IN THE SUPREME COURT OF FLORIDA

MIA CONSULTING GROUP, INC.,

Petitioner,

vs.

HACIENDA VILLAS, INC.,

Respondent.
_____/

Supreme Court
Case No.: SC10-2408

Lower Court
Case No.: 10-16264-CA-11

Appellate Court
Case No.: 3D10-1331

On Review From An Opinion Of The
Third District Court Of Appeal

ANSWER BRIEF OF RESPONDENT

DAVID T. WEISBROD, ESQ.
412 East Madison Street, Suite 1111
Tampa, Florida 33602
(813) 223-2792 / (813) 223-3124 (fax)
Attorney for Respondent
Florida Bar No. 312487

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

TABLE OF CITATIONS - Continued

Page

TABLE OF CITATIONS - Continued

Page

STATEMENT OF THE ISSUES

Page

STATEMENT OF CASE AND FACTS

(i) Nature of Case. By order of this Court on February 24, 2011, jurisdiction was accepted pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, and Article V, §3(b)(3), Florida Constitution, to review the opinion issued by the Third District Court of Appeal on October 6, 2010.

(ii) Course of Proceedings Below and Disposition in Trial and Appellate Courts. **MIA CONSULTING GROUP, INC.** (hereafter MIA or Petitioner) initiated this case by filing a Complaint against **HACIENDA VILLAS, INC.** (hereafter Hacienda or Respondent) in Miami-Dade County Circuit Court. (A-1). Hacienda responded with the filing of a Motion to Dismiss for Improper Venue (A-2) and a hearing was held before the Honorable Barbara Areces, Circuit Judge, on May 6, 2010. (A-6). At that time, the Circuit Court entered an order denying Hacienda's motion (A-3) and Hacienda took an interlocutory appeal to the Third District Court of Appeal pursuant to Rule 9.130(a)(3)(A), Florida Rules of Appellate Procedure.

Since no court reporter was present at the hearing on Hacienda's Motion to Dismiss for Improper Venue, the parties prepared a Stipulated Statement of Proceedings (A-6) as authorized by Rule 9.200(b)(4), Florida Rules of Appellate Procedure. After full briefing and oral argument, the Third District Court of Appeal entered its opinion on October 6, 2010, reversing the Circuit Court's denial of Hacienda's venue motion. (A-4). MIA filed a Motion for Rehearing (A-7) which was responded to by Hacienda (A-8) and the Third District Court of Appeal denied the Motion for Rehearing on November 12, 2010, leading to the subject proceedings.

(iii) Statement of Facts[1]. MIA is a Florida corporation with its principal place of business in Miami-Dade County, Florida. (A-1). Hacienda is a

[1]The facts are gleaned from MIA's Complaint and Hacienda's Motion to Dismiss. As the parties noted in their Stipulated Statement (A-6, paragraph 2), each party at

not-for-profit corporation, also organized under the laws of the State of Florida, whose sole place of business is in Hillsborough County. (A-2).[2] Hacienda owns and operates Hacienda Villas, an independent senior housing project, and has done so since 1979. (A-1). MIA contended that it managed a number of assisted living facilities and has worked with the United States Department of Housing and Urban Development "in the creation or management of assisted living facilities." (A-1). The gist of MIA's Complaint was as follows:

> (1) MIA, pursuant to an agreement with Hacienda, alleged that it would submit an application on Hacienda's behalf in order for Hacienda to receive a grant for the conversion of its housing project into an assisted living facility. (A-1);
>
> (2) MIA acknowledged that it was not to receive any fee in connection with the preparation and submission of the grant application, but further alleged that it would later be "appointed, retained, and paid" by Hacienda as a consultant and managing agent of the new assisted living facility. (A-1);
>
> (3) The scope of the duties MIA would later perform was left to conjecture as was the amount of payment;

---

the trial court level "relied upon the factual allegations contained within the four corners of the documents." Moreover, the facts are presented in a detailed fashion since "Venue questions require a close understanding of the salient facts and the pleader's theories of law." Mendez v. George Hunt, Inc., 191 So.2d 480, 482 (Fla. 4th DCA 1966).

[2] In attempting to set Miami-Dade County for venue, it was probably not an accident that MIA failed to allege that Hacienda only operated in Hillsborough County.

(4) MIA further alleged that it would receive payment at their office in Miami-Dade County, Florida. (A-1).[3]

MIA further contended that it prepared the application and submitted it to the federal government with an additional claim that in the application itself Hacienda "has contracted with MIA Consulting Group, Inc. to implement the assisted living program and provide/manage the supportive services for the assisted living facility residents." (A-1). Again, no such contract was attached to the Complaint or incorporated therein. After being awarded the federal grant to convert its facility, Hacienda began the process of converting the housing project, but, according to MIA, failed to retain them as the consultant and manager of the newly converted facility. (A-1). In fact, the Complaint alleged that Hacienda "failed to deliver to MIA in Miami-Dade County a signed contract under which MIA is authorized to implement the assisted living program at Hacienda Villas and manage the supportive services for the assisted living facility residents and failed to pay MIA any fees in connection with such contracts." (A-1). Although MIA asserted no contract existed, it nonetheless claimed that Hacienda had anticipatorily breached its agreement to pay MIA. (A-1).

Of course, MIA never performed any services at the Hacienda facility nor was MIA able to allege the specific amount of the "consultant and management fees" that were supposedly due and owing it under the contract which Hacienda failed to execute. (A-1).

In sum, MIA was suing Hacienda for damages pertaining to services which MIA never performed at Hacienda's facility pursuant to a contract which MIA acknowledged Hacienda never entered into with them for those services.

[3]It should be noted that no contract was attached or otherwise incorporated into the Complaint as required by Rule 1.130(a), Florida Rules of Civil Procedure.

SUMMARY OF ARGUMENT

Since 1966, every District Court of Appeal, with this Court's acknowledgment and approval, has applied the debtor-creditor rule, with established exceptions in venue cases. If a Plaintiff's suit is based upon an express promise to pay a sum certain, then a cause of action may be maintained in the Plaintiff's home county. This is the debtor-creditor rule and the Plaintiff's home county is properly assigned venue because that is the place where the breach - non payment - occurred. However, the accepted statewide application of the debtor-creditor rule acknowledges that it is not absolute and will not control venue where there is no debtor-creditor relationship between the parties, i.e., where no express promise to pay a sum certain exists between the parties. In that instance, general breach of contract venue rules control the determination. Accordingly, venue will lie, for cause of action purposes, where the Defendant's alleged breach occurred.

The case before this Court does not present a difficult application of accepted venue principles. As the Petitioner acknowledged in their Complaint, no contract for the performance of services at Respondent's place of business was ever entered into by the parties. The Petitioner never performed services of any kind on behalf of the Respondent pursuant to this non-existent contract. Accordingly, Petitioner's Complaint alleged an uncertain amount of damages flowing from Respondent's failure to retain them for the purposes of performing unspecified services at the Respondent's facility. Under these facts, Petitioner's attempt to set venue in their home county was rejected by the Third District, consistent with accepted venue law.

ISSUE

THE THIRD DISTRICT COURT OF APPEAL APPLIED DECADES OF CONSISTENT STATEWIDE OPINIONS FROM EVERY DISTRICT COURT OF APPEAL IN CONCLUDING MIA'S VENUE SELECTION WAS INCORRECT AS A MATTER OF LAW

MIA, a corporation with its principal place of business in Miami-Dade County filed suit in its home county against Hacienda, a not-for-profit corporation which operates solely in Hillsborough County. The subject Complaint established no apparent nexus to Miami-Dade County other than being the place where MIA has its principal office. On appeal from that venue assertion, the Third District Court of Appeal (hereafter Third District) applied, in a clear and unambiguous

manner, almost 50 years of venue precedent in concluding that Hillsborough County was the sole proper locale for venue purposes. Straining to declare over four decades of statewide precedent contrary to this Court's venue pronouncements, MIA argues a conflict which simply does not exist.

I. General Venue Considerations

Venue determinations stem from a statutory framework (§47.011, Florida Statutes, for individuals, and §47.051, Florida Statutes, for domestic corporations). The general venue statute, §47.011, provides, in material part, that venue lies ". . . only in the county where the Defendant resides, where the cause of action accrued, or where the property in litigation is located." Additionally, since Hacienda is a corporation, §47.051 must also be applied and it provides, again in pertinent part, that venue ". . . shall be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located." Since there is no property in litigation located in Miami-Dade County and Hacienda does not keep an office there, the statutory provision at issue (which is identical in both sections cited) is whether the cause of action accrued in Miami-Dade County in order to support MIA's venue selection.

A Defendant is said to have a home county privilege, for venue purposes, where the Defendant's residence and location of the cause of action are in the same county. Enfinger v. Baxley, 96 So.2d 538, 539-40 (Fla. 1957); Brown v. Nagelhout CSX, 33 So.3d 83 (Fla. 4th DCA 2010).[4] The home county privilege derives from the venue statutes' purpose which is to require litigation in the forum that will cause the least expense and inconvenience to the Defendant who must

[4]Enfinger is best known as announcing this Court's joint residency rule which is not applicable to this action.

respond. Barry Cook Ford, Inc. v. Ford Motor Co., 571 So.2d 61 (Fla. 1st DCA 1990). However, none of the foregoing negates the Plaintiff's venue prerogative and his choice may be presumed to be correct, but only if the selection has statutory support.

Contrary to MIA's contention (page 17, Initial Brief), the Plaintiff has the burden to ". . . allege in the Complaint a sufficient basis for the venue selected." Goedmaker v. Goedmaker, 520 So.2d 575, 578 (Fla. 1988). Accordingly, when reviewing the propriety of a Plaintiff's venue selection, the trial court must resolve any relevant factual disputes and then make a legal determination as to proper venue. That legal conclusion is subject to *de novo* review. PricewaterhouseCoopers, LLP v. Cedar Resources, Inc., 761 So.2d 1131, 1133 (Fla. 2nd DCA 1999). Finally, if venue is filed in the incorrect county, then the court shall either dismiss the action or transfer it to the proper county, as was ordered by the Third District below.

II. Is There Any Basis For MIA's "Contract" Claim To Be Brought In Miami-Dade County

A. The Rule For Breach of Contract Cases

Assuming the Complaint states a cause of action for breach of contract[5], venue lies where the alleged breach occurred, meaning where the Defendant failed

[5]It is not at all clear that the subject Complaint actually states a cause of action for breach of contract. First, by failing to either attach the contract or fully incorporate its provisions into the Complaint, MIA has not complied with Rule 1.130(a), Florida Rules of Civil Procedure. In Contractors Unlimited, Inc. v. Nortrax Equipment Co. Southeast, 833 So.2d 286, 288 (Fla. 5th DCA 2002), the Fifth District Court of Appeal held that a ". . . Complaint based on a written instrument does not state a cause of action until the instrument or an adequate portion thereof, is attached to or incorporated in the Complaint." To the extent that MIA suggests that the grant application contained the agreement between the parties, then they were obligated to attach that application to its Complaint. On the other hand, if MIA is proceeding upon the terms of a purported oral agreement,

to perform the covenant allegedly breached. Symbol Mattress of Florida, Inc. v. Royal Sleep Products, Inc., 832 So.2d 233 (Fla. 5th DCA 2002). Where the covenant breach is a failure to pay money due and owing for services rendered, venue may lie where payment is to be made and this is true even if the contract fails to specify the place of payment. Croker v. Powell, 156 So.146, 151 (Fla. 1934).

As the court below noted, the above rule is not absolute. It is this point which MIA refuses to acknowledge or accept, but in order for the place of payment rule to apply, there must be a contract between the parties (a dubious assertion in this matter) and it must establish a debtor-creditor relationship between the parties. ***Every District Court of Appeal agrees with this proposition***. Clarke v. Cartee, 549 So.2d 722 (Fla. 1st DCA 1989); Koslow v. Sanders, 4 So.3d 37 (Fla. 2nd DCA 2009); PDM Bridge Corp. v. JC Industrial Mfg., 851 So.2d 289, 291 (Fla. 3rd DCA 2003); Morales Sand & Soil, L.L.C. v. Kendall Props. and Invs., 923 So.2d 1229, 1232-34 (Fla. 4th DCA 2006); Magic Wok International, Inc. v. Li, 706 So.2d 372 (Fla. 5th DCA 1998). An undisputed part of the debtor-creditor rule is that the debt must be unliquidated and not subject to proof and, again, ***every District Court***

---

the Complaint is totally devoid of specifics as to the services MIA was obligated to perform. Quite frankly, there is no specificity attached to MIA's allegation that they were to be "the implementation consultant and managing agent of the Hacienda Villas facility." Does that mean they were to control operations, perform maintenance, complete janitorial services, or provide food for the various residents? Were they to be involved in clerical and other administrative duties? Beyond that, of course, there is absolutely no allegation as to what the financial compensation would be for these various services. Finally, if the breach of contract is based upon an oral agreement, at the time of the HUD application, to later enter into a written contract, then the lack of specificity in that oral agreement also dooms this cause of action. Rork v. Las Olas Co., 23 So.2d 839, 842 (Fla. 1945); Bluevack, Inc. v. Walter E. Heller and Company of Florida, 331 So.2d 359, 360 (Fla. 3rd DCA 1976).

of Appeal agrees. See: PDM; Morales; Koslow; Magic Wok; and Perry Building Systems, Inc. v. Hayes and Bates, Inc., 361 So.2d 443 (Fla. 1st DCA 1978).

Application of these rules to the subject facts lends support to the Third District's opinion in this cause. Even accepting the notion that there was some type of agreement for Hacienda to later employ MIA to perform services at its facility in Hillsborough County, there clearly is no set amount of money due and owing to MIA. In fact, since MIA was never hired to perform any services on Hacienda's behalf in Hillsborough County, it is uncertain (obviously) as to what amount of money it might be due and owing as a result of Hacienda's failure to retain MIA. MIA certainly has no claim for payment for services actually rendered, but rather, in its best case scenario, some claim for unliquidated damages flowing from Hacienda's failure to subsequently hire MIA after the conclusion of the grant process. Thus, there clearly was no debtor-creditor relationship between the parties, and whatever money may have been owed to MIA, it was plainly unliquidated. On these facts and theory of recovery, venue cannot lie in Miami-Dade County.

B. All Of The District Courts Of Appeal Have Not Ignored This Court's Venue Holdings

MIA begins its screed against the unified appellate court precedents noted above at page 5 of its brief and continues for approximately ten pages. After reviewing this Court's venue law, as set forth in Croker v. Powell and its progeny, MIA asserts, page 15, footnote 9, that the District Courts have imposed limitations on the Croker rule which have taken on a life of their own (MIA's description, not ours) and cites as the beginning authority for this rebellion, James A. Knowles v. Imperial Lumber Co., Inc., 238 So.2d 487 (Fla. 2nd DCA 1970). MIA's analysis is plainly wrong.

As part of its review of this Court's venue decisions, MIA cites Saf-T-Clean, Inc. v. Martin-Marietta Corp., 197 So.2d 8 (Fla. 1967). A simple review of Saf-T-Clean reveals the error of MIA's proposition that this Court has never accepted nor acknowledged the debtor-creditor rule. In Saf-T-Clean, the Plaintiff filed suit in its home county alleging the Defendant's failure to pay for services that had been performed pursuant to a written contract.[6] The Defendant objected to the Plaintiff's home county choice and as authority for its position cited Mendez v. George Hunt, Inc., 191 So.2d 480 (Fla. 4th DCA 1966).

Mendez had been issued by the Fourth District Court of Appeal approximately four months prior to this Court's opinion in Saf-T-Clean. In Mendez, the Plaintiff had been paid for the services rendered to the Defendant, but instituted suit in its home county for the remainder of the contract which the Defendant had breached by unilaterally renouncing and repudiating the partially completed contract. Mendez, at 481. The Fourth District acknowledged the Croker rule and recited the ". . . general and well recognized principal that, where there is an express promise to pay a sum of money and no place of payment is stipulated, the debtor should seek the creditor, unless otherwise provided. In such cases, the default and breach consist of the failure to pay the money and the cause of action accrues where the default occurred, which would necessarily be in the county where the creditor resides." Mendez, at 481. As the court went on to further note:

[6]Obviously, the facts of Saf-T-Clean differ from those present in this case. Here, we have no written contract nor the performance of services pursuant to that contract. The lack of a contract and/or the lack of performance of services resulting from a contractual agreement are distinguishing factors which set this case apart from Croker v. Powell and many of the other cited authorities.

> "We readily give allegiance to this worthy rule. However, we believe its application is linked to instances where the default consists simply of an omission to pay a certain sum of money which is due or already earned. To illustrate, we believe that Plaintiff here would be on firm ground and within the auspices of the stated rule if he had completed all of the work contractually prescribed, leaving due to him the balance of the contract price.
>
> ***
>
> In the case at hand, the gravamen - the breach - consists of the act of the Defendant, George Hunt, Inc., in renouncing and refusing to further recognize the partially completed contract. This act occurred in Collier County and, thus, the cause of action accrued there." Mendez, at 481.

Mendez went on to discuss Croker, noting that it contained an express contract for services which had been partially completed; indeed, some of those services had been performed in the Plaintiff's home county and no payment for the services had been received. The Mendez court had no problem understanding that the Plaintiff in Croker was well able to set venue in his home county, but noted that the difference in its case was that none of the services had been performed in the Plaintiff's home county and that the Plaintiff had already received full compensation for those services actually performed. Accordingly, the Fourth District upheld the Defendant's motion based upon improper venue.

With this background in mind, all this Court did in considering the Mendez opinion in Saf-T-Clean was to acknowledge that the damages in Mendez flowed from a repudiation of the contract and was not for money owed. Saf-T-Clean, at 11. In considering Mendez as authority for one of the parties before it, this Court had every opportunity to repudiate its holding. Moreover, this Court could have

questioned its wisdom or renounced its reasoning. However, this Court did no such thing. Rather, it acknowledged, consistent with prior precedent, that where an action is based upon a claim for damages for money due and owing, Plaintiff may choose its home county privilege. However, where damages do not meet the narrow criteria of the debtor-creditor rule, the home county privilege for place of payment does not apply.

This case appears to be much like Mendez in that MIA (in its best case scenario) claims Hacienda repudiated an agreement to retain MIA to perform services in Hillsborough County. The repudiation would have occurred in Hillsborough County and given that MIA's action is for compensation for services it would have rendered in Hillsborough County, venue may plainly not lie in Miami-Dade County.

C. MIA's Reliance On Sundor Brands, Inc. V. Groves Co., Inc. Is Equally Unavailing

At pages 15 through 17 of its brief, MIA places substantial reliance on the Fifth District's holding in Sundor Brands, Inc. v. Groves Co., Inc., 604 So.2d 901 (Fla. 5th DCA 1992). This reliance is misplaced.

All the Fifth District held in Sundor is that Sundor's home county privilege was applicable because ". . . its claims are for contractual indemnification and that this case falls within the rule that where the breach alleged is the failure to pay money due under a contract, 'the cause of action accrues', for venue purposes, where payment was to have been made." Sundor Brands, Inc., at 903. The Fifth District went on to note that where the breach of contract is a default of payment, the residence of the payee is where the cause of action accrues and for authority in support of this position ***the Fifth District cited James A. Knowles, Inc. v. Imperial Lumber Co., 238 So.2d 487 (Fla. 2nd DCA 1970)***. The very case that MIA claims

to have begun the march away from this Court's Croker venue rule is cited as correct authority in another venue case which MIA claims is well reasoned and purportedly in irreconcilable conflict with the Third District's opinion in this case. Not only is there no conflict due to the Fifth District's acknowledgment of the limitations on the debtor-creditor rule in Knowles, but the court further acknowledged the limitations of the rule when it reviewed American Intern. Food Corp. v. Lesko, 358 So.2d 250 (Fla. 4th DCA 1978). The Fifth District distinguished the factual circumstances of Lesko from Sundor Brands and in no way suggested that the limitations of the debtor-creditor rule did not apply. In fact, the Fifth District concluded that the Sundor Complaint did involve an express promise to pay under an indemnification provision of the subject contract. The Fifth District further noted that the key was this express promise to pay and the fact that the specific sum was not known was not dispositive. Indeed, that ruling is consistent with the Fifth District's understanding of liquidated damages from Bowman v. Kingsland Dev., Inc., 432 So.2d 660, 662 (Fla. 5th DCA 1983). There, it noted that "Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law." None of those factors are apparent from the Complaint in this case. As previously noted, the so-called agreement contains no specifics regarding the services to be performed or the rate of compensation for those services. There is no arithmetical calculation that can be applied nor are there any definite rules of law which will allow us to calculate any amount of damages due and owing to MIA. Consequently, Sundor Brands offers no help to MIA and consistent with Fifth District pronouncements, it not only accepts the debtor-creditor limitations, but by definition establishes that any damages in this

cause were unliquidated. Accordingly, venue could not lie in MIA's home county.

Per the Stipulated Statement (A-6), Petitioner relied solely upon the debtor-creditor rule for its venue assertion when it cited as authority Rayman v. Langdon Asset Mgmt., Inc., 745 So.2d 426 (Fla. 3rd DCA 1999). Not only is Rayman unavailing for Petitioner's claim (see: Hacienda's reliance upon Morales Sand & Soil, L.L.C. v. Kendall Props. and Invs., 923 So.2d 1229 (Fla. 4th DCA 2006); A-6), but the facts of Rayman are in conflict with the facts of this case.

In Rayman, a consultant actually performed services (pursuant to an oral joint venture agreement) as agreed by the parties. The consultant received three payments, albeit at the Defendants' place of business. When the consultant failed to receive final payment, it filed suit in its home county pursuant to the fully performed oral agreement. In that cause, the Third District had no problem applying the home county place of payment venue rule . However, the instant facts differ greatly from Rayman in that no services were performed pursuant to the purported agreement, that agreement itself is much in question, and no partial payments were made. Under those circumstances, Hacienda's reliance upon the exception to the debtor-creditor rule as outlined in Morales Sand & Soil, L.L.C. was well founded.

D. MIA's $120,000.00 Smokescreen

At pages 18 and 19 of its brief, MIA asserts that Hacienda argued the issue of liquidated damages for the first time on appeal and offered no proof at all in support of its motion to transfer venue. Further to point, MIA asserts in footnote 10 that there is actually an agreement for MIA to be paid the sum of $120,000.00 for the so-called "implementation fees" and the performance of additional services. None of these assertions are accurate or supported by the record.

As the Stipulated Statement of Proceedings (A-6) makes clear, Hacienda, in its presentation to the trial court, relied upon Morales Sand & Soil, L.L.C. v. Kendall Props. and Invs., 923 So.2d 1229 (Fla. 4th DCA 2006). In Morales, the court reviewed the general rule for venue stated in Croker and then acknowledged that the debtor-creditor relationship has limitations, citing to James A. Knowles, Inc. The court then acknowledged the rule from PDM Bridge Corp. and concluded, "where there is no liquidated debt involved, the court must look at the allegations of the Complaint to determine where the cause of action accrued and where venue lies." Morales, at 1232. MIA's assertion that the liquidated damages argument was argued for the first time on appeal is patently false.

A matter that was asserted for the first time on appeal is MIA's claim that they are due a liquidated sum of $120,000.00. This claim did not appear in the Complaint nor was it mentioned in MIA's Answer Brief before the Third District. Instead, MIA first made this non-record assertion in its Motion for Rehearing. (A-7, pages 3-4, footnote 2). The claim appears to have been made as part of some attempt by MIA to have the Third District remand to the trial court for a factual finding on the assertion. Hacienda objected to the non-record contention. (A-8, page 2, Hacienda's Response to the Motion for Rehearing). The non-record assertion is as out of place before this Court as it was in the Motion for Rehearing before the Third District.[7] Clearly, MIA's reliance upon Rayman v. Langdon Asset Mgmt., Inc., 745 So.2d 426 (Fla. 3rd DCA 1999) before the trial court (A-6), was legally unavailing once Hacienda countered with Morales Sand & Soil. That Morales correctly asserted the limitations of and exceptions to the debtor-creditor rule left MIA with little choice but to challenge those limitations and exceptions. However, every District Court of Appeal in this state and, indeed, this Court have approved the limitations and exceptions noted. There is no conflict and MIA's

[7]In footnote 10 of their brief, MIA suggests that Hacienda could not make a sworn statement to the Circuit Court regarding the $120,000.00. Notwithstanding the fact that the $120,000.00 claim had never been brought up in the Circuit Court, MIA's position is actually a turn on a related matter brought up in Hacienda's Reply Brief below. There, at page 2, Hacienda challenged MIA's assertion in its Answer Brief that Hacienda Villas conducted operations solely in Hillsborough County. At that point, we stated "throughout the entire brief submitted by Appellee, they dance around this crucial issue but cannot, as officers of the court, represent to the contrary regarding the status of Hacienda Villas." (Reply Brief of Hacienda Villas, page 2). In fact, what the undisputed record shows in this case is that not only was Hacienda Villas a Hillsborough County corporation with its sole place of business in Hillsborough County, but that nowhere does a $120,000.00 fee due and owing to MIA appear in the record before the trial court.

attempt to inject a non-record factual assertion (rejected by the Third District) fails to rescue their position.

E. If MIA Has A Cause Of Action, Where Did It Accrue?

After holding, quite correctly, that Miami-Dade County could not be the proper place of venue, the Third District explained its reasoning for holding Hillsborough County as the proper venue. Given that the debtor-creditor rule would not allow venue to be set in Miami-Dade County and that Hacienda's sole place of business was in Hillsborough County, there really was no choice but for the Third District to come to this conclusion. Nonetheless, MIA takes issue with the court's additional proclamation.

At the outset, we should note that Petitioner misstates the issue. (Petitioner's brief at page 24). Petitioner claims that the opinion, at page 2, framed MIA's claim as the ". . . non-payment of money due to be paid under a contract in Miami-Dade County." No such statement appears at page 2 of the court's opinion. Rather, the Third District stated, as part of its review of MIA's Complaint, that "MIA alleges that all payments to MIA ***for its services*** would be made at MIA's principal office in Miami-Dade County." (Emphasis supplied). MIA frames the issue in this fashion because it relies, in part, upon Croker v. Powell and other non-payment cases (page 26, Petitioner's brief) for support of its venue argument. As we have already made clear earlier in this brief, there was no contract pursuant to which MIA was owed a sum of money by Hacienda. Accordingly, Petitioner's misstatement of the claim and reliance on non-payment cases are unavailing.

On the other hand, the Third District's reliance upon Kumar v. Embassy Kosher Tours, Inc., 696 So.2d 393 (Fla. 3rd DCA 1997) and Weiner v. Prudential Mortgage Investors, Inc., 557 So.2d 912, 913 (Fla. 3rd DCA 1990) is right on point. In Kumar, the cause of action accrued due to repudiation of the contract and where

the agreement between the parties was to be performed. Since the services were agreed to be performed in Pinellas County and, likewise, since the anticipatory breach accrued as a result of a repudiation in Pinellas County, the Third District correctly held that Miami-Dade County was an inappropriate venue location. Those facts are strikingly similar to those present here. First, assuming there was a contract between the parties, it obviously called for services to be performed in Hillsborough County. Second, to the extent Hacienda repudiated the contract by refusing to allow MIA to perform services here, that repudiation also sets venue in Hillsborough County.

Weiner v. Prudential Mortgage Investors, Inc. is no different. That cause involved a breach of contract action based upon the failure of attorneys to provide legal services in the county where they had agreed to perform. The Third District concluded that the action accrued where the place of performance was to have occurred, as opposed to the place where the Plaintiff resided. Again, those facts are consistent with those present in this case.

Moreover, Petitioner's primary reliance upon Ryan v. Mobile Commc'n Enters., Inc., 594 So.2d 845 (Fla. 2nd DCA 1992) is also misplaced. In Ryan, Mobile Communications performed as agreed between the parties. The breach occurred when Ryan repudiated the contract and failed to pay the money due and owing. Accordingly, the Second District, again citing to James A. Knowles, Inc., applied the debtor-creditor rule and specifically stated that the breach was not pursuant to the covenant to perform services, but ". . . of Ryan's covenant to pay for those services." Ryan, at 846. The only reason Mobile Communications could not sue in its home county was because it was a foreign corporation. Accordingly, it had attempted to bring suit in Sarasota County, but the only proper place for venue turned out to be Ryan's place of residence - Brevard County.

Nothing in that factual scenario or court holding applies to the instant matter or aids Petitioner's claim.

We now turn to Petitioner's two additional citations of authority, Sagaz Industries, Inc. v. Martin, 706 So.2d 374 (Fla. 5th DCA 1998) and Thomas v. David Kilcoyne Real Estate Group, Inc., 791 So.2d 550 (Fla. 2nd DCA 2001). In Sagaz, the Fifth District concluded that ". . . the essence of Martin's claim is Sagaz' failure to pay for his services, and not the performance of services." Sagaz, at 376. Accordingly, the place of payment rule controls the venue determination. Once more, in this cause, no services were performed, no set amount is obviously due and owing to Petitioner (as opposed to Martin's claim that he was owed $204,162.00), and no debtor-creditor relationship exists between Petitioner and Respondent. Likewise, in Thomas, the breach of contract was a breach of the covenant to pay money due. For all the reasons stated above, Thomas is also unavailing for Petitioner's cause.[8]

CONCLUSION

Based upon the foregoing arguments and citations of authority, Respondent respectfully requests this Honorable Court conclude that review was improvidently

[8]Indeed, if as Petitioner claims there was a contract between the parties which Respondent repudiated by not allowing Petitioner to perform services in Hillsborough County, then the cause of action would still lie in Hillsborough County because the breach of contract would have been Hacienda's act of renouncing and refusing to further recognize the contract. Suzanne Walker and Associates, Inc. v. Qualtec Quality Services, Inc., 660 So.2d 384 (Fla. 5th DCA 1995).

granted and dismiss the writ or, in the alternative, in considering the merits of the subject claim, affirm the decision of the Third District Court of Appeal herein as consistent with decades of Florida venue law.

Respectfully submitted.

DAVID T. WEISBROD, ESQ.
412 East Madison Street, Suite 1111
Tampa, Florida 33602
(813) 223-2792 / (813) 223-3124 (fax)

Attorney for Respondent
Florida Bar No. 312487

Email: dweislaw@yahoo.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email (bstack@stackfernandez.com) and regular U.S. Mail to BRIAN J. STACK, ESQ., Stack Fernandez Anderson & Harris, P.A., 1200 Brickell Avenue, Suite 950, Miami, Florida 33131, this 11th day of April, 2011.

DAVID T. WEISBROD, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and has been typed in Times New Roman 14-point font.

DAVID T. WEISBROD, ESQ.