

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

JOSHUA NEMZOFF and : CIVIL ACTION
NEMZOFF & COMPANY, LLC :
 :
v. :
 :
BAPTIST HEALTH SYSTEM, INC., :
BETH O'BRIEN, MERCER DELTA :
CONSULTING, LLC, GARY FURR :
and RICKY CREECH : NO. 04-01458

MEMORANDUM AND ORDER

Fullam, Sr. J. September , 2004

Defendants sought to have this action dismissed, or transferred to Alabama. On July 22, 2004, I entered an order transferring the case to the United States District Court for the Northern District of Alabama. That order was docketed on July 23, 2004. The ten-day period for filing a motion for reconsideration of that order would have expired either on August 6, 2004 or on August 10, 2004, depending upon whether the parties learned of the order by mail.

On August 6, 2004, plaintiffs' counsel telephoned the Clerk's Office, and confirmed that conversation by letter dated the same day, stating that there would be no appeal from that order, and requesting the clerk to transfer the file to the Northern District of Alabama "as expeditiously as your office processes permit." Plaintiffs' counsel anticipated that, in the absence of such a request, the Clerk's Office might defer actual

transfer of the file until 30 days after the entry of my transfer order, to allow for possible appeals.

Notwithstanding this request, however, plaintiffs' counsel, on August 10, 2004, filed a motion for reconsideration (accompanied by a motion for leave to file that motion beyond the ten-day deadline, if necessary) urging that the transfer order be vacated (or modified to provide that, if the Alabama court ever dismissed the case because plaintiff was not registered to do business in Alabama, the case would then be re-transferred to this District for a different outcome). It seems that, in the interim, plaintiffs' counsel became aware that the defendants had filed an answer to the complaint, including new matter and a counterclaim, invoking an Alabama statute and an Alabama constitutional provision which, according to the defendants, would bar plaintiffs from succeeding in this lawsuit.

The Constitution of Alabama provides, in Article XII, § 232, that "no foreign corporation shall do any business in this state without ... filing with the Secretary of State a certified copy of his articles of incorporation or association"; and an implementing statute, Alabama Code § 10-2A-247(a)(1975) provides that:

All contracts or agreements made or entered into in this state by foreign corporations which have not obtained a certificate of authority to transact business in this state shall be held void at the action of such foreign corporation or any person claiming

through or under such foreign corporation by virtue of said void contract or agreement."

The relevance of these provisions is problematic, since plaintiff is not a corporation, but a limited liability company. However, another Alabama statute, Alabama Code § 10-12-52, provides "a foreign limited liability company transacting business in this state may not maintain any action, suit, or proceeding in any court of this state until it has registered in this state." I express no view as to whether this statute can be satisfied by registration as a condition of continuation of litigation; and it seems clear that plaintiffs' tort claims would not be affected by any of the foregoing statutory or constitutional provisions.

Defendants contend that the motion for reconsideration should be dismissed as untimely. Since weekends are not to be counted, plaintiffs' motion is, at most, two days late. Given the near-compliance, and given the probability that use of the mails may have been involved, I conclude that the filing should be deemed timely. I will therefore proceed to consideration of the merits of the motion for reconsideration.

I conclude that the motion for reconsideration should be denied, for the following reasons:

(1) Judicial Estoppel Having specifically urged the Clerk's Office to transfer the file to Alabama, plaintiffs cannot now be permitted to change position.

(2) If the law is properly applied, the outcome of this case should be the same in the Northern District of Alabama as it would be in this District.

(3) I take judicial notice of the fact that the judges of the Northern District of Alabama are at least as likely to reach correct legal decisions as would this court.

For all of the foregoing reasons, the motion for reconsideration will be denied. An Order follows.

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

JOSHUA NEMZOFF and	:	CIVIL ACTION
NEMZOFF & COMPANY, LLC	:	
	:	
v.	:	
	:	
BAPTIST HEALTH SYSTEM, INC.,	:	
BETH O'BRIEN, MERCER DELTA	:	
CONSULTING, LLC, GARY FURR	:	
and RICKY CREECH	:	NO. 04-01458

ORDER

AND NOW, this day of September 2004, upon
consideration of plaintiffs' motion for reconsideration and
motion for leave to file a motion for reconsideration, IT IS
ORDERED:

1. Plaintiffs' motion for reconsideration will be deemed
to have been timely filed.
2. Plaintiffs' motion for reconsideration is DENIED.

John P. Fullam, Sr. J.