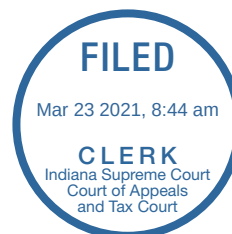


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

Mark Small
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Luke L. Tooley, Jr. Revocable
Trust,
Appellant-Plaintiff,

v.

Michael Ghosh and Mark J.
Pizur,
Appellee-Defendants.

March 23, 2021

Court of Appeals Case No.
20A-PL-2048

Appeal from the Marion Superior
Court

The Honorable Timothy W.
Oakes, Judge

Trial Court Cause No.
49D02-1907-PL-27224

Tavitas, Judge.

Case Summary

- [1] After Michael Ghosh secured a default judgment against Luke Tooley in Hamilton County, Ghosh sought to designate real property owned by the Luke L. Tooley Jr. Revocable Trust (“the Trust”) as collectible to satisfy the judgment. Ghosh and his attorney, Mark Pizur, filed a notice of *lis pendens* with respect to the property located in Howard County. The Trust, a legal entity distinct from Tooley himself, filed an action against Ghosh and Pizur in Marion County to quiet title and an action for slander of title. Pizur responded by filing a motion for change of venue, pursuant to Indiana Trial Rule 75, to the county where the default judgment was obtained—Hamilton County—which the trial court granted. Pizur also sought to have the Hamilton County and Marion County actions consolidated, but the trial court did not rule on that request. Finding that the motion to change venue was granted in error, we reverse and remand.

Issue

- [2] The only issue is whether the trial court erred in granting Pizur’s motion for change of venue.

Facts

- [3] On May 17, 2019, Michael Ghosh and Mark Pizur filed a notice of *lis pendens*¹ with respect to real property in Howard County (“the Property”) owned by the Trust. The *lis pendens* notice was filed with respect to a suit in Hamilton County that did not name the Trust specifically, but did name Luke Tooley, Jr. The notice, however, was recorded by the Howard County Clerk. The notice asserted that, on January 3, 2019, “a Default Judgment was granted against Luke L. Tooley, Jr. in favor of Plaintiff in the amount of \$84,567.13 and punitive damages in the amount of \$75,000.00, plus interest, costs and attorney’s fees to be determined.” Appellant’s App. Vol. II p. 11. The notice recognized that the Property was owned by the Trust, rather than by Tooley.
- [4] On July 8, 2019, the Trust filed a complaint in the Marion Superior Court. The complaint consisted of an action to quiet title and an action for slander of title, both with respect to the Property owned by the Trust. The named defendants were Michael Ghosh and Mark Pizur. The Trust, in its complaint, denied that Ghosh and Pizur have an interest in the Property.
- [5] On January 20, 2020, Ghosh and Pizur filed a “Notice of Bankruptcy and Motion to Stay Response to Plaintiff’s Complaint,” under the Marion County

¹ “[O]ne of the underlying purposes of *lis pendens* is to ‘provide[] a mechanism for a person to put third parties on notice that he may acquire an interest in real property as a result of a pending legal dispute.’” *Myers v. Leedy*, 915 N.E.2d 133, 138 (Ind. 2009) (quoting *Grubb v. Childers*, 705 N.E.2d 180, 181 n.1 (Ind. Ct. App. 1998)); *see also* Ind. Code § 32-30-11-1 (“Each clerk of the circuit court shall keep a *lis pendens* record. The *lis pendens* record is a public record.”).

cause number for the Trust's title actions. Appellant's App. Vol. II p. 22. That filing alleged that the *lis pendens* notice correlated with a fraudulent transfer action against Tooley, then pending in Hamilton County. It further alleged that Tooley filed for Chapter 7 Bankruptcy in December 2019. In its response, the Trust argued that it was a separate legal entity from Tooley, and that, under the applicable law, Tooley did not own the real property in question. The trial court granted the stay.

[6] On August 5, 2020, the Trust filed a notice with the Marion County trial court that the bankruptcy stay was to be lifted.² Pizur subsequently filed a motion for change of venue and also sought to have the title claims from Marion County consolidated with the Hamilton County lawsuit on October 6, 2020. In his motion, Pizur argued:

Pursuant to Rule 75(A)(1) of the Indiana Rules of Trial Procedure, preferred venue lies in Hamilton County as Defendant, Michael Ghosh, resides in said county. Similarly, the allegations asserted against Pizur in the case *sub judice* involve the preparation and filing of a *Lis Pendens* notice. Pizur is an attorney, and his law office is located at Carmel, Indiana. Accordingly, the allegations concerning Pizur involved the performance of his professional legal duties on behalf of his client, Ghosh, that were undertaken in Carmel, Hamilton County, Indiana. Thus, both Defendants reside is [sic] Hamilton County.

² The record reflects that the bankruptcy court actually granted Ghosh relief from the stay on September 8, 2020.

Appellant's App. Vol. III p. 20. Pizur further argued: "Additionally, this cause of action should be transferred to Hamilton County, Indiana and consolidated with Cause No. 29D02-1707-PL-006437 in order to foster judicial economy, as the subject real estate of this action is already part of a pending fraudulent transfer action." *Id.* at 21.

[7] The Trust objected to Pizur's motion on the grounds that: (1) Marion County was a county of preferred venue because Pizur resided in Marion County; (2) the Trust had not been provided with a copy of the complaint in the Hamilton County action; and (3) the Trust was not a party to the Hamilton County action.

[8] Without a hearing, the trial court granted the motion for change of venue to Hamilton County, but not the motion for consolidation of the cases, on November 4, 2020. The trial court's order is reproduced here:

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT 2
CIVIL DIVISION
CAUSE NO. 49D02-1907-PL-027224

LUKE L. TOOLEY, JR.
REVOCABLE TRUST,
Plaintiff,
vs.

MICHAEL GHOSH,
MARK J. PIZUR, and all other persons
in the world, known or unknown, claiming
any right, title, estate, lien or interest of any
nature in the real property described herein that
is adverse to Plaintiff's title thereto,
Defendants.

Matter remains set for a hearing on Nov
4th, 2020 at 11:30am.
-Judge Oakes

Hearing held and GRANTED

GRANTED
November 4, 2020

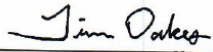
**ORDER ON RENEWED MOTION TO TRANSFER CASE TO HAMILTON COUNTY AND
CONSOLIDATE**

Defendant, Mark J. Pizur, having provided a renewed notice of the granting of relief from the automatic stay of Luke L. Tooley, Jr.'s bankruptcy and the Court being duly advised, now grants Defendant's Renewed Motion to Transfer Case to Hamilton County and to Consolidate it with the pending action under Cause No. 29D02-1707-PL-006437 in the Hamilton Superior Court 2.

SO ORDERED.

November 4, 2020

Dated


JUDGE, MARION SUPERIOR COURT 2

DISTRIBUTION:

Counsels of Record

FILED
November 4, 2020
CLERK OF THE COURT
MARION COUNTY
BO

3

The Trust now appeals.

Analysis

- [9] We first note that Ghosh and Pizur did not file an appellees' brief. "[W]here, as here, the appellees do not submit a brief on appeal, the appellate court need not develop an argument for the appellees but instead will 'reverse the trial court's judgment if the appellant's brief presents a case of prima facie error.'" *Salzer v.*

³ The order appears to erroneously state that a hearing on the motion occurred.

Washington Regular Baptist Church Cemetery, 141 N.E.3d 384, 386 (Ind. 2020) (quoting *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014)).

“Prima facie error in this context means ‘at first sight, on first appearance, or on the face of it.’” *Id.*

[10] This less stringent standard of review “relieves [us] of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee.” *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014) (citing *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002)). We are obligated, however, to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id.* (citing *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006)).

[11] We review a trial court’s ruling on a motion to transfer venue for an abuse of discretion. *Muneer v. Muneer*, 951 N.E.2d 241, 243 (Ind. Ct. App. 2011). “An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of facts and circumstances before the trial court, or when the trial court has misinterpreted the law.” *Id.*

Bagsby v. Snedeker, 93 N.E.3d 1127, 1129 (Ind. Ct. App. 2018), *trans. denied*.

[12] Pizur raised two grounds for transfer to Hamilton County in his motion to transfer: (1) Marion County was not a preferred venue, while Hamilton County was; and (2) for purposes of judicial economy where the case pending in Hamilton County related to the same real estate.

[13] The sole question here is whether the trial court erred in granting the motion for change of venue from Marion County to Hamilton County.⁴ Indiana Trial Rule 75, which governs venue in Indiana, reads in pertinent part:

(A) Venue. Any case may be venued, commenced and decided in any court in any county, except, that upon the filing of a pleading or a motion to dismiss allowed by Rule 12(B)(3), the court, from allegations of the complaint or after hearing evidence thereon or considering affidavits or documentary evidence filed with the motion or in opposition to it, shall order the case transferred to a county or court selected by the party first properly filing such motion or pleading if the court determines that the county or court where the action was filed does not meet preferred venue requirements or is not authorized to decide the case and that the court or county selected has preferred venue and is authorized to decide the case. Preferred venue lies in:

(1) the county where the greater percentage of individual defendants included in the complaint resides, or, if there is no such greater percentage, the place where any individual defendant so named resides;

[14] “Our [S]upreme [C]ourt has explained that ‘[g]enerally, any case may be venued in any court in the state, subject to the right of an objecting party to

⁴ Several arguments below address whether it was proper to consolidate the title claims and the Hamilton County lawsuit. The trial court’s order appears to be a proposed form order, in which the trial court has crossed out the portion relating to consolidation. We conclude that the trial court’s order grants a change of venue only, and, therefore, do not address the matter of whether consolidation of the actions was appropriate.

request that the case be transferred to a preferred venue listed in [Trial] Rule 75(A).” *Freeman v. Timberland Home Ctr., Inc.*, 148 N.E.3d 321, 325-26 (Ind. Ct. App. 2020) (quoting *Randolph Cty. v. Chamness*, 879 N.E.2d 555, 556 (Ind. 2008)). Because Trial Rule 75 lists ten subsections defining preferred venue, multiple preferred venues can exist simultaneously. *Id.* (quoting *Randolph*, 879 N.E.2d at 557). The rule does not assign priority to any particular preferred venue. *Belcher v. Kroczek*, 13 N.E.3d 448, 451 (Ind. Ct. App. 2014) (citing *Coffman v. Olson & Co.*, 872 N.E.2d 145, 147 (Ind. Ct. App. 2007)).

[15] The threshold question for the instant motion to transfer venue is whether the original venue, Marion County, is a preferred venue under Indiana Trial Rule 75(A)(1). “If the county where the complaint was filed is a preferred venue, transfer to another county based on venue is improper.” *Freeman*, 148 N.E.3d at 325-26 (citations omitted). Thus, if Marion County was a preferred venue in the case at bar, the trial court erred in transferring venue.

[16] The limited record includes an affidavit of service from Mark Small, attorney for the Trust. Small averred that he obtained what he reasonably believed was a residential address for defendant Pizur, located in Marion County, and perfected service at that address. Neither Pizur nor Ghosh has disputed that the Marion County address is Pizur’s residential address. No party has contested validity of service on Pizur. Rather, Ghosh and Pizur’s filings argue that Pizur’s law office is located in Hamilton County, a fact that is of no import to the venue analysis. We find no other evidence in the record that pertains to

Pizur's county of *residence*, which was the dispositive matter facing the trial court.

[17] The Trust argues that the original county of filing—Marion County—is a preferred venue, and therefore, the trial court was barred from transferring venue. We agree. The plain text of Trial Rule 75(A)(1) holds that preferred venue exists in “the county where the greater percentage of individual defendants included in the complaint resides, or, if there is no such greater percentage, the place where any individual defendant so named resides” In a case with only two defendants, each residing in different counties, both counties are preferred venues. The record reflects that Pizur resides in Marion County and Ghosh does not. Ghosh and Pizur, far from establishing that Pizur resides elsewhere, have not even attempted to dispute that fact. If the original venue is preferred, as here, a trial court may not transfer venue, and our analysis is at its conclusion.⁵

[18] Pizur further alleged below that Hamilton County Cause No. 29D02-1707-PL-006437 was filed first and involves the same real estate as the Marion County suit filed by the Trust. Here, the trial court did not specify its findings and/or conclusions regarding its order to transfer. The trial court did not transfer the Marion County case for purposes of consolidating it with the Hamilton County case. That intent is evinced by the trial court striking the consolidation

⁵ It may be true that Hamilton County is also a preferred venue, but as previously mentioned, Trial Rule 75 does not create priority among multiple preferred venues.

language from the order. It appears the trial court sought to transfer the Marion County case based purely on the allegation that Hamilton County was a preferred venue and Marion County was not.

- [19] The Marion County trial court did not hold a hearing prior to the transfer order and the record before us is sparse. Based on that limited record, we find that Marion County is a preferred venue. We find that the record is devoid of facts that would justify transferring the case to Hamilton County based on the assertion, without evidence, that a case involving the subject real estate was pending in Hamilton County. It was prima facie error for the trial court to grant Pizur's motion for change of venue. We reverse.

Conclusion

- [20] The trial court's decision was against the logic and effect of the facts and circumstances before it. The trial court abused its discretion in granting Pizur's motion for change of venue pursuant to Trial Rule 75(A)(1). We reverse and remand with instructions to vacate the order transferring venue and for further proceedings.
- [21] Reversed and remanded.

Bailey, J., and Robb, J., concur.