REL: November 2, 2018

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170696

Ex parte Killian Construction Company and Christian Mills

PETITION FOR WRIT OF MANDAMUS

(In re: Edward E. Woerner

v.

Killian Construction Company and Christian Mills)

(Baldwin Circuit Court, CV-17-900436)

MENDHEIM, Justice.

Killian Construction Company ("Killian") and Christian Mills petition this Court for a writ of mandamus directing the

Baldwin Circuit Court to vacate its order denying their motion to dismiss the underlying action and to enter an order dismissing the action, based on improper venue. We grant the petition and issue the writ.

I. Facts

The City of Foley, Alabama, contracted with Killian to construct the Foley Sports Tourism Complex ("the sports complex"). Killian is a Missouri corporation whose principal place of business is located in Springfield, Missouri. On December 17, 2015, Killian entered into a subcontract for part of the work on the sports complex with Edward E. Woerner, who owns Southern Turf Nurseries, Inc. ("the subcontract"). Woerner is a resident of Baldwin County.

Under the subcontract, Woerner agreed to spread sand on all sports fields, to install sod on all sports fields, and to sprig and overspread all common areas in connection with the sports complex. Section 16 of the subcontract provided:

> "16. Governing Law; Venue. This Subcontract Agreement and the rights and duties of all persons arising from or related to this Subcontract Agreement shall be governed by the laws of the State of Missouri. Any dispute arising under or related to this Subcontract Agreement, the performance of work or provision of any materials pursuant hereto, shall be brought only in state court in Greene

> County, State of Missouri, or if federal jurisdiction is applicable, in the U.S. District Court for the Western District of Missouri, Southern Division. The parties hereto agree to waive trial by jury in all proceedings under this Subcontract Agreement and waive, as against each other, any claim or entitlement to punitive or exemplary damages."

(Emphasis added.)

According to Woerner, Killian failed to pay him the full amount due for the work performed under the subcontract and failed to pay him for additional work performed at the sports complex that was not included in the subcontract. On April 25, 2017, Woerner filed a complaint in the Baldwin Circuit Court against Killian and one of Killian's employees, Christian Mills.[1] Woerner alleged that he had performed all the work required under the subcontract but that Killian had failed to pay him the full amount due under the subcontract, with the outstanding balance being $143,581. Woerner also alleged that Mills, who the complaint stated had been "at all times pertinent thereto, ... Defendant Killian's

[1]The original complaint was filed in the name of "Southern Turf Nurseries, Inc.," but on May 30, 2017, an amended complaint was filed that substituted "Edward E. Woerner" for "Southern Turf Nurseries, Inc.," as the sole plaintiff in the action. The parties agree that Woerner is the correct plaintiff in the action.

representative in dealings with [Woerner]," had convinced Woerner "to perform maintenance work not within the original [subcontract]" for a certain price, but that Woerner was never paid for that work. Woerner alleged that the outstanding amount for the additional work was $206,996. The complaint asserted three counts. Count I asserted a claim "against Defendant Killian for breach of contract in the amount of $350,577.00, plus interest and costs." Count II asserted a claim against both Killian and Mills alleging that Mills committed fraudulent misrepresentations "to induce [Woerner] to continue to work on the project" and sought compensatory and punitive damages. Count III asserted a claim of unjust enrichment against Killian in the amount of $350,577.

On June 2, 2017, Killian and Mills filed: (1) a "Notice of Removal" in the United States District Court for the Southern District of Alabama ("the federal district court") and (2) a "Notice of Removal of Action to Federal Court" in the circuit court in which the defendants notified the circuit court that the action had been removed to the federal district court. In their notice filed in the federal district court, Killian and Mills alleged complete diversity among the parties

because Mills was a resident and citizen of the State of Florida. Killian and Mills also stated that Woerner "filed [his] Complaint in [the] Circuit Court of Baldwin County, Alabama, despite [his] agreement to litigate any dispute arising under or related to the Subcontract in Missouri pursuant to a mandatory forum selection clause," and they quoted section 16 of the subcontract.

On June 7, 2017, Woerner filed in the federal district court a motion to remand the action to state court because, he asserted, complete diversity was lacking. According to Woerner, Mills was, in fact, domiciled in Alabama. The federal district court referred the matter to United States Magistrate Judge Sonja F. Bivens. On June 13, 2017, Woerner filed an amended complaint in the federal district court. On June 23, 2017, Killian and Mills filed a response in opposition to Woerner's motion to remand the action to state court.

On June 27, 2017, Killian and Mills filed in the federal district court a "Motion to Dismiss or Transfer Venue and Brief in Support Thereof." In the motion, Killian and Mills moved to dismiss Woerner's amended complaint

> "in its entirety, or to transfer venue to the United States District Court for the Western District of Missouri, Southern Division, due to a mandatory forum selection clause stipulated to in the parties' Subcontract Agreement (the 'Subcontract'). The forum selection clause makes Missouri the exclusive, agreed upon forum for this litigation."

The motion quoted section 16 of the subcontract. In support of the motion to dismiss, Killian and Mills filed an affidavit of Matt Breland, Killian's "Project Executive," who asserted that Mills was a citizen and resident of the State of Florida and who described the nature of the subcontract between Killian and Woerner. A copy of the subcontract was attached to Breland's affidavit.

On January 31, 2018, Magistrate Judge Bivens entered an order in which she declared that "[t]he parties in this case have presented conflicting, fragmented evidence, such that the record is incomplete and inconclusive as to Mills' domicile at the time the complaint was filed. Accordingly, this matter is hereby scheduled for an evidentiary hearing before the undersigned on February 20, 2018." Following the evidentiary hearing, on March 7, 2018, Magistrate Judge Bivens entered a "Report and Recommendation" on the issue of Mills's domicile in which she recounted the evidence the parties had presented

for their respective positions. Judge Bivens concluded: "In examining the totality of the evidence presented, the Court finds that Mills was domiciled in Alabama and was a citizen of Alabama at the time he purchased his home in Foley, Alabama, in 2015, if not earlier." Magistrate Judge Bivens recommended that Woerner's motion to remand should be granted.

On March 22, 2018, the federal district court entered an order adopting the recommendation of Magistrate Judge Bivens, and it remanded the action to the Baldwin Circuit Court.

On March 29, 2018, Killian and Mills filed in the circuit court a "Motion to Dismiss for Contractually Improper Venue." In the motion, Killian and Mills moved to dismiss the action without prejudice "pursuant to the mandatory forum selection clause stipulated to in the parties' Subcontract Agreement (the 'Subcontract'). The forum selection clause makes Missouri the exclusive, agreed upon forum for this litigation." Killian and Mills argued that the outbound forum-selection clause was valid and applicable to all claims because: (1) the claims were all related to the subcontract and (2) Mills, as a Killian employee, was entitled to enforce the forum-selection clause because of his relationship to

Killian. As they had done in their motion to dismiss in the federal district court, Killian and Mills attached an affidavit of Breland to their motion, and Breland's affidavit included a copy of the subcontract.

On March 30, 2018, Woerner filed in the circuit court a response in opposition to Killian and Mills's motion to dismiss the action. In the response, Woerner argued that the outbound forum-selection clause should not be enforced because it would be "seriously inconvenient" to do so because most of the witnesses he intended to use were residents of Baldwin County. Woerner subsequently filed a supplement to his response in opposition to the motion to dismiss in which he purported to "identify those persons having knowledge of discoverable information," a total of 23 individuals. He alleged that all the individuals were Alabama residents and that 19 were residents of Baldwin County.

On April 23, 2018, Killian and Mills filed a reply to Woerner's responses in opposition to their motion to dismiss. They argued that distance alone did not establish that Missouri was a "seriously inconvenient" forum.

On April 24, 2018, Woerner filed a second supplement to his response in opposition to the motion to dismiss. In his second supplement, in addition to contending that Missouri was a "seriously inconvenient" forum, Woerner argued that Mills could not enforce the outbound forum-selection clause because he was not a party to the subcontract. Woerner also stated that at trial he would ask the circuit court to "make a site visit in order that the Court will have a full understanding of the site issues."

On the same date, Killian and Mills filed a reply to Woerner's second supplement. They argued that

> "[t]his lawsuit involves a simple claim of non-payment on a subcontract, and there is no need for a judge to visit the Foley Sports Complex to understand that issue. Any complexities -- which have not been explained at all by [Woerner] -- that may require a visual inspection of the property can be effectively explained via photographs or videos."

On April 25, 2018, the circuit court entered an order that stated: "Motion to Dismiss, or in the alternative [for a] Summary Judgment[,] filed by Killian Construction Company and Christian Mills is hereby denied." Killian and Mills filed a timely petition for a writ of mandamus from the circuit court's April 25, 2018, order.

II. Standard of Review

> "'[A] petition for a writ of mandamus is the proper vehicle for obtaining review of an order denying enforcement of an "outbound" forum-selection clause when it is presented in a motion to dismiss.' Ex parte D.M. White Constr. Co., 806 So. 2d 370, 372 (Ala. 2001); see Ex parte CTB, Inc., 782 So. 2d 188, 190 (Ala. 2000). ... '[T]he review of a trial court's ruling on the question of enforcing a forum-selection clause is for an abuse of discretion.' Ex parte D.M. White Constr. Co., 806 So. 2d at 372."

Ex parte Leasecomm Corp., 886 So. 2d 58, 62 (Ala. 2003).

> "A writ of mandamus is an extraordinary remedy available only when the petitioner can demonstrate: '"(1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court."' Ex parte Nall, 879 So. 2d 541, 543 (Ala. 2003) (quoting Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001))."

Ex parte Hodge, 153 So. 3d 734, 738-39 (Ala. 2014).

III. Analysis

Killian and Mills contend that the circuit court exceeded its discretion by failing to enforce the outbound forum-selection clause in section 16 of the subcontract. They note that this Court has held that "'a forum-selection clause should be enforced so long as enforcing it is neither unfair nor unreasonable under the circumstances.'" Ex parte

Consolidated Pipe & Supply Co., [Ms. 1170050, June 22, 2018] ___ So. 3d ___, ___ (Ala. 2018) (quoting Ex parte Northern Capital Res. Corp., 751 So. 2d 12, 14 (Ala. 1999)).

> "This Court has stated that an outbound forum-selection clause is enforceable unless the party challenging the clause can clearly establish that enforcement of the clause (1) would be unfair on the basis that the contract was affected by fraud, undue influence, or overweening bargaining power or (2) would be seriously inconvenient for the trial of the action. Ex parte Leasecomm Corp., 879 So. 2d 1156 (Ala. 2003). A party seeking to dismiss an action filed in Alabama based on the existence of an outbound forum-selection clause must initially establish the existence of a contract containing an outbound forum-selection clause. The burden then shifts to the party challenging the enforcement of the clause to establish that enforcement of the clause would be unfair or unreasonable under the circumstances. Ex parte PT Solutions Holdings, LLC, 225 So. 3d 37 (Ala. 2016). This Court has noted that '[t]he burden on the challenging party is difficult to meet.' [Ex parte] D.M. White Constr. [Co.], 806 So. 2d [370,] 372 [(Ala. 2001)]."

Ex parte Terex USA, LLC, [Ms. 1161113, March 30, 2018] ___ So. 3d ___, ___ (Ala. 2018).

In the circuit court, Killian and Mills established that a contract between Killian and Woerner exists and that that contract contains an outbound forum-selection clause. Accordingly, Woerner had to establish that enforcement of the clause would be unfair or unreasonable under the

circumstances. In the circuit court, Woerner did not contend that the contract was affected by fraud, undue influence, or overweening bargaining power. Instead, he contended -- and repeats to this Court -- that enforcement of the outbound forum-selection clause would be unreasonable because, he says, Missouri would be a "seriously inconvenient" forum for a trial of the action. Woerner argues that all the witnesses he plans to call at trial are Alabama residents and that the vast majority of them reside in Baldwin County. Therefore, he says, all of those witnesses, including Woerner himself, would have to travel a great distance if the trial was held in Missouri. Woerner also mentions that he plans to ask the circuit court to make a site visit to the sports complex "in order that the circuit court will have a full understanding of the site issues." Woerner's brief, p. 23.

> "This Court has held that
>
> > "'distance of travel does not establish that a forum is unreasonable. Ex parte Northern Capital Res. Corp., 751 So. 2d 12 (Ala. 1999) (enforcing outbound forum-selection clause requiring that litigation be conducted in Missouri); O'Brien Eng'g Co. v. Continental Machs., Inc., [738 So. 2d 844 (Ala. 1999)] (enforcing outbound forum-selection clause requiring that litigation be conducted in

> Minnesota); Moseley v. Electronic Realty Assocs., 730 So. 2d 227 (Ala. Civ. App. 1998) (enforcing outbound forum-selection clause requiring that litigation be conducted in Kansas); and Professional Ins. Corp., et al. v. Sutherland, 700 So. 2d 347 (Ala. 1997) (enforcing outbound forum-selection clause requiring that litigation be conducted in Florida).'
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> "Ex parte D.M. White Constr. Co., 806 So. 2d [370,] 373–74 [(Ala. 2001)]. A complaining party must cite more than mere distance to warrant negating the forum-selection clause. '"Inconvenience" sufficient to void a forum-selection clause is present where a "trial in that forum would be so gravely difficult and inconvenient that the challenging party would effectively be deprived of his day in court."' Ex parte Leasecomm Corp., 886 So. 2d [58,] at 62–63 [(Ala. 2003)] (quoting Ex parte Rymer, 860 So. 2d 339, 342 (Ala. 2003))."

Ex parte PT Solutions Holdings, LLC, 225 So. 3d 37, 46 (Ala. 2016); see also Ex parte Soprema, Inc., 949 So. 2d 907, 914 (Ala. 2006) (rejecting a "most of the witnesses are located in Alabama" argument because the plaintiff was aware of potential inconvenience of conducting litigation in a location different from its corporate headquarters when it executed the agreement).

As the above authority indicates, the mere fact that witnesses would have to travel to Missouri is not a sufficient reason to avoid the operation of a validly agreed-upon forum-

selection clause. As for a site visit by the circuit court, Woerner never explained in the circuit court, nor does he elaborate on appeal, what "site issues" would require the court to make an in-person examination of the sports complex in order for Woerner to present his case. Killian and Mills correctly observe that this action, at bottom, concerns an alleged breach of a contract. Woerner himself summarizes the case as follows in his brief: "This litigation arises entirely from Defendant Killian Construction Co.'s failure to pay [Woerner] for extensive site work performed by [Woerner] at the Foley Sports Tourism Complex ... and from Defendant Mills's fraudulent conduct with respect to said project." Woerner's brief, pp. 22-23. Woerner provides no specific details as to why a site visit by the circuit court would be imperative to the presentation of his case or why, as Killian and Mills have suggested, photographs or videos of the site would be inadequate. Consequently, Woerner has not submitted sufficient evidence in support of his assertion that Missouri would be "seriously inconvenient for trial," and he has failed to establish that he can avoid the enforcement of the outbound forum-selection clause.

Woerner also argues, as he did below, that Mills cannot enforce the outbound forum-selection clause because he is not a signatory to the subcontract and, in any event, the claims against him involve conduct that occurred after the subcontract was executed. According to Woerner, these facts mean that the claims against Mills would have to be tried separately in Alabama while the case against Killian proceeded in Missouri, which, he asserts, constitutes a serious inconvenience. Although Woerner does not cite any authority supporting this argument, this Court has stated:

> "'"The enforcement of a forum-selection clause creates a serious inconvenience if it would result in two lawsuits involving similar claims or issues being tried in separate courts." Alpha Sys. Integration, Inc. v. Silicon Graphics, Inc., 646 N.W.2d 904, 909 (Minn. Ct. App. 2002) (emphasis added).'"

Ex parte Soprema, Inc., 949 So. 2d 907, 915 (Ala. 2006) (quoting Ex parte Leasecomm Corp., 886 So. 2d at 63).

As to the issue whether Mills can enforce the outbound forum-selection clause, the complaint describes Mills as being "employed by Defendant Killian" and, "at all times pertinent hereto, ... Defendant Killian's representative in dealings with [Woerner]." Moreover, in Count II of the complaint,

Woerner seeks to hold both Killian and Mills liable for Mills's allegedly fraudulent representations to Woerner. Thus, on the facts as alleged by Woerner, Mills was Killian's employee and agent, and Woerner is attempting to hold Killian liable for Mills's actions as its employee. In Ex parte Procom Services, Inc., 884 So. 2d 827 (Ala. 2003), this Court considered an analogous set of facts and addressed whether such nonsignatories may enforce a forum-selection clause.

> "Leitch and Crews state in the petition for a writ of mandamus that they 'are both entitled to have the outbound forum-selection clause applied to Smith's claims asserted against them' even though they were not signatories to Smith's employment agreement with Procom. Leitch and Crews cite no Alabama cases that directly address the issue whether a forum-selection clause can apply to one who was not a signatory to the contract containing it, nor has our research revealed any Alabama case directly on point. However, federal courts have held that forum-selection clauses bind nonsignatories that are closely related to the contractual relationship or who are 'transaction participants.' See, e.g., Hugel v. Corporation of Lloyd's, 999 F.2d 206, 209-10 (7th Cir. 1993) ('In order to bind a non-party to a forum selection clause, the party must be "closely related" to the dispute such that it becomes "foreseeable" that it will be bound.'); Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514 n.5 (9th Cir. 1988) ('We agree with the district court that the alleged conduct of the non-parties is so closely related to the contractual relationship that the forum selection clause applies to all defendants.'); Brock v. Entre Computer Ctrs., Inc., 740 F. Supp. 428, 431

> (E.D. Tex. 1990) ('[T]he court finds that the forum selection clause applies to all parties to the contract, whether signatories or not.'); and Clinton v. Janger, 583 F. Supp. 284, 290 (N.D. Ill. 1984) ('a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses'). This authority is persuasive, but not binding. See Weems v. Jefferson-Pilot Life Ins. Co., 663 So. 2d 905, 913 (Ala. 1995), quoting Ex parte Gurganus, 603 So. 2d 903, 908 (Ala. 1992) ('"[t]his Court may rely on a decision of any federal court, but it is bound by the decisions of the United States Supreme Court"').
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> "We also note an analogy between this Court's enforcement of arbitration clauses as to nonsignatories to a contract and the enforcement of the forum-selection clause in this instance. This Court has stated that '[i]f a nonsignatory's claims are "intertwined with" and "related to" the contract, arbitration can be enforced.' Cook's Pest Control, Inc. v. Boykin, 807 So. 2d 524, 527 (Ala. 2001); see also Stevens v. Phillips, 852 So. 2d 123, 130 (Ala. 2002), quoting Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1121 (3d Cir. 1993) ('"'Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements.'"'), and Ex parte Gray, 686 So. 2d 250, 251 (Ala. 1996) ('A party should not be able to avoid an arbitration agreement merely by suing an employee of a principal.'). Because Smith's claims against Leitch and Crews arise out of statements Leitch and Crews allegedly made while negotiating Smith's employment contract with Procom, we conclude that Leitch and Crews are entitled to enforce the outbound forum-selection clause contained in the employment contract."

884 So. 2d at 834 (emphasis added).

As an employee of Killian and its agent for the sports-complex project, Mills is clearly "closely related" to the subcontract. Furthermore, the claims against Mills are "related to" and "intertwined with" the subcontract. The claims against Mills concern additional work Woerner performed at the sports complex allegedly for Killian at Mills's request. Based on Woerner's allegations, the fact that the additional work was not included in the original work to be performed under the subcontract does not preclude Mills from enforcing the outbound forum-selection clause. The outbound forum-selection clause expressly states that "[a]ny dispute arising under or related to this Subcontract Agreement, the performance of work or provision of any materials pursuant hereto, shall be brought only in state court in Greene County, State of Missouri." (Emphasis added.) This Court has held that "[t]he term 'arising out of or relating to' has a broad application." Unum Life Ins. Co. of America v. Wright, 897 So. 2d 1059, 1086 (Ala. 2004). The claims against Mills as presented by Woerner arise under or relate to the subcontract, and, accordingly, Mills can enforce the outbound forum-selection clause. Thus, we do not reach the issue whether

enforcement of the clause as to Killian, but not Mills, would result in serious inconvenience.

The foregoing arguments constituted the only reasons Woerner presented to the circuit court as to why the outbound forum-selection clause should not be enforced. Before this Court, Woerner presents an entirely new argument as his primary reason why this Court should agree with the circuit court's decision not to enforce the forum-selection clause. He contends that Killian and Mills waived their right to enforce the outbound forum-selection clause by not initially invoking the forum-selection clause and instead

> "improperly remov[ing] this case to the United States District Court for the Southern District of Alabama. The improper removal resulted in an over nine-month delay during which [Killian and Mills] participated in substantial litigation in federal court seeking to oust the circuit court from its lawful jurisdiction. [Woerner] was able to defeat [Killian and Mills's] false allegations of Mills's citizenship but doing so took many months and a full-blown bench trial on the citizenship issue. ... Here, the writ should be denied on our particular facts."

Woerner's brief, pp. 13-14.

As Woerner notes, this Court has stated:

> "[A] party may waive its right to enforce a forum-selection clause, as it may with other contract provisions, by evincing an intention to do

> so. We note that no rigid rule exists for determining what constitutes a waiver of the right to enforce a forum-selection clause; the determination whether there has been a waiver must, instead, be based on the particular facts of each case."

Ex parte Spencer, 111 So. 3d 713, 718 (Ala. 2012).

It is the fact-based nature of a waiver defense that presents a problem for Woerner. It is true that "'[t]his Court may affirm a trial court's judgment on "any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court."'" Warren v. Hooper, 984 So. 2d 1118, 1121 (Ala. 2007) (quoting General Motors Corp. v. Stokes Chevrolet, Inc., 885 So. 2d 119, 124 (Ala. 2003), quoting in turn Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003)). But, "'[t]his rule fails in application ... where due-process constraints require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance.'" Id. (quoting University of Alabama Health Servs. Found., P.C., 881 So. 2d at 1020). The alleged facts on which Woerner based his waiver defense are not undisputed, particularly his characterization of the merit, or lack thereof, of Killian and

Mills's attempt to remove the action to federal court. Because waiver is a fact-intensive defense, it was imperative for the circuit court to have been presented with the waiver defense in order to fully assess the issue.

Even if Woerner had properly presented his waiver defense to the circuit court, however, the procedural facts in this case and federal law on removal render the defense inapplicable here.

The outbound forum-selection clause provides, in pertinent part:

> "Any dispute arising under or related to this Subcontract Agreement, the performance of work or provision of any materials pursuant hereto, shall be brought only in state court in Greene County, State of Missouri, or if federal jurisdiction is applicable, in the U.S. District Court for the Western District of Missouri, Southern Division."

Thus, the forum-selection clause permits venue in federal or state court in Missouri for an action "arising under or related to" the subcontract.

Killian and Mills removed this case under the auspices of 28 U.S.C. 1446, the federal removal statute, contending that federal jurisdiction existed based on the complete diversity of the parties under 28 U.S.C. § 1332. Title 28 U.S.C.

§ 1441(b)(2) makes it clear that diversity jurisdiction requires complete diversity of all parties to the action: "(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Killian and Mills asserted that Mills was a resident and citizen of Florida, not Alabama, and, provided that allegation was true, the complete diversity required for federal jurisdiction would have existed.

Woerner faults Killian and Mills's removal of the case in two respects. First, he contends that Killian and Mills were lax in asserting their rights to enforce the outbound forum-selection clause because they did not do so in the circuit court until the case was remanded to the circuit court some nine months after Woerner initiated the action. Second, he argues that the removal was a sham because Mills was so obviously an Alabama resident that the removal could not be viewed as anything other than a litigation-delay tactic by Killian and Mills. Woerner is wrong on both counts.

Title 28 U.S.C. § 1446 provides, in part:

> "(a) Generally.--A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> "(b) Requirements; generally.--(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter."

(Emphasis added.)

Killian and Mills were served with the complaint on May 3, 2017. They filed the notice of removal in the federal district court on June 2, 2017, within the time frame required by 28 U.S.C. § 1446(b). In other words, Killian and Mills did exactly what they were statutorily obligated to do if they wanted the case to be adjudicated in federal court rather than in state court. Woerner argues that Killian and Mills should have asserted their rights to enforce the outbound forum-selection clause immediately in the circuit court, but if

Killian and Mills believed that the case belonged in federal court, they were required to invoke their right to remove the action within 30 days of their receipt of the complaint. This they did.

Woerner further contends that Killian and Mills

> "breached Paragraph 16 of the contract by removing the case to the Southern District of Alabama. The Southern District of Alabama is not one of the venues stipulated in the subject forum-selection clause, and [Killian and Mills] were not authorized to remove the case under 28 U.S.C. § 1441, or otherwise."

Woerner's brief, pp. 15-16. But 28 U.S.C. § 1446 requires a defendant to file the notice of removal "in the district court of the United States for the district and division within which such action is pending." In this case, that appropriate federal district court was the United States District Court for the Southern District of Alabama. Woerner asks us to find that Killian and Mills breached the terms of the outbound forum-selection clause by following federal statutory removal procedure.

Federal precedent makes it clear that a defendant does not waive the right to invoke a forum-selection clause when the defendant first asserts the right to remove the case to

federal court, and we see no basis for drawing a different conclusion for purposes of Alabama law.[2] See, e.g., Hollis v. Florida State Univ., 259 F.3d 1295, 1300 (11th Cir. 2001) ("Because § 1441(a) does not give a removing defendant a choice of districts to remove to, it may not be entirely accurate to characterize removal as the voluntary relinquishment of a legal right."); Kostelac v. Allianz Glob. Corp. & Specialty AG, 517 F. App'x 670, 675 n.6 (11th Cir. 2013) (not selected for publication in Federal Reporter) ("The removal of an action from state to federal court does not waive any Rule 12(b)[, Fed. R. Civ. P.,] defenses, including seeking a Rule 12(b)(3) dismissal based on a forum-selection clause."); Lambert v. Kysar, 983 F.2d 1110, 1113 n.2 (1st Cir. 1993) ("It is well settled that the filing of a removal petition in a diversity action, without more, does not waive the right to object in federal court to the state court venue.

[2]Our conclusion might be different if the applicable forum-selection clause permitted litigation only in state court. "Mandatory [forum-selection] clauses that require the parties to litigate exclusively in a particular state court ordinarily are held to waive the right of removal." Carmen Grp., Inc. v. Xavier Univ. of Louisiana, 41 F. Supp. 3d 8, 11–12 (D. D.C. 2014). Thus, if a party attempted to remove an action where a forum-selection clause limited the forum to state court, a waiver of that party's right to enforce the forum-selection clause might be implicated.

In order to obtain the benefits of a federal forum in a diversity case, '[the] removal must be "into the district where such suit is pending"[; n]o choice is possible and for that reason nothing in respect to venue can be waived.' Moss v. Atlantic Coast Line R. Co., 157 F.2d 1005 (2d Cir. 1946), cert. denied, 330 U.S. 839, 67 S.Ct. 980, 91 L.Ed. 1286 (1947)." (first emphasis added)); U.S. Smoke & Fire Curtain, LLC v. Bradley Lomas Electrolok, Ltd., 612 F. App'x 671, 672 (4th Cir. 2015) (not selected for publication in Federal Reporter) (disagreeing with the plaintiff's proposition that, "by removing the case to federal district court, [the defendant] waived its right to seek enforcement of the forum-selection clause"); and Spectracom, Inc. v. Tyco Int'l, Inc., 124 F. App'x 75, 77 (3d Cir. 2004) (not selected for publication in Federal Reporter) (agreeing with the First Circuit's conclusion in Lambert).

In addition to the fact that the act of removal itself did not waive Killian and Mills's rights to invoke the outbound forum-selection clause, Killian and Mills asserted those rights at their earliest opportunity in the federal district court. In their notice of removal filed in the

federal district court, Killian and Mills noted the existence of the outbound forum-selection clause and quoted section 16 of the subcontract. On June 27, 2017, less than a month after removing the case, Killian and Mills filed a motion to dismiss based on the forum-selection clause, seeking to have the case transferred to the United States District Court for the Western District of Missouri, Southern Division, pursuant to the terms of the outbound forum-selection clause. Additionally, following the federal district court's remand of the action to the Baldwin Circuit Court on March 22, 2018, Killian and Mills's first filing in the circuit court was their motion to dismiss this action, filed on March 29, 2018, based on the outbound forum-selection clause.

Killian and Mills's early invocation of the forum-selection clause contrasts with cases in which this Court has found an intentional waiver of a contractual right through invocation of the litigation process. For example, in Ocwen Loan Servicing, LLC v. Washington, 939 So. 2d 6 (Ala. 2006), this Court discussed a defendant's waiver of the right to compel arbitration by comparing it to a situation in an earlier case:

"In Ex parte Hood, 712 So. 2d 341 (Ala. 1998), the defendant removed an action to the federal court. Four months later, while the action was still pending in the federal court, the defendant advised the plaintiff through correspondence that it was invoking its rights under an arbitration agreement. Shortly thereafter, in its answer to the complaint, the defendant asserted its right to arbitration. This Court stated:

> "'We might assume that if Golden [the defendant] had immediately followed ... its removal with service of its answer pleading an arbitration defense, such action would have been sufficient to put Hood [the plaintiff] on notice that Golden still intended in the federal court to reserve its right to seek arbitration. Cf. Terminix Int'l Co. v. Jackson, 669 So. 2d 893, 896 (Ala. 1995) (holding that the plaintiff did not establish a waiver where the defendant's answer had put the plaintiff on notice of an arbitration defense). Filing an answer at such a time might have indicated that Golden intended to pursue arbitration instead of a federal judicial remedy, and it would have given Hood the opportunity to avoid spending the resources necessary to have the case remanded to the state court for a trial. As it was, Golden removed the case to the federal court and proceeded as if it was preparing for a judicial resolution of Hood's claim.'

"712 So. 2d at 346 (emphasis added). The defendant in Hood also agreed to a discovery schedule to govern the litigation in the federal court and agreed to a date for trial. Ocwen, however, did not participate in a discovery plan while the proceeding was in the federal court and, upon remand, although Ocwen responded to Washington's request for

> production, it did not initiate any discovery from Washington.
>
> "The dissenting opinion in Hood pointed out that the defendant there argued in its brief that 'it removed the case to the federal court because federal courts look more favorably on arbitration agreements than do the courts of this state.' 712 So. 2d at 347. Here, Ocwen advances no such reason for its removal of the action to the federal court. Ocwen counters the delay resulting from the foregoing events by pointing out that the litigation in the federal court was stayed for two months, that Ocwen was ignorant of its right to arbitrate, and that it should not be faulted for such ignorance because Washington failed to attach copies of her contract documents to her complaint. Of course, the stay was the result of a motion filed by Ocwen, not Washington, the purpose of which was to permit Ocwen to pursue its defense in a judicial forum in the federal court in Illinois.
>
> "Nothing in the record before us indicates that the proceedings in the United States District Court for the Northern District of Illinois, had they been allowed to go forward, would have been in an arbitral, rather than a judicial, forum."

939 So. 2d at 15.

Killian and Mills did nothing approaching the actions of the defendants in Ex parte Hood, 712 So. 2d 341 (Ala. 1998), and Ocwen that demonstrated an intention to forgo their contractual rights. It is particularly noteworthy that the Hood Court indicated that, had the defendant in that case immediately followed its removal of the case with a motion

invoking the right to compel arbitration, it would have placed the plaintiff on notice that the defendant had no intention of abandoning its contractual right to compel arbitration. Killian and Mills did immediately follow the removal of the case with a motion invoking their rights to enforce the outbound forum-selection clause. Thus, the facts in this case do not show an intentional waiver of a contractual right by Killian and Mills.

Finally, Woerner labels Killian and Mills's procedural action a "sham" and an "improper removal." Woerner asserts that "the record shows prejudicial delay arising from [Killian and Mills's] litigation tactics before they invoked the [forum-selection] clause and the circuit court denied their motion." Woerner's brief, p. 15. However, a perusal of Magistrate Judge Bivens's Report and Recommendation shows a legitimate dispute concerning Mills's domicile.

At the evidentiary hearing on the matter, Mills testified that he was born and reared in Florida; that he co-owned a home in Florida; that his parents, his former spouse, and his three adult children resided in Florida; that he started renting an apartment in Panama City Beach, Florida, in

March 2017; that he has been working on a job project in Panama City Beach since November 2016; that he registered to vote in Florida; that he voted in Florida in the presidential election of 2016; that he has a current Florida's driver's license; that his Regions bank account was opened in Florida; that his cellular telephone was obtained in Florida and his telephone number has a Florida area code; that his personal physician is located in Pensacola, Florida; and that it has always been his intention to make Florida his home. Mills also testified, however, that the home he co-owned in Florida is occupied by his former wife and that he had not resided there since 2009 or 2010; that he relocated to Gulf Shores, Alabama, and started renting a house with his fiancée in 2012; that he was working full-time in Alabama at that time; that he later purchased his current home in Foley, Alabama, where he lives with his fiancée and their two young children; that his fiancée works full-time in Foley; that his children attend day care in Foley, and that the last couple of years he paid income taxes in Alabama because that is where he was working. Mills further testified that, at the time of the hearing, he was spending three days a week with his family in Alabama and

four days at his apartment in Panama City Beach when working as a project manager there. He stated that the work project in Panama City Beach was slated for completion in January 2019.

In short, there was evidence supporting Mills's claim that he was a resident of Florida, and there was evidence to support Woerner's argument that Mills resided in Alabama. Magistrate Judge Bivens concluded that "the totality of the evidence confirms that Mills is properly classified as being domiciled in Alabama, not Florida, as of the filing of the lawsuit on April 25, 2017." This conclusion was adopted by the federal district court. There is no indication from the filings in the federal litigation provided by the parties that Killian and Mills's removal was considered a sham by the federal district court.

The foregoing analysis demonstrates that Woerner did not establish that venue in Missouri would be seriously inconvenient for the trial of the action. Also, Mills could enforce the outbound forum-selection clause because he was an employee of Killian directly involved in the sports-complex project and the claims against him were related to the

contract claims against Killian. Finally, Woerner's waiver defense is without merit. Accordingly, Woerner failed to establish that the outbound forum-selection clause should not be enforced. We therefore conclude that the circuit court exceeded its discretion by denying Killian and Mills's motion to dismiss this action without prejudice based on the applicable outbound forum-selection clause.

IV. Conclusion

Based on the foregoing, we conclude that Killian and Mills are entitled to the writ of mandamus. The circuit court is directed to vacate its April 25, 2018, order and to enter an order dismissing this action without prejudice so that it can be filed in the venue agreed upon by the parties in the subcontract, i.e., in state court in Greene County, Missouri.

PETITION GRANTED; WRIT ISSUED.

Stuart, C.J., and Bolin, Parker, Shaw, Main, Wise, Bryan, and Sellers, JJ., concur.