

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

PEGASUS DEVELOPMENT : CIVIL ACTION
CORPORATION :
 :
v. :
 :
JOHN HANE : NO. 05-6148

MEMORANDUM AND ORDER

McLaughlin, J.

March 9, 2006

In 1999, the parties entered into a Securities Purchase Agreement ("SPA"), under which the plaintiff agreed to make certain investments, under certain conditions, in Highcast Network, Inc. ("Highcast"), a company founded and controlled by the defendant. The plaintiff filed suit seeking a declaratory judgment that it owes no further duties to the defendant or Highcast under the SPA. The defendant has moved to dismiss the case for improper venue, or to transfer the case to the District of Maryland. Having examined the events and omissions giving rise to the claim, and having weighed all of the private and public factors for transfer set out in Jumara v. State Farm Insurance Company, 55 F.3d 873 (3d Cir. 1995), the Court will deny the motion as to both dismissal and transfer.

I. Background

The plaintiff is a Delaware corporation with its principal place of business in Bala Cynwyd, Pennsylvania. The defendant is a citizen and resident of Maryland. Highcast is a Maryland corporation with its principal place of business in Maryland.

The parties' dispute concerns their obligations under the SPA. The parties negotiated the terms of the SPA in a series of meetings, including two in the Eastern District of Pennsylvania, several in the Washington, DC metropolitan area, and one in Las Vegas. The parties executed the SPA from their respective home forums.

As amended, the SPA provided that the plaintiff would purchase 53 shares of Highcast common stock at an "Initial Closing" on February 7, 2000, and 58 more shares at a "Final First Closing" on an unspecified, mutually agreeable date. The SPA also provided that the plaintiff would purchase up to 80% of Highcast's stock in a series of "Additional First Closings" to take place thirty days after Highcast met certain milestones in a business plan and budget to be prepared by the parties. The SPA also contemplated the possibility of further investments.

The plaintiff purchased 53 shares of Highcast common stock on February 7, 2000, but made no additional investments. The defendant claims that the plaintiff has breached the SPA.

The plaintiff claims that it is not obligated to make any further investments in Highcast because the defendant did not prepare a business plan or budget for Highcast as required under the SPA.

II. Dismissal or Transfer Under 28 U.S.C. § 1406(a)

The plaintiff has moved to dismiss or transfer the case for improper venue under 28 U.S.C. § 1406(a). That statute provides that if venue is not appropriate, the Court must dismiss the case, or in the interest of justice, transfer the case to a district in which it could have been brought. 28 U.S.C. § 1406(a). On a motion to dismiss for improper venue, the moving party bears the burden of proof. Myers v. American Dental Ass'n, 695 F.2d 716, 724 (3d Cir. 1982).

In a civil action wherein jurisdiction is founded solely on diversity of citizenship, as it is here, venue is appropriate in a judicial district in which a "substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b). In determining whether a venue is appropriate, a court does not look to the parties' "contacts" with a particular district, but rather the location of those events or omissions giving rise to the claim. Cottman Transmission Systems, Inc., 36 F.3d 291, 294 (3d Cir. 1994). A venue may be appropriate even if it is not the "best" venue. Id.

Here, at least two of the negotiations leading up the

SPA occurred in the Eastern District of Pennsylvania. The plaintiff initially performed under the SPA from its office in Pennsylvania. The plaintiff then decided not to make additional investments in Highcast from its office in Pennsylvania. Moreover, the SPA provided that the plaintiff was to make additional investments by delivering certified checks or wire transfers at "Additional First Closings" to take place in Berwyn, Pennsylvania, unless the plaintiff and Highcast mutually agreed to another location.

The central claims in this litigation concern the plaintiff's alleged failure to make additional investments in Highcast under the SPA. Where the alleged omission is a failure to make payments, the omission occurs in the forum where the payor, not the payee, is located. See id. at 295. Here, the alleged payor is the plaintiff, who is located in Pennsylvania.

The Court finds that the defendant has not met his burden of showing that a substantial part of the events or omissions giving rise to the claims in this litigation did not occur in the Eastern District of Pennsylvania. Therefore, the Court will deny the plaintiff's motion as to dismissal or transfer under 28 U.S.C. § 1406(a).

III. Transfer Under 28 U.S.C. § 1404(a)

The plaintiff has moved, in the alternative, for the Court to transfer the action to the District of Maryland, under 28 U.S.C. § 1404(a). That statute provides:

For the convenience of 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). The party requesting transfer bears the burden of establishing the need for transfer. Jumara v. State Farm Insurance Co., 55 F.3d 873, 879 (3d Cir. 1995).

The Court must consider private and public factors to determine in which forum the interests of justice and convenience would best be served. Id. Private factors include: (1) the plaintiff's forum preference; (2) the defendant's preference; (3) where the claim arose; (4) the relative physical and financial condition of the parties; (5) the extent to which witnesses may be unavailable for trial in one of the fora; and (6) the extent to which books and records could not be produced in one of the fora. Id.

Public factors include: (1) the enforceability of a judgment; (2) practical considerations that could make trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty resulting from court congestion; (4) the local interest in deciding the controversy; (5) the public policies of the fora; and (6) the familiarity of the trial judge

with the applicable state law in diversity cases. Id. at 879-80.

Here, the private factors are either neutral or balance each other out. The first factor, plaintiff's choice, weighs against transfer. Generally, a court should not lightly disturb a plaintiff's choice of its home forum. Id. at 879.

The defendant argues that the plaintiff's choice of forum should not be entitled to deference because the plaintiff is not the injured party in this case.¹ The United States Court of Appeals for the Third Circuit has never addressed the question of whether a declaratory plaintiff's choice of forum is entitled to the same amount of deference as other plaintiffs. At least two courts in other jurisdictions have suggested that it is not. See Hyatt Int'l Corp. v. Coco, 302 F.3d 707, 719 (7th Cir. 2002) (in a declaratory judgment action, the principle of deference to the plaintiff's choice of forum has "less force"); Societe Generale v. Florida Health Sciences Center, Inc., 03 Civ. 5615, 2003 U.S. Dist. LEXIS 21502 at *24 (Dec. 1, 2003) (same). But see American Casualty Company of Reading, Pennsylvania v. Filco, No. 04-C-3782, 2004 U.S. Dist. Lexis 20851 at *7 (N.D. Ill. Oct. 14, 2004) (rejecting argument that declaratory plaintiffs' choice of forum should not be entitled to deference).

¹ The defendant has questioned the plaintiff's motives for filing an action for declaratory relief in this district. The Court does not find that the plaintiff's actions, in filing this suit in its home forum to resolve a live controversy, were motivated by a desire to vex, harass, or oppress the defendant.

The Court concludes that a declaratory plaintiff's choice of forum is entitled to deference, but that the level of deference might be lessened by evidence that the plaintiff filed the declaratory action or engaged in other tactics in order to deprive the so-called "natural plaintiff" of his choice of forum. See Hyatt Int'l Corp., 302 F.3d at 719. The Court does not find that the plaintiff filed the declaratory action or took other measures for the purpose of depriving the defendant of his choice of forum. Moreover, given the fact that the defendant sued the plaintiff in the Court of Common Pleas of Montgomery County, Pennsylvania in February 2005 regarding a separate but related severance agreement, the plaintiff might not have suspected that the defendant would object to this forum. Even if the Court gives the plaintiff's choice somewhat less deference because it filed the instant action rather than waiting to be sued, the plaintiff's choice still weighs against transfer.

The second factor, defendant's choice, weighs in favor of transfer. The defendant is a resident of Maryland and prefers to litigate this matter in the District of Maryland.

The third factor, where the claim arose, weighs slightly against transfer. Events or omissions giving rise to the defendant's claim that the plaintiff failed to perform under the SPA occurred in both Pennsylvania and Maryland, as did events or omissions giving rise the plaintiff's claim that the defendant

failed to satisfy conditions precedent to its performance. The main omission in dispute, however, the plaintiff's alleged failure to make additional investments in Highcast, occurred in Pennsylvania.

The fourth factor, convenience of the parties as indicated by their relative physical and financial condition, weighs in favor of transfer. The plaintiff is a corporation with more than \$30 million in cash and maintains offices and employees in Maryland. The defendant is an individual proceeding pro se. He is currently unemployed and his resources are significantly more limited than that of the plaintiff. In addition, the defendant's wife was recently diagnosed with a serious illness.

The fifth and sixth private factors, availability of witnesses and location of books and records, are neutral. The parties have indicated that the two most important witnesses, apart from the defendant, reside in Pennsylvania, but are willing to travel to Maryland to testify. The parties have not identified any witnesses who are unwilling or unable to travel to testify. Both parties possess relevant documents, but these documents can be shipped for use in either forum.

The public factors are either neutral or not relevant. The defendant argues that the local interest factor weighs in favor of transfer because Maryland has an interest in deciding a controversy that could result in the bankruptcy of a Maryland

corporation. The Court does not view this controversy as a particularly local one. Whatever interest Maryland has in deciding a controversy involving a business located in that state is equaled by the interest Pennsylvania has in deciding a controversy involving a business that has its principal place of business in this state.

Having weighed the Jumara factors, the Court concludes that the defendant has not met his burden of establishing the need for transfer. The Court does appreciate the challenges facing the defendant in defending this action pro se some distance from his home while his wife is ill. The Court will make efforts to facilitate the defendant's participation in the case, including use of telephone conferences and flexibility in scheduling.

An appropriate Order follows.

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ORDER

AND NOW, this 9th day of March, 2006, upon consideration of the defendant's Motion to Dismiss or Transfer (Doc. No. 8), the plaintiff's opposition, the defendant's reply thereto, and the parties' February 27 and March 1, 2006 letters to the Court, and following a status conference held on the record on February 24, 2006, IT IS HEREBY ORDERED that the defendant's motion is DENIED, for the reasons stated in a memorandum of this date.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.