

JURISDICTIONAL STATEMENT

Appellant sued Respondent for the unauthorized practice of law in the State of Missouri. The circuit court dismissed Appellant's petition based on improper venue while stating that the dismissal was without prejudice. The court based its decision on a contract that was not a part of Appellant's petition and that would effectively limit Appellant's claims to those under the laws of the State of Illinois. Jurisdiction is based on Mo. Rev. Stat. §512.020 in that the court's Order/Judgment was, in fact, a final judgment disposing of Appellant's claims under the laws of the State of Missouri.

STATEMENT OF FACTS

On January 30, 2009, Appellant filed its Petition in the Circuit Court of St. Charles County seeking damages from Francorp, Inc. and Donald Boroian for the unauthorized practice of law pursuant to Mo. Rev. Stat. §484.010 - .020 (Legal File pp. 3 -5). On March 31, 2009, Respondent Francorp, Inc. filed its Motion to Dismiss (Legal File pp. 6 – 18 & Supplemental Legal File p. 6A) . Attached to Respondent's Motion to Dismiss was a contract between Francorp, Inc. and Terry James one of the owners of the founding members of Appellant, JitterSwing, LLC (Legal File pp. 8 - 15). Also attached to Respondent's Motion to Dismiss was the Certificate of Organization and Articles of Organization for Appellant, JitterSwing, LLC (Legal File pp. 16 – 17) and a check from Terry James to Respondent, Francorp, Inc. in the amount of \$10,000.00 (Legal File p. 18).

Respondent's Motion to Dismiss was heard by the circuit court on April 20, 2009. After oral argument, the court entered its order dismissing Appellant's Petition (Legal File p. 20) based on the contract presented to the court by Respondent in its Motion to Dismiss. The court stated its ruling was "without prejudice" while citing Missouri Rule of Civil Procedure 55.27 and specifically citing the provision of the contract that stated "The parties agree that any dispute arising under this Agreement shall be resolved in the state and federal courts, within the State of Illinois, and each party expressly consents to jurisdiction therein."

Donald Boroian, the only other defendant, was never successfully served. In an order signed by the court on May 22, 2009, Mr. Boroian was dismissed from the suit (Legal File p. 21).

POINTS RELIED ON

1. The trial court erred when entering its Order/Judgment dismissing Appellant's Petition because it was based on a contract attached to Respondent's Motion to Dismiss in that, despite reciting that it was "without prejudice," was a Motion for Summary Judgement that was dispositive of Appellant's claims based on Missouri law and was a final order for purposes of appeal.

- a. Missouri Rule of Civil Procedure 55.27(a).
- b. Missouri Rule of Civil Procedure 67.01.
- c. Mo. Rev. Stat. §484.010 - .020.
- d. Mo. Rev. Stat. §508.010.2.

2. The trial court erred when entering its Order/Judgment dismissing Appellant's Petition because it was based on a contract attached to Respondent's Motion to Dismiss in that Mo. Rev. Stat. §484.010 – 020 embodies the public policy of the State of Missouri with respect to engaging in the "law business" in the State of Missouri, requires each person so engaged to be licensed, and that statute may not be abrogated by private contract.

- a. Mo. Rev. Stat. §484.010 - .020.
- b. *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 at 338, 339 (Mo banc. 2007).

ARGUMENT

1. The trial court erred when entering its Order/Judgment dismissing Appellant's Petition because it was based on a contract attached to Respondent's Motion to Dismiss in that, despite reciting that it was "without prejudice," was a Motion for Summary Judgement that was dispositive of Appellant's claims based on Missouri law and was a final order for purposes of appeal.

Appellant's Petition raised a single issue, a claim for damages against Respondent under Missouri law for engaging in the "law business" without a license in the preparation of various franchise documents for Appellant (Legal File pp. 3 – 5) . Respondent filed its Motion to Dismiss asserting various factual matters outside the petition (Legal File pp. 6 – 18 and Supplemental Legal File p. 6A). In Paragraph 2, 6 and 7 of its Motion to Dismiss (Legal File p. 6 and Supplemental Legal File p. 6A), Respondent raises a defense of improper venue which, while Respondent did not specifically cite it, would come under under Rule 55.27(a)(3) . In Paragraphs 3 – 5, 8 and 9, Respondent raises various factual matters based on the attachments to its Motion which come under Rule 55.27(a)(6) for failure to state a claim upon which relief can be granted. However, the last

sentence of Rule 55.27(a) states “If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 74.04.”

After oral argument, the court entered its Order/Judgment which states in full:

Defendant Francorp, Inc.’s Motion to Dismiss is called and heard. The Court grants Defendant’s Motion to Dismiss without prejudice pursuant to Missouri Supreme Court rule of Civil Procedure 55.27 & [sic] for the reason that the parties contracted to which State’s law should apply, [illegible] under Acknowledgments section seventh paragraph: “The parties agreed that any dispute arising under this Agreement shall be resolved in the state or federal courts, within the State of Illinois.

In the sentence immediately preceding the section recited by the court in its Order/Judgment, that same contract provides “This proposal shall be construed and enforced, under the laws of the State of Illinois, without giving effect to its conflict of laws principles. (Legal File p. 15) ”

Thus, the court applies a contract to the claim of Appellant limiting its rights to those afforded under the laws of the State of Illinois. In this regard, Missouri Rule of Civil Procedure 67.01 states: “A dismissal without prejudice permits the party to bring another civil action for the same cause, unless the civil action is otherwise barred. A dismissal with prejudice bars the assertion of the same cause of action or claim against the same party [emphasis added].” Without respect to the recitation by the court that its order is “without prejudice,” Appellant’s cause of action against Respondent for the engaging in the “law business” pursuant to Mo. Rev. Stat. §484.010 – 020 is clearly barred by the court’s Order/Judgment because it is not a law of the State of Illinois. The Respondent’s Motion to Dismiss was, in fact, a Motion for Summary Judgment under Rule 55.27(a). The court’s Order/Judgment was with prejudice and is a final order for purposes of appeal under Rule 67.01.

Further, St. Charles County is the proper venue for Appellant’s cause of action. Mo. Rev. Stat. §508.010.2 states: “In all actions in which there is no count alleging a tort, venue shall be determined: . . . (4) When all defendants are nonresidents of the state, suit may be brought in a county in this state.” Appellant’s cause of action is based on Missouri statutes and is not a tort.

The case cited by Respondent in Paragraph 7 of its Motion to Dismiss, *Gibson v. Gibson*, 687 S.W.2d 274 (Mo. Ct. App. 1985) (Supplemental Legal File p. 6A), addressed a choice of venue clause

in a property settlement agreement pursuant to a dissolution proceeding. However, that dissolution proceeding had already been heard in Platte County and the agreement provided that jurisdiction would be retained in that jurisdiction. The Respondent in that action wanted to bring his suit for specific performance of the property settlement agreement in Clay County, also in Missouri and a county adjacent to Platte County. The *Gibson* decision has no application to the questions raised herein.

Finally, Respondent's claim set out in paragraph 10 of its Motion to Dismiss (Supplemental Legal File p. 6A), that "an entity must be convicted of engaging in the unauthorized practice of law" as a matter of criminal law prior to being able to sue for damages under Mo. Rev. Stat. §484.020.2 is simply unsupported by a plain reading of the statute or any case authority.

2. The trial court erred when entering its Order/Judgment dismissing Appellant's Petition because it was based on a contract attached to Respondent's Motion to Dismiss in that Mo. Rev. Stat. §484.010 – 020 embodies the public policy of the State of Missouri with respect to engaging in the "law business" in the State of Missouri, requires each person so engaged to be licensed, and that statute may not be abrogated by private contract.

With respect to engaging in the business of law in the State of Missouri, Mo. Rev. Stat. §484.010.2 provides:

The "law business" is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

Further, Mo. Rev. Stat. §484.020, provides:

1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association, partnership, limited liability company or corporation, except a professional corporation organized pursuant to the provisions of chapter 356, RSMo, a limited liability company organized and registered pursuant to the provisions of chapter 347, RSMo, or a limited liability partnership organized or registered pursuant to the provisions of chapter 358, RSMo, engage in the practice of the law or do law business as defined in section 484.010, or both.

2. Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association, partnership, limited liability company or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri.

In this regard, in *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 at 338, 339 (Mo banc. 2007), the Missouri Supreme Court has stated:

The judiciary is necessarily the sole arbiter of what constitutes the practice of law. . . . This court has prohibited a company and its non-lawyer agents, servants, employees, and trust associates from drawing, preparing, or assisting in the preparation of trust workbooks, trusts, will and powers of attorney, *for valuable consideration*, for Missouri residents without the direct supervision of an independent licensed attorney selected by and representing those individuals. *In re Mid-America Living Trust Associates, Inc.* 927 S.W.2d 855, 871 (Mo. Banc 1996). Escrow companies may not charge a separate fee for document preparation or vary their customary charges for closing services based upon whether documents are to be prepared in the transaction. *In re First Escrow, Inc.*, 840 S.W.2d 838,849 (Mo. Banc 1992).

The basis of Appellant's claim is that Respondent provided legal documents, i.e., a uniform franchise offering circular and associated legal documents, for valuable consideration to Appellant, a Missouri limited liability company with its principal place of business in Missouri. Respondent's actions constitute the "law business." As an Illinois corporation, Respondent cannot be and in its Motion to Dismiss, made no claim to be licensed to practice law in the State of Missouri.

Respondent's Motion to Dismiss is based on the theory that engaging in the "law business" in the State of Missouri without being licensed can be contractually circumvented simply by signing a contract that states that Missouri law does not apply to Respondent's activities. If the court's decision is upheld, the control of the Supreme Court and the Missouri legislature over the practice of law in the State of Missouri will be rendered meaningless. The court's Order/Judgment should be reversed and Appellant should be allowed to prove its allegations against Respondent pursuant to Mo. Rev. Stat. §484.020.2.

CONCLUSION

Appellant, a Missouri limited liability company with its principal place of business in Missouri, sued Respondent for engaging in the business of law without being licensed to do so. The

court dismissed Appellant's petition based on a contract between Appellant's founder and Respondent that applies Illinois law to any disputes arising under the contract. Respondent's Motion to Dismiss which attached the contract was, in fact, a Motion for Summary Judgment and the court's Order/Judgment was a dismissal with prejudice and a final order for purposes of appeal.

The practice of law in Missouri is controlled by the Missouri Supreme Court and the Missouri legislature. Missouri Supreme Court rules and Missouri statutes with respect to the practice of law cannot be abrogated by private contract. The court's Order/Judgment applying a contract between Respondent and one of the founding members of Appellant that limits the rights of Appellant to those under the laws of the State of Illinois is in derogation of the public policy of the State of Missouri as expressed by the Missouri Supreme Court and the Missouri legislature regulating the practice of law within the State of Missouri and should be reversed.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Appellant's Brief was sent by United States mail, postage prepaid, on this 27th day of October, 2009, to John E. Tresslar, Attorney for Defendant/Respondent, 1115 Locust Street, Fourth Floor, St. Louis, MO 63101.



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1. Order/Judgment of the Court (Legal File p. 20).

- a. “Defendant Francorp, Inc.’s Motion to Dismiss is called and heard. The Court grants Defendant’s Motion to Dismiss without prejudice pursuant to Missouri Supreme Court rule of Civil Procedure 55.27 & [sic] for the reason that the parties contracted to which State’s law should apply, [illegible] under Acknowledgments section seventh paragraph: “The parties agreed that any dispute arising under this Agreement shall be resolved in the state or federal courts, within the State of Illinois.”

2. Controlling Statutes, Rules of Court.

- a. RULE 55.27 DEFENSES AND OBJECTIONS HOW PRESENTED BY PLEADING OR MOTION MOTION FOR JUDGMENT ON THE PLEADINGS

(a) How Presented. Every defense, in law or fact, to a claim in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

- (1) lack of jurisdiction over the subject matter,
- (2) lack of jurisdiction over the person,
- (3) improper venue,
- (4) insufficiency of process,
- (5) insufficiency of service of process,

- (6) failure to state a claim upon which relief can be granted,
- (7) failure to join a party under Rule 52.04,
- (8) that plaintiff should furnish security for costs,
- (9) that plaintiff does not have legal capacity to sue,
- (10) that there is another action pending between the same parties for the same cause in this state,
- (11) that several claims have been improperly united,
- (12) that the counterclaim or cross-claim is one which cannot be properly interposed in this action.

A motion making any of these defenses shall be made within the time allowed for responding to the opposing party's pleading, or, if no responsive pleading is permitted, within thirty days after the service of the last pleading. Motions and pleadings may be filed simultaneously without waiver of the matters contained in either. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 74.04.

b. RULE 67.01 DISMISSAL WITHOUT PREJUDICE AND WITH PREJUDICE

A dismissal without prejudice permits the party to bring another civil action for the same cause, unless the civil action is otherwise barred. A dismissal with prejudice bars the assertion of the same cause of action or claim against the same party.

- c. MO. REV. STAT. §484.010. 1. The "practice of the law" is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

2. The "law business" is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a

valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

- d. MO. REV. STAT. §484.020. 1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association, partnership, limited liability company or corporation, except a professional corporation organized pursuant to the provisions of chapter 356, RSMo, a limited liability company organized and registered pursuant to the provisions of chapter 347, RSMo, or* a limited liability partnership organized or registered pursuant to the provisions of chapter 358, RSMo, engage in the practice of the law or do law business as defined in section 484.010, or both.

2. Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association, partnership, limited liability company or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association, partnership, limited liability company or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri.

3. It is hereby made the duty of the attorney general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association, partnership, limited liability company or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the state.

- e. MO. REV. STAT. §508.010. 1. As used in this section, "principal place of residence" shall mean the county which is the main place where an individual resides in the state of Missouri. There shall be a rebuttable presumption that the county of voter registration at the time of injury is the principal place of residence. There shall be only one principal place of residence.

2. In all actions in which there is no count alleging a tort, venue shall be determined as follows:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

(3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;

(4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state.

3. Instructions – N/A.

Ji Herswing LLC

VS.

FILED

IN THE

CIRCUIT COURT

County of St. Charles, Missouri

APR 20 2009

3 Division

No. 0911-CV 01033

Judy Zerr
Circuit Clerk
ST. CHARLES COUNTY

Francorp Inc., et al

April 20

2009

ORDER / JUDGMENT

Defendant Francorp, Inc.'s Motion to Dismiss is called and heard. The Court grants Defendant's Motion to Dismiss without prejudice pursuant to Missouri Supreme Court Rule of Civil Procedure 55.27 for the reason that the parties contracted to which State's law should apply, per p. 8 under Acknowledgment section. Relevant provisions: "The parties agree that any dispute arising under this Agreement shall be resolved in the State or federal courts, within the State of Missouri, and each party expressly consents to jurisdiction therein."

So Ordered

Allen S. Kriker #33346
Attorney

M. J. [Signature] 4-20-09
Judge CIV-3 2157

[Signature] 35364
Attorney (20)