

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

ULTIMATE RESOURCE, INC. : CIVIL ACTION
 :
 v. :
 :
 :
 KENNETH GOSS, :
 GOSS ENTERPRISES, INC., :
 FLAGSHIP HEALTHCARE, INC., and :
 FRANCIS L. SHEA, III : NO. 99-1826

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

March 17, 2000

Ultimate Resources, Inc. ("URI") executed a Representation Agreement with I.V. Concepts ("IVC") under which URI would act as a consultant in connection with the sale of IVC.¹ URI alleges that after performing extensive work for IVC in order to attract Flagship Healthcare, Inc. ("Flagship") as a buyer, including the collection, assembly and analysis of information, URI has not received payment of its \$175,000 agreed upon fee. Defendants Goss Enterprises, Kenneth Goss, President of Goss Enterprises, and Francis Shea, President of Flagship, move to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) or, in the alternative, to transfer venue pursuant to 28 U.S.C. § 1404(a) to the United States District

¹ Following the execution of the URI/IVC Representation Agreement, IVC amended its Articles of Incorporation to officially change its name to Goss Enterprises, Inc. ("Goss Enterprises"). The Representation Agreement refers to the corporation as IVC, so the court will refer to it as IVC.

Court for the Southern District of Florida, Fort Lauderdale Division. Defendants' motions to dismiss and, alternatively, to transfer venue will be denied.

BACKGROUND

URI, a Pennsylvania corporation specializing in consulting, sent a mass mailing to numerous Florida corporations, including IVC, a home health care company, as part of an advertising campaign to solicit business. See Second Affidavit of Nagle Bridwell at ¶ 4. In response to this advertisement, Juan Gallinal, Vice President of IVC, telephoned URI to discuss retaining URI as a consultant and marketing facility. See id. at ¶ 5. A Representation Agreement, under which URI would act as a consultant in connection with the sale of IVC, was prepared by URI and signed by Kenneth Goss, President and owner of IVC, on September 30, 1997.

URI collected, assembled and analyzed necessary information and prepared a complex package regarding IVC to attract a buyer. Between August, 1997 and October, 1998, URI and IVC exchanged information and communicated regarding the representation and sale of IVC. See Amended Complaint at ¶¶ 12-18, 20, 23-26, 28 & 31. IVC was ultimately sold to Flagship at IVC's asking price. See id. at Introduction & ¶ 25. Steve Marhee, Chief Financial Officer of IVC, Kenneth Goss, President of IVC, and Juan

Gallinal, Vice President of IVC, each assured URI that, as part of the sales agreement, Flagship would pay URI's fee. See Second Affidavit of Nagle Bridwell at ¶¶ 8(k), 8(m), and 8(n). Neither Flagship nor IVC has paid URI the \$175,000 due under the Representation Agreement.

Plaintiff brought an action alleging breach of contract, interference with a contractual relationship, negligent misrepresentation, civil conspiracy, fraudulent transfer and unjust enrichment. Defendants' prior motion to strike plaintiff's prayer for attorneys' fees was granted; defendants' motions to strike plaintiff's prayer for costs and to dismiss for lack of subject matter jurisdiction were denied. Defendants also move to dismiss for lack of personal jurisdiction or, in the alternative, to transfer venue to the Southern District of Florida, Fort Lauderdale Division, pursuant to 28 U.S.C. § 1404(a). They allege that there are not the "minimum contacts" necessary for personal jurisdiction over them in the Eastern District of Pennsylvania. In the alternative, they argue for transfer of venue because the action could have been brought in the Southern District of Florida and the location of the events giving rise to the litigation, sources of proof and witnesses make a transfer in the interest of justice. The claims against Flagship have been severed and stayed since it filed for bankruptcy in the United States Bankruptcy Court for the Southern

District of Florida on January 5, 2000.

DISCUSSION

1. MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Upon a challenge to personal jurisdiction by the defendant, the plaintiff bears the burden of proving that there is jurisdiction, but the court must consider the pleadings and affidavits in the light most favorable to the non-moving party. See Lieb v. American Pacific International, Inc., 489 F. Supp. 690, 694 (E.D. Pa. 1990). In an action where subject matter jurisdiction is based on diversity of citizenship, a federal court may exercise personal jurisdiction to the same extent as a court in the state in which it sits. See Dollar Savings Bank v. First Security Bank of Utah, 746 F.2d 208, 211 (3d Cir. 1984). Pennsylvania permits jurisdiction to the full extent allowed by the Due Process Clause of the United States Constitution. See 42 Pa. Cons. Stat. Ann. § 5322(b). The Due Process Clause permits the exercise of personal jurisdiction over those persons who have minimum contacts with the state but only if exercising jurisdiction comports with "fair play and substantial justice." See Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985).

Personal jurisdiction may be either general or specific. "The presence of a corporation in a state never has been doubted when its activities in the jurisdiction have not only been

continuous and systematic, but also give rise to the liability sought to be enforced. See International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). When the cause of action arises from defendant's contacts with the forum state, the plaintiff may establish specific jurisdiction by showing that the contacts meet a minimal threshold. See Allied Leather Corp. v. Altama Delta Corp., 785 F. Supp. 494, 497 (M.D. Pa. 1992). This threshold cannot be established solely on the basis of a contract with an in-state plaintiff, but not much more is required. See Pan Ocean Trade & Invest Co. v. Super Time Int'l Corp., No. CIV.A.94-5539, 1995 WL 31613, at *1 (E.D. Pa. Jan. 26, 1995)(citing Burger King, 471 U.S. at 474).

IVC/Goss Enterprises had adequate contacts with Pennsylvania to meet the minimal threshold requirement in an action arising out of those contacts. During the fourteen month period from August, 1997 to October, 1998, IVC responded to URI's mailing, executed a contract with URI, initiated and engaged in multiple communications and exchanges with URI, requested additional services from URI and benefited from URI's services. By participating in this relationship with a Pennsylvania corporation, IVC/Goss Enterprises "availed [it]self of the privilege of conducting business [in Pennsylvania.]" See Burger King, 471 U.S. at 475-76. These exchanges gave rise to the liability sought to be enforced here by URI. Exercising personal

jurisdiction over Goss Enterprises comports with "fair play and substantial justice." See id. at 476.

Similarly, Kenneth Goss and Francis Shea, as Presidents of their respective corporations, actively oversaw the operations of their corporations as they had repeated contact with and received significant benefits from URI. See Commodity Futures Trading Comm'n v. American Metal Exchange Corp., 693 F. Supp. 168, 188 (D.N.J. 1988) (exercising personal jurisdiction over defendant who was shareholder, owner and director of corporation based on defendant's active oversight of corporation). As is the case with the corporate defendants, this litigation arises from the relationship between these defendants and the forum state and it is appropriate at this time for this court to exercise personal jurisdiction over these defendants whether or not there is personal liability for their acts as corporate officers.

2. MOTION TO TRANSFER VENUE TO THE SOUTHERN DISTRICT OF FLORIDA

In an action where jurisdiction is based on diversity of citizenship, venue lies in a "judicial district where any defendant resides, if all defendants reside in the same State [or] a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred" 28 U.S.C. § 1391(a). For purposes of venue, "a defendant that is a corporation shall be deemed to reside in any judicial district

in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c).

"For the convenience of parties and witnesses, [or] 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). The decision to transfer an action pursuant to § 1404(a) rests in the court's discretion. See Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 628, 631-32 (3d Cir. 1989). The burden of establishing the justification for transfer of venue rests on the movant. See Babn Technologies Corp. v. Bruno, 25 F. Supp.2d 593, 598 (E.D. Pa. 1998). The appropriateness of transfer must be demonstrated by a preponderance of the evidence. See Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970).

A. ACTION IN THE SOUTHERN DISTRICT OF FLORIDA

The threshold inquiry of any § 1404(a) motion is whether the transferee district is a district in which the action originally might have been brought. See National Utility Service, Inc., v. Queens Group, Inc., 857 F. Supp. 237, 240 (E.D.N.Y. 1994).

There is subject matter jurisdiction in the Southern District of Florida. The jurisdiction is based on diversity of citizenship under 28 U.S.C. § 1332.

"The district courts shall have original jurisdiction of all

civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states" 28 U.S.C. § 1332(a).

URI's \$175,000 claim exceeds the \$75,000 amount in controversy requirement and the action is between citizens of different states.

"A corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business" 28 U.S.C. § 1332(c)(1). There is diversity of citizenship in this case because the plaintiff, URI, is incorporated in and has its principal place of business in Pennsylvania, corporate defendant Goss Enterprises is incorporated in and has its principal place of business in Florida and individual defendants Kenneth Goss and Francis Shea are both citizens of Florida.

To try a case, a federal court must have jurisdiction over the defendant's person, property, or the res that is the subject of the suit. 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1063 (2d ed. 1987). Goss Enterprises is incorporated in Florida and has its principal place of business in Florida, therefore, it "should reasonably anticipate being hailed into court [there]." See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Individual defendants Goss and Shea are subject to personal

jurisdiction in the jurisdiction in which they are domiciled. 4
Charles Alan Wright & Arthur R. Miller, Federal Practice and
Procedure: Civil 2d § 1065 (2d ed. 1987). There is jurisdiction
over these defendants in the Southern District of Florida.

Venue would be in the Southern District of Florida. Venue is
proper, in cases based on diversity jurisdiction, in a "judicial
district where any defendant resides, if all defendants reside in
the same State [or] a judicial district in which a substantial
part of the events or omissions giving rise to the claim occurred
. . . ." 28 U.S.C. § 1391(a). For purposes of venue, "a
defendant that is a corporation shall be deemed to reside in any
judicial district in which it is subject to personal jurisdiction
at the time the action is commenced." 28 U.S.C. § 1391(c).
Venue is proper in Florida because it is where all of the
defendants reside. This action could have been brought in the
Southern District of Florida.

B. THE INTEREST OF JUSTICE

Once the threshold inquiry of whether the suit could have
been brought in the transferee district is resolved, the court
must determine whether a balancing of convenience and the
interests of justice favor a trial in the proposed transferee
forum. This determination is made on consideration of the same
factors relevant to a determination of forum non conveniens.

Norwood v. Kirkpatrick, 349 U.S. 29 (1955). These factors include:

- (1) relative ease of access to sources of proof;
- (2) availability of compulsory process for attendance of unwilling witnesses;
- (3) cost of attendance at trial by willing witnesses;
- (4) the possibility of view of the premises, if appropriate;
- (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 relation of the community in which the courts and jurors are required to serve to the occurrences that give rise to the litigation.

See Schmidt v. Leader Dogs, 544 F. Supp. 42, 47 (1982).

Consideration of many of these factors leads to a neutral conclusion. Both plaintiff and defendants will have sources of proof in the form of documents and records which can be transported to either location. The possibility of viewing the premises is not important in this case. The cost of attendance at trial by willing witnesses is neutral because each party has witnesses that will have to travel to the location of trial, regardless of where it takes place.

As for the ability to compel witnesses, party witnesses are presumed to be willing to testify in either forum despite any inconvenience. See Hillard v. Guidant Corp., 76 F. Supp.2d 566, 570 (M.D. Pa. 1999). Nonparty witnesses may be compelled to appear unless they reside more than one hundred miles from the court at which the trial is held. Fed. R. Civ. P. 45(c)(3). Defendants claim that they will need several non-party witnesses including Tim Stockdale and Kenneth Veneziano, representatives of Flagship. These non-party witnesses reside in Florida and, therefore, cannot be compelled to testify at trial in the Eastern District of Pennsylvania. Although the plaintiff has not identified its potential witnesses, it is possible that former URI employees who worked on the URI/IVC contract could not be compelled to testify at a trial in the Southern District of Florida. As a result, regardless of where the trial is held, there may be some difficulties compelling non-party witnesses to testify.

But there is a factor strongly favoring denial of transfer, the "public interest" factor; The relative congestion of court dockets and the length of time between filing and trial favor trying this case in the Eastern District of Pennsylvania. According to the JNet Judicial Caseload Profile Report, the Eastern District of Pennsylvania is less congested than the Southern District of Florida. As of 1998, the Pennsylvania court

had 344 cases pending per judgeship, but the Southern District of Florida had 498. See JNet, at <http://156.119.80.10>. In addition, the median time for a civil case to come to trial in the Southern District of Florida is twenty-two months as contrasted with a median of 12 months in the Eastern District of Pennsylvania. See id. The heavy criminal case load in the Southern District of Florida and the delay for civil cases reaching trial make it inadvisable to transfer this case to the Southern District of Florida.

This court must also weigh choice of law considerations. The parties dispute whether Florida or Pennsylvania law governs the agreement, but it is likely the agreement is governed by Pennsylvania law. Even if the agreement is governed by Florida law, the "relative simplicity" of breach of contract issues would assume the familiarity of this judge with the applicable state law. See Scheidt v. Klein, 956 F.2d 963, 966 (10th Cir. 1995) (stating that applicability of state law of alternative forum is not significant concern when issues are relatively simple, as with breach of contract cases).

Finally, the relationship of the community in which the courts and jurors are required to serve to the occurrences giving rise to the litigation favors denial of transfer. Pennsylvania has an interest in providing a Pennsylvania corporation with a Pennsylvania forum for redressing injuries inflicted by an out-

of-state actor. See Burger King, 471 U.S. at 473-74 ("where individuals 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities.").

In ruling on a defendants' motion to transfer, "the plaintiff's choice of venue should not be lightly disturbed." Jamura v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). The weight given to a plaintiff's choice of forum is even greater when the plaintiff resides in the chosen forum. See Trustees of the Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds. v. Ramchandani, No. CIV.A.98-6108, 1999 WL 179748, at *1 (E.D. Pa. 1981). A motion to transfer should not be granted if it will merely shift the inconvenience from the defendant to the plaintiff. See Dinterman v. Nationwide Mut. Ins. Co., 26 F. Supp.2d 744, 749-50 (E.D. Pa. 1998). The above considerations lead to the conclusion that it is not in the interest of justice to transfer this case to the Southern District of Florida.

CONCLUSION

This court has personal jurisdiction over the defendants and it is not in the interest of justice to transfer this case to the Southern District of Florida, Fort Lauderdale Division; The

motions to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and to transfer venue pursuant to 28 U.S.C. § 1404(a) will be denied.

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KENNETH GOSS, :
GOSS ENTERPRISES, INC., :
FLAGSHIP HEALTHCARE, INC., and :
FRANCIS L. SHEA, III : NO. 99-1826

ORDER

AND NOW this 17th day of March, 2000, upon consideration of defendants' motions to dismiss or, in the alternative, to transfer venue and plaintiff's responses thereto, after a hearing at which counsel for all parties were heard, and in accordance with the attached memorandum, it is **ORDERED** that:

1. The motion of defendants Kenneth Goss and Goss Enterprises, Inc. to dismiss or, in the alternative, to transfer venue to the United States District Court for the Southern District of Florida, Fort Lauderdale, Division is **DENIED**.

2. The motion of defendant Francis L. Shea, III to dismiss or, in the alternative, to transfer venue is **DENIED**.

3. A status hearing will be held March 29, 2000 at 2:00 P.M. EST on all outstanding motions, to set a deadline for discovery and list for trial.

S.J.