

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EXTRAORDINARY PROPERTIES, INC.	:	CIVIL ACTION
d/b/a REMAX EXTRAORDINARY	:	
PROPERTIES,	:	
Plaintiff,	:	
	:	
v.	:	NO. 99-4305
	:	
NATIONWIDE MUTUAL INSURANCE	:	
COMPANY,	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, J. JANUARY , 2000

Presently before the Court is the Motion of Defendant, Nationwide Mutual Insurance Company ("Defendant"), to Transfer Venue to the Eastern District of North Carolina pursuant to 28 U.S.C. section 1404(a).¹ 28 U.S.C. § 1404(a)(West Supp. 1998). The Plaintiff, Extraordinary Properties, Inc. d/b/a Remax Extraordinary Properties ("Plaintiff"), filed a Complaint in this Court alleging breach of contract and bad faith. Plaintiff's claim involves property damage and loss which occurred on September 8, 1996 in Wilmington, North Carolina when a heavy rainstorm allegedly caused sanitary sewage lines to back up, discharging water and raw sewage through the floor drains and roof at Plaintiff's premises. The present action seeks recovery of damages under a business owners' policy of insurance issued by

¹Defendant's Motion is entitled "Motion to Transfer . . . Pursuant to 28 U.S.C. § 1401(a)." Defendant's Motion, however, actually seeks relief under 28 U.S.C. section 1404(a).

Defendant and provided in accordance with North Carolina law. For the following reasons, the Motion is granted.

I. FACTS.

Plaintiff originally brought suit in North Carolina state court. In that action, Defendant filed and served Plaintiff with discovery requests, including Requests for Admission, on November 10, 1997. On December 8, 1997, the clerk of court granted Plaintiff an extension of time until January 9, 1998 to answer the requests; Plaintiff did not respond. Plaintiff ultimately responded to Defendant's discovery requests on April 2, 1998. Defendant never filed a Motion to Compel these responses. Upon receipt of the responses, defense counsel never objected to the responses or revealed that he considered the Requests for Admission admitted because they were not received within the required time.

Over one year later, defense counsel moved for summary judgment, stating on the first day of trial that the Requests for Admission were deemed admitted because they were not timely answered. The state court judge then entered summary judgment, deeming the Requests for Admission admitted. The next day, Plaintiff's counsel moved to vacate summary judgment and voluntarily dismiss the action due to improper service on Defendant. Plaintiff contends that it agreed to this voluntary dismissal (1) so that the North Carolina judge would not have to

find that the North Carolina defense attorney "was a liar," and (2) because North Carolina's tolling provision extends the statute of limitations by one year after a plaintiff takes a voluntary dismissal. Thereafter, the judge revoked Plaintiff's counsel's pro hac vice admission, dismissed the case without prejudice and recused himself from any further proceedings.

Following the dismissal, Plaintiff's counsel decided to re-file the Complaint in federal court in Wilmington, North Carolina, but was unable to retain local counsel as required by Local Rule 2.04 of the United States District Court for the Eastern District of North Carolina ("Eastern District of North Carolina"). Local Rule 2.04, entitled "Representation by Local Counsel Who Must Sign All Pleadings," requires that an attorney may represent a client pro hac vice, but must simultaneously engage local counsel:

who shall sign each pleading, motion, discovery procedure or other document filed in this court. If an attorney appears solely to bring the litigant in compliance with this rule, he shall in each instance designate himself 'LR 2.04 Counsel.' In signing the pleading, motion, discovery request or other document, counsel certifies that he is an authorized representative for communication with the court about the litigation, and the document conforms to the practice and procedure of this court.

(Pl.'s Am. Resp. to Def.'s Mot. to Transfer at 5, ¶ 19(q).)

Plaintiff prefers that this action proceed in the Eastern District of North Carolina, but states that local counsel cannot

be obtained because defense counsel's conduct has "poisoned the waters in the proposed transferee district." (Plaintiff's Supplemental Br. in Opp'n to Def.'s Mot. to Transfer at 2.) Accordingly, Plaintiff has not attempted to file this action in the Eastern District of North Carolina.

II. DISCUSSION.

Section 1404(a) provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a)(West Supp. 1998). The moving party bears the burden of establishing the need for transfer. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). In considering a motion to transfer, courts generally balance the following factors:

1. the relative ease of access to sources of proof;
2. the availability of compulsory process for attendance of unwilling witnesses;
3. the cost of obtaining attendance of willing witnesses;
4. the possibility of viewing premises, if applicable;
5. all other practical problems that make trial of a case easy, expeditious and inexpensive; and
6. public interest factors, including the relative congestion of court dockets, choice of law considerations and the relationship of the community in which the courts and jurors are required to serve to the occurrences that give rise to the litigation.

Blum v. Petco Animal Supplies, Inc., No. CIV.A. 98-4855, 1998 WL

848059, at *1 (E.D. Pa. Dec. 7, 1998)(citing Leonardo Da Vinci's Horse, Inc. v. O'Brien, 761 F. Supp. 1222, 1229 (E.D. Pa. 1991)(citing Gulf Oil v. Gilbert, 330 U.S. 501, 508-09 (1947))). In addition, courts should look to the plaintiff's choice of forum, which is entitled to great weight and will rarely be disturbed. Gulf Oil, 330 U.S. at 508. "However, a plaintiff's choice receives less weight where none of the operative facts occurred in the selected forum." Fidelity Leasing, Inc. v. Metavec Corp., No. CIV.A. 98-6035, 1999 WL 269933, at *2 (E.D. Pa. Apr. 29, 1999)(citation omitted).

Applying these principles to the facts of this case, the majority of factors indicate this case should be transferred to the Eastern District of North Carolina. The claim arose in North Carolina. The subject insurance policy was issued to the Defendant in North Carolina and this action seeks recovery under a business owners' insurance policy providing coverage under North Carolina law. The Plaintiff corporation is incorporated and is licensed to do business in North Carolina, and the Defendant, an Ohio corporation, is also authorized to conduct business in North Carolina. All potential witnesses identified in the parties' state court pre-trial order, (Pl.'s Br. in Opp'n to Def.'s Mot. to Transfer Exs. 9(F) & (G),) are likely to reside in North Carolina or are within the subpoena power of the Eastern District of North Carolina.

Plaintiff itself concedes that, it's procedural difficulties notwithstanding, it "desire[s] the Eastern District of North Carolina as the venue for this action." (Compl. at ¶ 4.) Further, the only relationship between the parties and this district is that Plaintiff's attorney's principal office is located in Philadelphia and Plaintiff's attorney is admitted to practice before the bar of this Court. However, Plaintiff's attorney is also admitted to practice in North Carolina. Thus, the Eastern District of North Carolina is a far more appropriate and convenient forum for all of the parties to this action.

Plaintiff states that Defendant fails to identify the key witnesses to the action, therefore no evidentiary basis for Defendant's allegation of inconvenience exists, and Defendant's Motion must be denied as fatally defective. Plaintiff overlooks its own inclusion of the pre-trial order from the state court action in the record. In that order, each party listed the witnesses they expected to call in the case. Plaintiff listed two witnesses from Wilmington, North Carolina and one witness from South Carolina. Defendant listed a total of ten witnesses: seven witnesses from Wilmington, North Carolina; one witness from Raleigh, North Carolina; one witness from Columbus, Ohio; and one witness from Florida.

The Defendant argues that if the case remains in Pennsylvania, the pertinent records and witnesses will be outside

the one hundred mile jurisdiction of the Court and cannot be compelled by process. Defendant contends that all of its employees and witnesses with knowledge of this matter, and all documentation of the alleged damages, are located in Wilmington, North Carolina. Plaintiff counters with the statement that "[m]uch of [the] actions involving the claims handling and North Carolina litigation occurred in Philadelphia where Plaintiff's attorney is located." (Pl.'s Am. Resp. to Def.'s Mot. to Transfer at 1, ¶¶ 16-17.) Plaintiff agrees that the Court could not compel unwilling witnesses to appear, but insists that it will voluntarily produce all of its witnesses in Philadelphia and suggests that Defendant could also agree to voluntarily produce its witnesses in this district. However, in light of the expense involved, it is unlikely that Defendant, although a large corporation, would agree to voluntarily produce its witnesses in this district.

The sole reason Plaintiff provides for failure to file in the Eastern District of North Carolina is "no lawyer in that venue is willing to file this action in that venue and thus [Plaintiff] is forced to file this action in this court." (Compl. at ¶ 4.) Defendant has offered Plaintiff assistance in locating local counsel. Plaintiff claims, however, that Defendant's assistance would prejudice Plaintiff because much of the local logistics of the case, i.e., appearing at conferences

and helping arrange the availability of witnesses, would fall on local counsel and it's unlikely that local counsel who does not have some tie to the Defendant or the local Wilmington, North Carolina defense bar could be secured. Plaintiff states, and this Court agrees, that the potential for the appearance of a conflict of interest by this offer seems to require this Court's denial of the request. However, Plaintiff has offered no evidence other than oral representations that it has contacted approximately ten attorneys unwilling to act as local counsel to support its argument that local counsel cannot be obtained. This evidence is insufficient to warrant retention of this action in this district. Since Plaintiff's attorney is admitted to practice in North Carolina, Plaintiff might consider the solution arrived at in the case of Sinakin v. Havens, No. CIV.A.96-8199, 1997 WL 363859 (E.D. Pa. June 13, 1997), wherein the court waived the local rule and allowed counsel additional time to retain a local attorney.

III. CONCLUSION.

For all of the above reasons, this case will be transferred to the Eastern District of North Carolina pursuant to section 1404(a).

An Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EXTRAORDINARY PROPERTIES, INC.	:	CIVIL ACTION
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PROPERTIES,	:	
Plaintiff,	:	
	:	
v.	:	NO. 99-4305
	:	
NATIONWIDE MUTUAL INSURANCE	:	
COMPANY,	:	
Defendant.	:	

ORDER

AND NOW, this day of January, 2000, upon consideration of Defendant's Motion to Transfer Venue, and the responses thereto, it is hereby ORDERED that said Motion is GRANTED and this action is hereby TRANSFERRED to the United States District Court for the Eastern District of North Carolina.

BY THE COURT:

Robert F. Kelly, J.