

In re R.R. Repair & Maint., Inc.

Court of Appeals of Texas, Fifth District, Dallas

November 2, 2009, Opinion Filed

No. 05-09-01035-CV

Reporter

2009 Tex. App. LEXIS 8404; 2009 WL 3531636

IN RE RAILROAD REPAIR & MAINTENANCE, INC., WILLIAM MURRAY, ELIZABETH MURRAY, WILLIAM MURRAY d/b/a WP MURRAY SALVAGE, and JOHN W. MICHENER

Prior History: [*1] Original Proceeding from the 95th District Court, Dallas County, Texas. Trial Court Cause No. DC-09-01953.

Core Terms

venue, mandatory, trial court, permissive, motion to transfer, venue provision, mandamus, abused, declaratory judgment, unconscionable, pleadings, parties, argues, waived, forum selection clause, court of appeals, venue statute, cannot agree, provides, requires

Case Summary

Procedural Posture

Relator sellers sought mandamus relief from an order of respondent, the 95th District Court, Dallas County (Texas), which denied the sellers' motion to transfer venue to Tarrant County of a suit brought by real party in interest buyers alleging breach of contract, fraud, and negligent misrepresentation in connection with the parties' asset purchase agreement. The buyers also sought a declaratory judgment relating to a contract with a third party.

Overview

The parties' agreement provided for exclusive jurisdiction and venue in either Tarrant County or the United States District Court for the Northern District of Texas. The amount paid by the buyers exceeded one million dollars. The court noted that mandamus was the proper vehicle to enforce mandatory venue as provided in [Tex. Civ. Prac. & Rem. Code Ann. § 15.0642](#) (2002). The court determined that the transaction was a major transaction, as defined in [Tex. Civ. Prac. & Rem. Code Ann. § 15.020\(a\)](#), and that the parties' agreement provided for mandatory venue in Tarrant County pursuant to [§ 15.020\(b\)](#). The buyers' venue choice under [Tex. Civ. Prac. & Rem. Code Ann. § 15.002](#), a permissive venue statute, had to yield to the mandatory venue provision in [§ 15.020](#) because joinder was proper within the meaning of [Tex. Civ. Prac. & Rem. Code Ann. §§ 15.003, 15.004, 15.005](#) (2002). The motion to transfer complied with [Tex. R. Civ. P. 86\(3\)\(b\)](#), and the sellers were not required to deny the buyers' permissive venue facts. The buyers did not show under [§ 15.020\(d\)\(1\)](#) that the venue selection provision was procured by fraud or unconscionable; mere allegations of fraud did not suffice.

Outcome

The court conditionally granted the petition for a writ of mandamus and ordered the trial court to vacate its denial of the motion to transfer venue and to enter an order granting the motion.

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Venue > Special Venue

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN1 Mandamus is the proper vehicle to enforce mandatory venue. [Tex. Civ. Prac. & Rem. Code Ann. § 15.0642](#) (2002). Ordinarily, mandamus relief lies when the trial court has abused its discretion and a party has no adequate appellate remedy. However, where a party seeks to enforce a mandatory venue provision under Tex. Civ. Prac. & Rem. Code Ann. ch. 15, a party is not required to prove the lack of an adequate appellate remedy, but is required only to show that the trial court abused its discretion by failing to transfer the case. A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. In determining whether the trial court abused its discretion in the resolution of factual matters, the court of appeals may not substitute its judgment for that of the trial court and may not disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. A trial court has no discretion in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN2 [Tex. Civ. Prac. & Rem. Code Ann. § 15.020](#) is a mandatory venue provision. It provides that an action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county. [§ 15.020\(b\)](#). Further, it defines a "major transaction" as a transaction evidenced by

a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than \$ 1 million. [§ 15.020\(a\)](#).

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Uniform Declaratory Judgment Act

HN3 The Declaratory Judgments Act, [Tex. Civ. Prac. & Rem. Code Ann. § 37.001 et seq.](#), has no mandatory venue provision. Rather, an action under the Declaratory Judgments Act is governed by the general venue rules for any civil action.

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN4 Mandatory venue provisions trump permissive ones.

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN5 See [Tex. Civ. Prac. & Rem. Code Ann. § 15.004](#) (2002).

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN6 See [Tex. Civ. Prac. & Rem. Code Ann. § 15.005](#) (2002).

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

HN7 [Tex. Civ. Prac. & Rem. Code Ann. § 15.003](#) solely describes joinder in the context of a suit in which there is more than one plaintiff.

Civil Procedure > ... > Venue > Motions to Transfer > General Overview

Civil Procedure > Preliminary Considerations >
Venue > Special Venue

HN8 [Tex. R. Civ. P. 86\(3\)\(b\)](#) requires that a motion to transfer state that mandatory venue exists in another county, designate the specific statutory venue provision relied upon, and state the legal and factual basis for the transfer of the action to a specific county.

Civil Procedure > Preliminary Considerations >
Venue > Special Venue

Contracts Law > Contract Conditions &
Provisions > Forum Selection Clauses

HN9 Case law requires a court to presume a forum selection clause is valid and enforceable unless the opposing party meets a heavy burden of proof to show (1) the clause was procured by fraud, undue influence, or overreaching, or (2) enforcement would be unreasonable and unjust. Moreover, [Tex. Civ. Prac. & Rem. Code Ann. § 15.020](#) does not delineate fraud itself as a defense to enforcement of the selected venue, but provides for a defense to enforcement where the agreement described by this section was unconscionable at the time that it was made. [§ 15.020\(d\)\(1\)](#).

Counsel: For RELATOR: Mr. William Brent Shellhorse, Whitaker, Chalk, Swindle & Sawyer, Fort Worth, Tx; Mack Ed Swindle, Michener Larimore Swindle Whitaker, et al, Fort Worth, TX; Thomas F. Harkins, Jr., Michener Larimore Swindle Whitaker, et al, Fort Worth, TX.

For REAL PARTIES: Mark J. Dyer, Martin, Disiere, Jefferson & Wisdom, L.L.P., Dallas, TX; Ted B. Lyon, Jr., Ted B. Lyon & Associates, P.C., Mesquite, TX; Josh Birmingham, Ted B. Lyon & Associates, P.C., Mesquite, TX.

Judges: Before Justices Bridges, Richter, and Lang. Opinion By Justice Lang.

Opinion by: DOUGLAS S. LANG

Opinion

MEMORANDUM OPINION

Opinion By Justice Lang

Relators Railroad Repair & Maintenance, Inc., William Murray, Elizabeth Murray, William Murray d/b/a WP Murray Salvage, and John W. Michener (Inc.) brought this mandamus proceeding to challenge the trial court's refusal to transfer this case to Tarrant County. Because mandatory venue lies in Tarrant County, we conclude the trial court abused its discretion when it denied Relators' motion. Therefore, we conditionally grant the writ.

I. FACTUAL AND PROCEDURAL BACKGROUND

Relators, Inc. and real parties in interest, Railroad Repair & Maintenance, LLC, Thomas Howard, and Jim Howard (LLC) entered into an Asset Purchase Agreement (APA) with an expressly stated value of approximately \$ 7 million. The APA contained the following provision regarding venue:

P 6.08 Governing Law; Choice of Forum; Waiver of Jury Trial; Attorney's Fees.

This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas applicable to contracts executed in and [*2] to be performed in that state and without regard to any applicable conflicts of law. *In any action among the parties arising out or relating to this Agreement or any of the transactions contemplated by this Agreement: (a) each party irrevocably and unconditionally consents and submits to the exclusive jurisdiction and venue of either the state courts located in Tarrant County, Texas or the United States District Court for the*

Northern District of Texas, (b) each party irrevocably consents to service of process by first class certified mail, return receipt requested, postage prepaid, (c) each party irrevocably waives any and all rights to a trial by jury in any legal proceeding arising out of or related to this Agreement or the transactions contemplated hereby.

(Emphasis added.)

After LLC paid approximately \$ 4.5 million for the purchase of Railroad Repair & Maintenance, Inc., LLC filed suit against Inc. in Dallas County for breach of contract, fraud, and negligent misrepresentation in connection with the APA. In the lawsuit, LLC also asserted a claim in connection with a construction contract between Inc. and Dallas Garland & Northeastern Railroad, Inc. (DGNO), a company with its principal [*3] place of business in Dallas County. Specifically, LLC sought a declaratory judgment that "there exists an actual case or controversy of a justiciable nature" between LLC, Inc. and DGNO.

Inc. filed a "Motion to Dismiss For Violation Of Forum Selection Clause Or, Alternatively, For Transfer Of Venue" to Tarrant County, and a general denial subject to that motion. Subsequently, LLC filed a response to Inc.'s motion and Inc. filed a reply in support. On May 19, 2009, a hearing was held on Inc.'s motion, but no evidence was presented and the trial court denied the motion without stating its reasons. Also on May 19, 2009, LLC amended its petition to add claims against additional parties. Later, LLC filed a second amended petition. This mandamus proceeding followed.

II. STANDARD FOR MANDAMUS TO ENFORCE MANDATORY VENUE

HNI Mandamus is the proper vehicle to enforce mandatory venue. TEX. CIV. PRAC. & REM. CODE ANN. § 15.0642 (Vernon 2002). Ordinarily,

mandamus relief lies when the trial court has abused its discretion and a party has no adequate appellate remedy. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135-36 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992). However, where a party [*4] seeks to enforce a mandatory venue provision under Chapter 15 of the Texas Civil Practices and Remedies Code, a party is not required to prove the lack of an adequate appellate remedy, but is required only to show that the trial court abused its discretion by failing to transfer the case. *In re Tex. DOT*, 218 S.W.3d 74, 76 (Tex. 2007).

A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005); *In re Tex. Am. Express*, 190 S.W.3d 720, 723 (Tex. App.-Dallas 2005, orig. proceeding). In determining whether the trial court abused its discretion in the resolution of factual matters, the court of appeals may not substitute its judgment for that of the trial court and may not disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. *Walker*, 827 S.W.2d at 839-40; *In re Tex. Am. Express*, 190 S.W.3d at 724. "A trial court has no 'discretion' in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze [*5] or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ." *Walker*, 827 S.W.2d at 840; *In re Tex. Am. Express*, 190 S.W.3d at 724.

III. CONTENTIONS OF PARTIES

Inc. contends the trial court abused its discretion when it denied the motion to transfer. Specifically, Inc. argues that the trial court was required to transfer venue to Tarrant County because section 15.020 of the Civil Practice and Remedies Code governs the underlying suit, and this mandatory

venue provision controls over the permissive venue provision upon which LLC based its venue choice. See [TEX. CIV. PRAC. & REM. CODE ANN. § 15.020](#) (Vernon Supp. 2008). LLC responds that the trial court correctly denied Inc.'s motion to transfer venue because [section 15.020](#) cannot govern venue of the underlying suit as it is based on the APA and Paragraph 6.08 of the APA does not contain language providing for mandatory venue in Tarrant County. LLC asserts that the language in the APA describes Tarrant County merely as a county of permissive venue. Further, LLC argues that even if Tarrant County is the county of mandatory venue under the APA, (1) venue is mandatory in Dallas [*6] County under the Declaratory Judgments Act because LLC seeks a declaratory judgment against DGNO, and DGNO is an indispensable party to the action; (2) Inc. waived any venue objection because Inc. failed to specifically deny the venue facts alleged in LLC's pleadings as required under [Texas Rule of Civil Procedure 87](#) and [Maranatha Temple, Inc. v. Enter. Products Co., et. al., 833 S.W.2d 736 \(Tex. App.-Houston \[1st Dist.\] 1992, writ denied\)](#); and (3) the APA's venue-selection provision is unenforceable because it was procured by fraud and undue influence, and is "unconscionable under Texas Law."

B. Applicable Law

HN2 [Section 15.020 of the Civil Practice and Remedies Code](#) is a mandatory venue provision. [In re Royalco Oil & Gas Corp., 287 S.W.3d 398, 399, n.2 \(Tex. App.-Waco 2009, orig. proceeding\)](#). It provides that "[a]n action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county." [TEX. CIV. PRAC. & REM. CODE ANN. § 15.020\(b\)](#). Further, it defines a "major transaction" as "a transaction evidenced by a written agreement under which a person pays [*7] or receives, or is obligated to pay or entitled to receive,

consideration with an aggregate stated value equal to or greater than \$ 1 million." [TEX. CIV. PRAC. & REM. CODE ANN. § 15.020\(a\)](#).

B. Application of the Law to the Facts

Prior to addressing whether Paragraph 6.08 of the APA provides for mandatory venue pursuant to [section 15.020](#), we must determine whether the transaction meets the test of a "major transaction" within the meaning of [section 15.020\(a\)](#). See [TEX. CIV. PRAC. & REM. CODE ANN. § 15.020\(a\)](#). Inc. contends the APA was a written agreement with an expressly stated aggregate value of approximately \$ 7 million, and therefore the transaction under the APA is a "major transaction" pursuant to [section 15.020\(a\)](#). See *id.* LLC does not dispute the facts supporting this assertion or differ with the conclusion urged by Inc. We agree with Inc. Accordingly, we conclude, on this record, the transaction under the APA is a "major transaction." *Id.*

Next, we address the language of the venue-selection provision of the APA and LLC's argument that permissive, rather than mandatory venue, is described. Specifically citing [In re Tex. Windstorm Ins. Ass'n., 121 S.W.3d 821, 824 \(Tex. App.-Beaumont 2003, orig. proceeding\)](#), [*8] LLC claims that the language of Paragraph 6.08 describes Tarrant County as an "acceptable venue. . . but not the only venue where claims can be brought." See [121 S.W.3d 821](#). LLC asserts that under [Texas Windstorm](#), "[l]anguage such as 'shall' and 'must' is required" for a venue provision to be mandatory. See *id.* at 824. However, [Texas Windstorm](#) addresses the interpretation of the language of a venue statute, [Article 21.49, section 9A of the Texas Insurance Code](#), respecting a suit brought by an insurance policy holder after a claim for losses was denied. See *id.* [Texas Windstorm](#)'s interpretation of statutory language is simply not applicable in our interpretation of the APA's contractual venue-selection provision.

Additionally, LLC urges us to follow [Mabon Ltd. v. Afri-Carib. Enterprises, Inc., 29 S.W.3d 291,](#)

[297 \(Tex. App.-Houston \[14th Dist.\] 2000, no pet.\)](#). LLC claims *Mabon Ltd.* establishes the permissive nature of Paragraph 6.08 because that case presented a "similar venue provision" to that at issue here.

In *Mabon Ltd.*, the Houston Fourteenth Court of Appeals considered the following provision and held that the provision was permissive in nature:

It is also agreed between the parties [*9] [that] because of the multi-state and multi-country jurisdiction involved due to the locations of the principals, banks and depositories, etc., the laws of ... Nigeria will apply and the Federal District of Nigeria shall have venue.

[29 S.W.3d at 297-98](#). We cannot agree that the clause interpreted by *Mabon Ltd.* is similar to Paragraph 6.08. The clause in the APA is plainly distinguishable because it contains the "explicit language regarding exclusivity" that was lacking in the *Mabon* case. Cf. [id. at 297](#). Specifically, the APA clause states that LLC and Inc. "irrevocably and unconditionally consent and submit to the *exclusive jurisdiction and venue* of either the state courts located in Tarrant County, Texas or the United States District Court for the Northern District of Texas[.]" (Emphasis added). We conclude that the language of Paragraph 6.08 of the APA provides for mandatory venue in Tarrant County as required by [section 15.020 of the Texas Civil Practice and Remedies Code](#).

Having decided that Tarrant County is the county of mandatory venue under [section 15.020](#), we address the other arguments asserted by LLC. First, LLC argues that regardless of whether this Court concludes venue is [*10] mandatory in Tarrant County pursuant to [section 15.020](#), the "Declaratory Judgments Act is a mandatory venue statute and the only place where venue is proper to all necessary and indispensable parties is Dallas

County." However, we cannot agree. **HN3** The Declaratory Judgments Act, [sections 37.001 et seq.](#), has no mandatory venue provision. Rather, an action under the Declaratory Judgments Act is governed by the general venue rules for any civil action, a fact that is conceded in LLC's argument. See [Bonham State Bank v. Beadle, 907 S.W.2d 465, 471 \(Tex. 1995\)](#). Further, LLC's pleadings show that LLC asserted that venue lies in Dallas County under the general, permissive venue statute, [section 15.002 of the Civil Practice and Remedies Code](#). See [TEX. CIV. PRAC. & REM. CODE ANN. § 15.002](#) (Vernon 2002).

It is clear that **HN4** "mandatory venue provisions trump permissive ones." [Airvantage, L.L.C. v. TBAN Properties # 1, L.T.D., 269 S.W.3d 254, 257 \(Tex. App.-Dallas 2008, no pet.\)](#) (citing [Wichita County v. Hart, 917 S.W.2d 779, 781 \(Tex.1996\)](#)). Accordingly, LLC's venue choice under [section 15.002](#), a permissive venue statute, must yield to the mandatory venue provision in [section 15.020](#), if it is indeed [*11] properly joined. [Airvantage, L.L.C. v. 269 S.W.3d at 257; TEX. CIV. PRAC. & REM. CODE ANN. § 15.004](#) (Vernon 2002) **HN5** ("In a suit in which a plaintiff properly joins two or more claims or causes of action arising from the same transaction, occurrence, or series of transactions or occurrences, and one of the claims or causes is governed by the mandatory venue provisions of Subchapter B, ¹ the suit shall be brought in the county required by the mandatory venue statute."); [TEX. CIV. PRAC. & REM. CODE ANN. § 15.005](#) (Vernon 2002) **HN6** ("In a suit in which the plaintiff has established proper venue against a defendant, the court also has venue of all the defendants in all claims or actions arising out of the same transaction, occurrence, or series of transactions or occurrences.").

Citing [Vandy v. Commissioners Ct., 620 S.W.2d 104 \(Tex. 1981\)](#), and [section 15.003 of the Civil Practice and Remedies Code](#), LLC argues that DGNO is an "indispensable" party to the action

¹ [TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 et seq.](#)

under *Texas Rule of Civil Procedure 39*. See *620 S.W.2d 104*; *TEX. CIV. PRAC. & REM. CODE ANN. § 15.003* (Vernon 2002) (entitled "Multiple Plaintiffs and Intervening Plaintiffs"); *TEX. R. CIV. P. 39* [*12] (entitled "Joinder of Persons Needed For Just Adjudication"). However, as noted by the *Vandy* court, the word "indispensable" has long been omitted from the language of *Rule 39*. See *Vandy*, *620 S.W.2d at 106*. Further, even assuming without deciding that *Rule 39* requires joinder of DGNO, the record does not support LLC's assertion that *section 15.003* requires Inc. to "establish proper venue against DGNO." *HN7 Section 15.003* solely describes joinder in the context of a suit in which there is more than one plaintiff. See *TEX. CIV. PRAC. & REM. CODE ANN. § 15.003*. On the record before this Court, LLC appear as the only plaintiff. Therefore, we cannot agree, on this record, that proper joinder under *section 15.003* requires Inc. to independently establish venue against DGNO. See *id.*

Second, LLC contends that Inc. did not meet its burden to specifically deny the venue facts alleged in LLC's pleadings and Inc.'s assertion of mandatory venue is waived. LLC asserts that a specific denial is required in this case by *Texas Rule of Civil Procedure 87* and *Maranatha Temple*. See *TEX. R. CIV. P. 87(3)(a)*; see also *Maranatha Temple*, *833 S.W.2d at 740* ("[S]pecific denial of a venue fact requires that the fact [*13] itself be denied.").

We cannot agree that the holding in *Maranatha Temple* dictates that we conclude Inc. waived its assertion of mandatory venue under *section 15.020*. The facts and decisions in *Maranatha* demonstrate a materially different situation from the one before us today. In *Maranatha*, the plaintiff claimed defendants had trespassed on its real property located in Chambers County. Based upon then effective (and since repealed) *section 15.037*, plaintiff asserted venue was in Harris County for the foreign corporation defendants. See *TEX. CIV. PRAC. & REM. CODE ANN. § 15.037* (Vernon

1986) (repealed 1995) (see *TEX. CIV. PRAC. & REM. CODE ANN. § 15.018*) (Vernon Supp. 2008). Plaintiff also asserted Harris County was the proper venue against all defendants unless a mandatory exception was raised. *TEX. CIV. PRAC. & REM. CODE ANN. § 15.061* (Vernon 1986) (repealed 1995) (see *TEX. CIV. PRAC. & REM. CODE ANN. § 15.005*) (Vernon 2002). Several defendants filed motions to transfer that claimed mandatory venue was in Chambers County, the county where the real estate was located, claiming Maranatha Temple had brought an action respecting a question of title to land. *TEX. CIV. PRAC. & REM. CODE ANN. § 15.011* [*14] (Vernon 1986). The record reflected defendants did not specifically deny the permissive venue facts alleged by Maranatha on which it based the Harris County venue.

The court of appeals concluded the trial court in deciding that there was mandatory venue in Chambers County under *section 15.011* because the pleadings of Maranatha alleged only trespass, not a "question of title" as required to enforce mandatory venue pursuant to *section 15.011*. *Maranatha Temple*, *833 S.W.2d at 739*. Accordingly, because of the trial court's error in transferring the case, the court of appeals then analyzed the status of the venue as alleged in Harris County. The court of appeals determined because defendants failed to specifically deny the permissive venue facts pleaded by Maranatha, those facts were established pursuant to *Rule 87*, and venue was proven to be Harris County.

In the case before us, Inc.'s mandatory venue claim was raised by motion to transfer filed in accordance with *Texas Rule of Civil Procedure 86*. See *TEX. R. CIV. P. 86*. As stated above, the mandatory venue in Tarrant County is established on this record pursuant to *section 15.020*.

LLC cites us no case law that supports its contention that [*15] mandatory venue is waived by the failure of the movant on a motion to

transfer to specifically deny the permissive venue facts of its adversary. Even assuming without deciding that when Inc. filed its motion to transfer venue based upon a mandatory venue provision, Inc. was required to specifically deny the venue facts supporting Dallas County as a permissive venue, the effect would be that the alleged permissive venue facts were admitted for venue purposes. See *Moriarty v. Williams*, 752 S.W.2d 610, 612 (Tex. App.-El Paso 1988, writ denied). As stated above, even assuming LLC's permissive venue facts were proven, LLC's choice of permissive venue in Dallas County is "trumped" by Inc.'s asserted mandatory venue in Tarrant County. See *Airvantage, L.L.C.*, 269 S.W.3d at 257. In its motion to transfer, Inc. properly objected to Dallas County as a permissive venue and asserted that Paragraph 6.08 of the APA provides for mandatory venue in Tarrant County pursuant to section 15.020. See HN8 TEX. R. CIV. P. 86(3)(b) (requiring that a motion to transfer state mandatory venue exists in another county, designate the specific statutory venue provision relied upon, and state the legal and factual basis [*16] for the transfer of the action to a specific county). Further, the APA was attached to LLC's first amended petition as an exhibit, LLC acknowledged in that pleading execution of the APA, and based its suit on the APA. In fact, LLC did not contest the venue facts alleged in Inc.'s motion to transfer (i.e. Paragraph 6.08 of the APA provided for Tarrant County venue under section 15.020). Under these circumstances, on this record, Inc. did not waive its venue objection.

Finally, LLC argues that the APA's venue-selection provision "[wa]s procured by fraud and undue influence, it [wa]s unconscionable and enforcement would be unreasonable and unjust." See TEX. CIV. PRAC. & REM. CODE ANN. § 15.020(d)(1). The two arguments are distinct, but neither is supported by evidence on the record, and we cannot agree with LLC's position.

Initially, LLC claims fraud as alleged in its pleadings requires the venue provision not be enforced. However, the case law cited by LLC does not address how mere allegations of fraud in a petition can support non-enforcement of mandatory venue pursuant to section 15.020. Further, HN9 those cases would uniformly require a court to presume a forum selection clause is valid [*17] and enforceable unless the opposing party meets a "heavy burden of proof" to show (1) the clause was procured by fraud, undue influence, or overreaching, or (2) enforcement would be unreasonable and unjust. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972); *Luxury Travel Source v. Am. Airlines, Inc.*, 276 S.W.3d 154, 168 (Tex. App.-Ft. Worth 2008, no pet.). However, no evidence of fraud was before the trial court at the time of the hearing on the motion to transfer. In its response to the motion to transfer, LLC simply cited the trial court to its petition that alleged fraud, misrepresentation, and a "scheme." Further, LLC cites to this Court, as evidence of fraud, certain objections and interrogatories that are attached as appendices to LLC's response to the petition for writ of mandamus. The documents offered by LLC in its appendices are dated July 1, 2009 and September 4, 2009, long after the May 19, 2009 hearing on Inc.'s motion to transfer venue. Accordingly, at the time of the hearing on the motion to transfer, the documents could not have been considered by the trial court. Moreover, section 15.020 does not delineate fraud itself as a defense to enforcement of the [*18] selected venue, but provides for a defense to enforcement where "the agreement described by this section was unconscionable at the time that it was made." TEX. CIV. PRAC. & REM. CODE ANN. § 15.020(d)(1).²

Additionally, LLC contends that the trial court's denial of the motion to transfer is not error and

² Other defenses exist under Section 15.020 where the agreement is voidable under Section 35.52 and Chapter 272 of the Business & Commerce Code or where venue is established under a state statute other than this title. See TEX. CIV. PRAC. & REM. CODE ANN. § 15.020(d)(2), (3) (Vernon Supp. 2008)

Paragraph 6.08 cannot be enforced because the APA was unconscionable at the time that it was made. However, as stated above, no evidence of unconscionability was before the trial court for consideration. LLC filed a response to Inc.'s motion that simply stated, without evidentiary support, "[a]t the time the APA was executed, there was a great disparity in the value exchanged to such an effect that [LLC's] multi-million dollar investment. . . has turned out to be worthless because of [Inc.'s] misrepresentations." As with its assertion of fraud described above, LLC argues that its claim of unconscionability [*19] is supported by objections and answers to LLC's first set of interrogatories served on them that are attached as appendices to LLC's response to Inc.'s petition for mandamus. However, those documents are dated long after the trial court ruled on the motion to transfer. Accordingly, we do not consider those documents.

On this record, we conclude the trial court abused its discretion by denying Inc.'s motion to transfer venue to Tarrant County.

IV. CONCLUSION

The trial court clearly abused its discretion when it denied Relators' "Motion to Dismiss For Violation Of Forum Selection Clause Or, Alternatively, For Transfer Of Venue" to Tarrant County. Relators' petition for a writ of mandamus is conditionally **GRANTED**.

The Court **ORDERS** the Honorable Ken Mohlberg, Presiding Judge of the 95th District Court, Dallas County, to **VACATE** his May 19, 2009 "Order" denying Relators' "Motion to Dismiss For Violation Of Forum Selection Clause Or, Alternatively, For Transfer Of Venue," and **ENTER** an order granting Relators' "Motion to Dismiss For Violation Of Forum Selection Clause Or, Alternatively, For Transfer Of Venue." The writ will only issue if the trial court fails to comply.

DOUGLAS S. LANG

JUSTICE