

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

ATLAS COMMUNICATIONS, LTD. : CIVIL ACTION
 :
 v. :
 :
 LYMAN E. WADDILL and INTEGRITY :
 TELECOM, INC. : No. 97-1373

MEMORANDUM AND ORDER

Norma L. Shapiro J.

October 28, 1997

This breach of contract action was brought by Atlas Communications Ltd. ("Atlas") against Integrity Telecom, Inc. ("Integrity") and its principal agents, Lyman E. Waddill ("Waddill") and Paul Dugan ("Dugan"). Before the court is defendant Waddill's Motion to Transfer Venue based on 28 U.S.C. §§ 1406, and 1404(a). Because defendant Waddill waived any objections to venue, the motion under § 1406 will be denied. Because Waddill has not demonstrated that convenience and the interests of justice mandate a transfer, the motion under § 1404(a) will be denied.

BACKGROUND

Atlas is a telephone company organized pursuant to the laws of the Commonwealth of Pennsylvania. Atlas sells domestic long-distance service to customers that resell the service. Atlas also provides some international service, if it is a small portion of the customer's need. Integrity specializes in servicing companies that sell prepaid debit card service to long-

distance telephone users. Atlas alleges that in mid-December, 1996, Integrity, through its agents, contracted to purchase long-distance phone service from Atlas to resell to its customers. In February, 1997, a dispute arose over the amount of money Integrity owed Atlas. Atlas terminated service on February 12, 1997.

On February 24, 1997, Atlas filed this action against Integrity and its principal agents, Paul Dugan and Lyman E. Waddill. On February 27, 1997, Atlas, seeking a prejudgment writ of attachment against Integrity, filed an action in California state court. After a hearing the following day, the California court granted Atlas's request for a temporary restraining order. Waddill was served with the complaint on April 1, 1997. On April 24, 1997, Atlas filed a motion for default against defendant Waddill. This motion was granted, pursuant to Fed. R. Civ. P. 55(a), by order of April 24, 1997. On June 16, 1997, defendant Waddill filed a motion to set aside the default, and attached the present Motion to Transfer Venue. Following a hearing, on August 11, 1997, the court granted defendant Waddill's motion to set aside the default, and ordered the Motion to Transfer Venue filed nunc pro tunc.

DISCUSSION

1. Transfer of Venue under 28 U.S.C. § 1406 .

Waddill attached this challenge to venue to a motion to set aside the default. Having defaulted, Waddill cannot assert a challenge to venue under 28 U.S.C. § 1406, because a "defendant .

. . waives venue by failing seasonably to assert it, or even simply by making default." Hoffman v. Blaski, 363 U.S. 335, 343 (1960). It is well established that any objection to venue is waived by a defendant who defaults. See 15 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3829 (2d ed. 1986).

The objection to venue is not revived upon the court's decision to set aside the default. An assertion of improper venue is waived if not asserted before the expiration of the period in which the defendant is required to appear or respond. Totalplan Corp of Am. v. Lure Camera Ltd., 613 F. Supp. 451 (W.D.N.Y. 1985). "The fact that a court has allowed a party in default to proceed to suit and answer the complaint does not automatically put the defaulting party in the position of one who is making a timely response to the complaint." Bavouset v. Shaw's of San Francisco, 43 F.R.D. 296, 299 (S.D. Tex. 1967). Waddill's motion to transfer venue under 28 U.S.C. § 1406 was waived, and cannot be asserted.

2. Transfer of Venue under 28 U.S.C. § 1404 .

In the alternative, Waddill moved for a change of venue under 28 U.S.C. § 1404(a):

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.

The movant bears the burden of establishing the need for transfer. Shutte v. Armco Steel Corp., 431 F.2d 22 (3d Cir.

1970), cert. denied, 401 U.S. 910 (1971). While the decision should be based on "an individualized case-by-case consideration of the convenience and fairness," Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988), the plaintiff's choice of venue should not be lightly disturbed. Schexnider v. McDermott Int'l, Inc., 817 F.2d 1159 (5th Cir. 1987).

Private and public interests must be considered in deciding whether to transfer, including, inter alia: plaintiff's forum choice; the defendant's preference; forum selection clauses, if any; the situs of the claim; the physical and financial convenience to the parties; the possible unavailability of witnesses; and, in diversity actions, the familiarity of the trial judge with the applicable state law. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-80 (3d Cir. 1995).

A. Venue in the Northern District of California

Under § 1404(a), the court may only transfer the action to another district in which the action "might have been brought." 28 U.S.C. § 1404(a). The Northern District of California has both subject matter jurisdiction and in personam jurisdiction. Atlas argues that only courts in Pennsylvania have jurisdiction because the parties "contracted for Pennsylvania to have jurisdiction over this matter," but the judicial power of the United States originates from the Constitution and acts of Congress, not the agreement of parties to a suit. "The parties ... may not confer subject matter jurisdiction upon the federal courts by stipulation, and lack of subject matter jurisdiction

cannot be waived by the parties or ignored by the court."
Pacific Nat'l Ins. Co. v. Transport Ins. Co., 341 F.2d 514, 516
(8th Cir.), cert. denied, 381 U.S. 912 (1965); see also
Pennsylvania v. Union Gas Co., 491 U.S. 1, 25 (1989) (Stevens,
J., concurring) ("[T]he cases are legion holding that a party may
not waive a defect in subject-matter jurisdiction or invoke
federal jurisdiction simply by consent." (citations omitted)).

If this court has subject matter authority under 28 U.S.C. §
1332, the District Court for the Northern District of California
would also have subject matter jurisdiction under the same
provision. That court would also have in personam jurisdiction
over the defendants, because all the defendants reside in
California. This action could have been brought in the Northern
District of California, and this court may transfer it there
under 28 U.S.C. § 1404.

B. Forum Selection Clause.

Substantial consideration, but not dispositive weight, must
be given to the parties' agreement on the forum, Stewart, 487
U.S. at 29, 31; Red Bull Assocs. v. Best Western Int'l, Inc.,
862 F.2d 963, 967 (2d Cir.1988).

Defendant Waddill argues that because he did not sign the
contract, he should not be bound by the forum selection clause.
The complaint alleges that Waddill is liable on the contract
because he ignored corporate formalities as an Integrity officer,
and used Integrity's corporate structure for his personal
benefit. The Court of Appeals has held that a range of

transaction participants, parties and non-parties, should be subject to forum selection clauses. Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202-03 (3d Cir.), cert. denied, 464 U.S. 938, (1983); Cinema Laser Technology, Inc. v. Hampson, 1991 WL 90913, at *3 (D.N.J. May 30, 1991) (non-party officer of contracting corporation on constructive notice of and bound by forum selection clause). This action arises out of Waddill's actions as an officer of Integrity; in determining the appropriate venue, the forum selection clause in the contract may be given effect.

Even if Waddill is correct that he is not contractually bound by the forum selection clause, Atlas as plaintiff chose this forum, "a paramount consideration [which] should not lightly be disturbed." Sovereign Bank, F.S.B. v. Rochester Community Savings Bank, 907 F. Supp. 123, 126 (E.D. Pa. 1995).

C. Convenience of the Parties

Waddill argues emphasizes the location of both defendants in California, as well as plaintiff's commencement of an attachment proceeding in California and retention of counsel for that purpose. Waddill also relies on his financial difficulties since Integrity's recent bankruptcy.

It may be more convenient for Waddill and Integrity to defend at home. However, Atlas is incorporated in Pennsylvania with its principal place of business in Pennsylvania, it is more convenient for Atlas to prosecute this suit here. "Atlas has agreed to pay Waddill's travel expenses." (Atlas's Brief in

Opposition to Defendant Waddill's Motion to Transfer Venue, p. 18). The convenience of the parties does not sufficiently weigh in favor of California to ignore the forum selection clause and Atlas's choice of forum.

D. Availability of Other Witnesses.

Several witnesses from California will "review the Plaintiff's phone logs for accuracy" and explain "the reasons for nonpayment." (Memorandum of Law in Support of Motion to Transfer Venue, p. 8). But Atlas will call witnesses from its office, located in Pennsylvania. Witnesses are located in both California and Pennsylvania, so neither locale is more convenient than the other regarding the availability and convenience of witnesses.

E. Law to be Applied.

The contract provides that it "shall be governed by . . . the laws of . . . Pennsylvania." Defendant argues that "if in fact Pennsylvania law is to govern, . . . the law to be applied . . . [is not] complicated or unique to Pennsylvania." (Memorandum of Law in Support of Motion to Transfer Venue, p. 9). This court, sitting in Pennsylvania, has greater experience with Pennsylvania law than the California courts. The choice of law provision weighs in favor of this court retaining jurisdiction.

CONCLUSION

Waddill's motion to transfer venue under § 1406 was waived when he defaulted. In considering his motion to transfer under §

1404(a), the plaintiff's choice of forum, the forum selection clause, and the choice of law clause all favor retention of the case. The convenience of the parties and the availability of witnesses do not favor transfer. There are no public interests outweighing the factors denying transfer. Waddill's motion to transfer will be denied.

An appropriate order follows.

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ORDER

AND NOW, this 28th day of October, 1997, upon consideration of defendant's Waddill's Motion to Transfer Venue, and plaintiff's opposition thereto, it is **ORDERED** that:

Defendant Waddill's Motion to Transfer Venue is **DENIED**;

Norma L. Shapiro J.