other arguments, that venue was improper in Medina County because the debt that gave

rise to the action occurred in Florida and concerned a Florida corporation. Evans further argued that the Shareholder Stock Buy-Sell Agreement was governed by, and construed in accordance with, the laws of the State of Florida. Renacci filed a brief in opposition. Evans filed a brief in response thereto. Unlike his motion, Evans supported his response brief with a notarized affidavit. In addition, he resubmitted his original motion and affidavit for change of venue. In his response, Evans clarified his argument that the Agreement specifically provided that jurisdiction and venue were proper in Pinellas County, Florida. On May 7, 2008, the trial court entered an order denying Evans' motion to change venue.

{¶4} On September 18, 2008, Judge Kimbler recused himself. The case was assigned to Judge Collier, who assigned the case to a magistrate. On November 20, 2008, Renacci filed a motion for summary judgment. Evans filed a response to Renacci's motion on December 4, 2008. On December 8, 2008, the magistrate issued a decision granting summary judgment in favor of Renacci on the breach of contract claim and denying summary judgment on the fraud claim. Thereafter, on December 16, 2008, Evans filed a motion in opposition to summary judgment in which he essentially challenged the magistrate's decision. On December 29, 2008, the trial court issued an order affirming the magistrate's decision and entering judgment in favor of Renacci. Renacci dismissed the fraud claim on December 31, 2008. Evans timely appealed the trial court's decision. He has raised four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "IMPROPER VENUE DUE TO PERSONAL AND SUBJECT MATTER JURISDICTION: THERE ARE NO GROUNDS IN THIS CASE THAT ALLOWS MEDINA COUNTY PERSONAL OR SUBJECT MATTER JURISDICTION. THE EVIDENCE WILL SHOW THIS ACTION NEEDS TO BE DISMISSED DUE TO IMPROPER VENUE."

{¶5} In his first assignment of error, Evans essentially contends that the trial court erred in denying his motion for a change of venue. He argues that there is no basis for Medina County to exercise personal or subject matter jurisdiction over him.

{¶6} Although Evans' first assignment of error references personal jurisdiction, subject matter jurisdiction and venue, he has concentrated his arguments on venue and personal jurisdiction. We believe it is helpful at the outset to discuss the differences between subject matter jurisdiction, personal jurisdiction and venue. "Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits" and "defines the competency of a court to render a valid judgment in a particular action." *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 87. Black's Law Dictionary defines "personal jurisdiction" as "[a] court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather merely over property interests". Black's Law Dictionary (8 Ed.2004) 870. Lastly, venue is defined as the particular locality where a suit should be heard, after jurisdiction is established. *Steiner*, 32 Ohio St.2d at 87.

Venue

{¶7} Civ.R. 3 governs venue. Civ.R. 3(B) provides in relevant part:

> "Any 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;
>
> "(4) A county in which a public officer maintains his or her principal office if suit is brought against the officer in the officer's official capacity;
>
> "(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; or, if the claim for relief arose upon a river, other watercourse, or a road, that is the boundary of the state, or of two or more counties, in any county bordering on the river, watercourse, or road, and opposite to the place where the claim for relief arose[.]"

{¶8} These subsections of Civ.R. 3(B) are to be read in the disjunctive; the presence of any one of the first nine provides venue to proceed. *Wise v. Wise* (1983), 8 Ohio App.3d 243, 243.

{¶9} In Evans' motion to change venue, he alleged that venue was improper in Medina County because the debt that gave rise to the action occurred in Florida and concerned a Florida corporation. He alleged that he resides in Michigan and that the Agreement was governed by and should be construed in accordance with the laws of the State of Florida. Lastly, he alleged that the products that were produced and sold by Garco Enterprises were packaged, warehoused and shipped from a location in Pittsburgh, Pennsylvania.

{¶10} In response to Evans' motion, Renacci argued that Evans did not provide a defense as to why Medina, Ohio was an improper venue. He further argued that Evans failed to support his statements with a notarized affidavit and consequently, that the trial court could not rely upon them. Lastly, Renacci asserted that venue was proper under Civ.R. 3(B)(6) because all or part of the claim arose in Medina County. He explained that Evans entered into an agreement to be responsible to Renacci for any and all sums of money loaned to Garco. Renacci averred that he resides in Medina County and that his principal place of business is located in Medina. Further, he argued that the suit was commenced to recover funds that were provided within Medina County, were previously accounted for in the county and that Evans received the benefit of these funds which were ultimately used in the operation of Garco. Specifically, Renacci alleged that he had "provided financing to Gary Evans with the security of a note with Fifth Third Bank which was being paid in the County of Medina in the State of Ohio."

{¶11} Unlike his initial motion to change venue, Evans supported his response brief with a notarized affidavit. In addition, he resubmitted his original motion and affidavit for change of venue. In response, Evans asserted that neither he nor Garco had any business transactions with Fifth Third Bank. He alleged that Garco exclusively used a bank in Florida for all its transactions. Evans also contested Renacci's assertion that financial record-keeping was performed in Medina. Evans attached the parties' Agreement to the response brief. He pointed to the section of the Agreement that states that "This Agreement is governed by and construed in accordance with the laws of the State of Florida, without regard to the conflicts of laws provisions." He also noted that Section 18 of the Agreement governs jurisdiction and venue and states that

> "The parties hereby consent and agree to the jurisdiction and venue of the Court of Common Pleas of Pinellas County Florida, with respect to any and all claims, causes of action, or proceedings of any kind arising from or in connection with this Agreement or the transactions contemplated hereby."

{¶12} Decisions regarding venue are left to the sound discretion of the trial court. See *McCoy v. Lawther* (1985), 17 Ohio St.3d 37, 38. An abuse of discretion is more than an error of law or judgment, but rather, it is a finding that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. However, in this assignment of error, Evans essentially disputes the trial court's interpretation of the forum selection clause. See *EI UK Holdings, Inc. v. Cinergy UK, Inc.*, 9th Dist. No. 22326, 2005-Ohio-1271, at ¶15.

{¶13} "If the terms of a contract are clear and unambiguous, then their interpretation is a question of law." *Beckler v. Lorain City School Dist*. (Jul. 3, 1996), 9th Dist. No. 95CA006049, at *2. Questions of law are reviewed by an appellate court de novo. *Butler v. Joshi* (May 9, 2001), 9th Dist. No. 00CA0058, at *4. Because we review questions of law de novo, we do not

give deference to the trial court's conclusions. *Tamarkin Co. v. Wheeler* (1992), 81 Ohio App.3d 232, 234. "The purpose of contract construction is to discover and effectuate the intent of the parties." *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 313. We presume that the parties' intent can be gleaned from the written terms of the contract. *Troutman v. Hartford Fire Ins. Co.* (Nov. 14, 2001), 9th Dist. No. 20583, at *3. In *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.*, (1993), 66 Ohio St.3d 173, the Ohio Supreme Court examined forum-selection clauses in commercial contracts. The Court explained that "[i]n the light of present-day commercial realities, *** a forum selection clause in a commercial contract should control, absent a strong showing that it should be set aside." Id. at 175.

{¶14} Here, the parties both clearly assented to the Agreement that contained the forum-selection clause. Neither party has argued on appeal that the clause is invalid or was procured by fraud. Rather, the parties essentially disagree as to whether the forum selection clause is mandatory or permissive.

{¶15} Renacci cites the Tenth District Court of Appeals decision in *Patel v. Patel*, 10th Dist. No. 06AP-1260, 2007-Ohio-5963, to support his assertion that "a mandatory forum selection must clearly evidence the intent of the parties that all other forums are excluded." He argues that "[t]he Parties (sic) agreement clearly did not exclude all other forums and Appellant never alleged that Pinellas County, Florida was exclusive and the clause mandatory over both claims of Fraud (sic) and breach of contract." We agree.

{¶16} We find guidance from the *Patel* court's examination of forum selection clauses. The *Patel* court discussed the distinction between "mandatory" and "permissive" forum selection clauses, quoting from this Court's decision in *EI UK Holdings*, supra, at ¶20-21, wherein we examined the distinction between mandatory and permissive clauses:

> "Mandatory forum selection clauses contain clear language showing that jurisdiction is appropriate only in the designated forum. In contrast, permissive forum selection clauses authorize jurisdiction in a designated forum, but do not prohibit litigation elsewhere.
>
> "Where venue is specified with mandatory language, the clause will be enforced. Where a forum selection clause states 'mandatory or obligatory language,' it is a mandatory clause that limits litigation to the designated venue. However, "*when only jurisdiction is specified* the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive." (Citations omitted and emphasis added.) *Patel*, supra, at ¶13, quoting *EI UK Holdings*, supra, at ¶20-21.

{¶17} The *Patel* court then explained that mandatory forum selection clauses "must clearly display the intent of the contracting parties to choose a particular forum to the exclusion of all other." (Citations and quotations omitted.) *Patel*, supra, at ¶14.

{¶18} In *EI UK Holdings*, supra, this Court examined whether the language of the forum clause at issue was mandatory or permissive. In determining that the clause was permissive, we found significant that the clause: "(1) provided 'no reference whatsoever to venue'; (2) did 'not contain any language to indicate an intent on behalf of the parties to make jurisdiction exclusive'; and (3) had no language indicating that a suit elsewhere was forbidden." Id. at ¶15, quoting *EI UK Holdings*, at ¶22.

{¶19} The *Patel* court similarly found the following clause was permissive:

> "This Agreement shall be governed by and construed in accordance with the substantive law of the State of Ohio. The parties intend to and hereby do confer jurisdiction upon the courts of any jurisdiction within the State of Ohio to determine any dispute arising out of or related to this Agreement, including the enforcement and the breach hereof." *Patel*, supra, at ¶12.

In reaching its conclusion, the court relied on the fact that the clause did not reference venue, did not contain words of exclusivity, and did not prohibit lawsuits elsewhere. Id. at ¶16.

{¶20} Here, in contrast to the clause at issue in *Patel*, Section 18 of the Agreement specifically references venue, stating that the parties "consent and agree to the jurisdiction *and*

venue of the Court of Common Pleas of Pinellas County Florida, with respect to any and all claims, causes of action, or proceedings of any kind arising from or in connection with this Agreement or the transactions contemplated hereby." (Emphasis added.) However, as in *Patel* and *EI UK Holdings*, this provision does not contain words of exclusivity and does not specifically prohibit lawsuits elsewhere. We cannot conclude that this clause is mandatory merely because it contains a venue provision.

{¶21} Further, we conclude that the trial court did not err in determining that Medina County is a proper venue for this action. Renacci asserted that venue was proper in Medina County pursuant to Civ.R. 3(B)(3) because the loan default occurred in Medina and the repayment was to be cured and reimbursed in Medina. The record supports this contention. The Agreement clearly states that Renacci agreed to obtain a line of credit for the benefit of the company and that he was to be reimbursed in Medina.

> "The company (Garco) and Mr. Evans must jointly and severally immediately reimburse, and indemnify *** and save harmless Mr. Renacci for, against, and from any and all payments, losses, damages, liabilities, actions, suits or claims, now or any time hereafter, paid or incurred by Mr. Renacci arising directly or indirectly out of the Guaranty, any failure of Company to timely and fully pay all amounts and perform all obligations under the Line of Credit, any Event of Default *** and all costs and expenses *** paid or incurred by Mr. Renacci arising from or related to the Guaranty, this Agreement or the Line of Credit."

{¶22} Moreover, Evans admitted in his answer that Renacci had the company checkbook and signed all the checks, including any loan interest payments. Evans has not disputed that Renacci resides in Medina. Accordingly, Evans has essentially admitted that Medina is "[a] county in which he conducted activity that gave rise to" Renacci's breach of contract claim for Evans' failure to reimburse Renacci for the losses he suffered as a result of his provision of funding to Garco. Therefore, based on the foregoing, the trial court did not err in denying Evans' motion to dismiss for improper venue.

Jurisdiction

{¶23} Although Evans has asserted in his stated assignment of error that he is challenging subject matter jurisdiction on appeal, he has not set forth any arguments in support of this contention. This Court has previously held that a defendant has the burden of affirmatively demonstrating the error of the trial court on appeal. *State v. Cook*, 9th Dist. No. 20675, 2002-Ohio-2646, at ¶27. "Moreover, '[i]f an argument exists that can support this assignment of error, it is not this court's duty to root it out.'" Id., quoting *Cardone v. Cardone* (May 6, 1998), 9th Dist. Nos. 18349 and 18673, at *8. See, also, *State v. Patton*, 9th Dist. No. 02CA0113-M, 2003-Ohio-4030, at ¶15.

{¶24} Unlike subject matter jurisdiction, which cannot be waived, a party may waive personal jurisdiction. *Qualchoice, Inc. v. Nieciecki*, 11th Dist. No. 2002-P-0100, 2003-Ohio-6966, at ¶17, fn 1. While Evans has raised specific arguments with regard to the court's personal jurisdiction, we will not address these contentions. The trial court record reflects that Evans did not raise any challenges to the trial court's personal jurisdiction. See *Stefano & Associates, Inc. v. Global Lending Group, Inc.*, 9th Dist. No. 23799, 2008-Ohio-177, at ¶18 ("It is axiomatic that a litigant who fails to raise an argument in the trial court forfeits his right to raise that issue on appeal"). Accordingly, he has forfeited all but plain error on appeal. Evans has failed to address plain error in his brief. In civil cases, the application of the plain error doctrine is reserved for the rarest of circumstances. See *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, syllabus. Moreover, we will not engage in an analysis of plain error if an appellant fails to argue plain error on appeal. *Conti v. Spitzer Auto World Amherst, Inc.*, 9th Dist. No. 07CA009121, 2008-Ohio-1320, at ¶8. Because Evans forfeited his argument with regard to personal jurisdiction and

has not argued plain error on appeal, we decline to address his challenge to the trial court's personal jurisdiction.

{¶25} Evans' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "ERROR IN RESPONSE TO JUDGMENT: [EVANS] FILED A TIMELY RESPONSE TO THE MAGISTRATES [SIC] DECISION WHICH WAS NOT ALLOWED FOR THE REASON IT WAS NOT FILED IN A TIMELY FASHION."

ASSIGNMENT OF ERROR III

> "MISTRIAL ON JUDGE RECUSAL: IRREGULARITY IN THE PROCEEDINGS OF THE COURT PREVENTED [EVANS] FROM HAVING A FAIR HEARING."

ASSIGNMENT OF ERROR IV

> "LACK OF RESPONSE TO INTERROGATORIES / ADMISSIONS: THE PLAINTIFF OBJECTED AND REFUSED TO ANSWER THE INTERROGATORIES AND ADMISSIONS WHICH ADVERSELY AFFECTED THE CASE AND ALLOWED THE SUMMARY JUDGMENT."

{¶26} Evans has failed to support his second, third and fourth assignments of error with citations to authority, as required under App.R. 16(A)(7), which provides:

> "The appellant shall include in its brief ***
>
> "An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies."

{¶27} Moreover, Evans' second, third and fourth assignments of error in no way comport with the local rules. Loc.R. 7(B)(7) requires that an appellant's brief include the following: "The argument shall contain the contentions of the appellant with respect to the assignments of error and the supporting reasons with citations to the authorities and statutes on which the appellant relies." As this Court explained, supra, a defendant has the burden of

affirmatively demonstrating the error of the trial court on appeal. *Cook*, supra, at ¶27. "Moreover, '[i]f an argument exists that can support this assignment of error, it is not this court's duty to root it out.'" Id., quoting *Cardone*, supra, at *8.

III.

{¶28} Evans' assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

GARY T. EVANS, pro se, Appellant.

LAURA L. MILLS, Attorney at Law, for Appellee.