

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

FRONTIER INSURANCE CO. : CIVIL ACTION  
 :  
v. :  
 :  
NATIONAL SIGNAL CORP.; : NO. 98-4265  
JOSEPH S. BANASIAK; and :  
KIMBERLY A. BANASIAK :

**MEMORANDUM**

Giles, J.

November \_\_\_\_, 1998

Plaintiff brings this diversity action for indemnity and breach of contract, seeking declaratory and monetary relief. Now before this court is the motion of defendants Joseph S. Banasiak and Kimberly A. Banasiak (collectively the “Banasiaks”) to dismiss the complaint for lack of personal jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(2), for improper venue, pursuant to Fed. R. Civ. P. 12(b)(3), or to transfer venue to a different district, pursuant to 28 U.S.C. § 1404(a). For the reasons that follow, the motion is denied.

**FACTUAL BACKGROUND**

The Banasiaks are the owners, officers, and directors of defendant National Signal Corp. (“National”). No party is domiciled in Pennsylvania. National is a Michigan corporation with its principal place of business in Michigan; the Banasiaks reside in Michigan; and the plaintiff, Frontier Insurance Co. (“Frontier”), is a New York corporation with its principal place of business in New York. (Compl. ¶¶ 5-9).

In March and April 1993, National contracted with the New Hope and Ivyland Railroad for design, refurbishment, and construction work on several railroad grade crossing signals in Pennsylvania. (Compl. ¶ 17; Mem. Opp. Mot. Dismiss, Ex. B). On April 1, Frontier issued a

Performance and Payment Bond as security for that work. (Compl. ¶¶ 16-17). In March 1993, plaintiff had entered a General Agreement of Indemnity (the “Agreement”) signed by all defendants, including the Banasiaks in their individual capacities. (Compl. Ex. A). By the Agreement, the Banasiaks undertook to indemnify Frontier from any claims, demands, payments, or judgments that Frontier incurred for having bonded National’s Pennsylvania railroad construction work. (Compl. Ex. A, ¶ 2). The defendants entered the Agreement to induce Frontier to issue the performance and payment bond as security for National’s work on the Pennsylvania railroad construction (Compl. ¶¶ 15-17).

In June 1994, one of National’s suppliers filed suit against Frontier and National, seeking payment for equipment sold to National. (Compl. ¶¶ 18-20). Judgment was entered against the plaintiff in that earlier action, which defendants allege was the result of malpractice by plaintiff’s attorney. (Mem. Supp. Mot. Dismiss at 3-4). In July 1997, Frontier paid that supplier in excess of \$200,000 under the terms of the performance bond. (Compl. ¶ 21). This lawsuit, to recover moneys paid and expended according to the indemnity Agreement, followed.

### DISCUSSION

The Banasiaks’ motion<sup>1</sup> asks the court to dismiss the case on three grounds: 1) for lack of personal jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(2); 2) for improper venue, pursuant to Fed. R. Civ. P. 12(b)(3); and for transfer of venue, pursuant to 28 U.S.C. § 1404(a). We address each of these in turn.

#### **Personal Jurisdiction**

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<sup>1</sup> National is not a party to the motion.

When a defendant raises the defense of the court's lack of personal jurisdiction, the plaintiff bears the burden of bringing forward sufficient jurisdictional facts to establish with reasonable particularity that there were sufficient contacts between the defendants and the forum as to make jurisdiction proper. Mellon Bank (East) PSFS, Nat'l. Ass'n. v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). For purposes of the motion, this court must accept as true the plaintiff's version of the facts, and draw all inferences from the pleadings, affidavits, and exhibits in plaintiff's favor. DiMark Mktg., Inc. v. Louisiana Health Serv. & Indem. Co., 913 F. Supp. 402, 405 (E.D. Pa. 1996).

A federal district court sitting in diversity exercises personal jurisdiction over non-resident defendants to the extent permissible under the laws of the state in which the court sits. Grand Entertainment Group v. Star Media Sales, 988 F.2d 476, 481 (3d Cir. 1993); Fed. R. Civ. P. 4(e). Under Pennsylvania law, a court exercises jurisdiction to the fullest extent permitted by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. 42 Pa. Con. Stat. Ann. § 5322(b).

The Due Process Clause demands that defendants establish "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Provident Nat'l. Bank v. Calif. Fed. Sav. & Loan Ass'n., 819 F.2d 434, 437 (3d Cir. 1987) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). The court applies a two-part analysis. First, defendants must establish minimum contacts with the forum through affirmative acts by which they purposefully avail themselves of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985) (quoting

Hanson v. Denckla, 357 U.S. 235, 253 (1958)); Grand Entertainment, 988 F.2d at 482. These contacts are established where “defendant’s conduct and connection are such that [defendants] should reasonably anticipate being haled into court there.” Burger King, 471 U.S. at 474. The plaintiff bears the burden of establishing the existence of minimum contacts. North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 689 (3d Cir.), cert. denied, 498 U.S. 847 (1990). Second, once sufficient minimum contacts have been established, the court must consider whether the assertion of personal jurisdiction would comport with “fair play and substantial justice,” Burger King, 471 U.S. at 476, a determination for which the defendant challenging the court’s jurisdiction bears a heavy burden of proof. Grand Entertainment, 988 F.2d at 483 (citations omitted); see Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (Brennan, J., concurring in part and concurring in the judgment) (noting that it is the “rare” case in which a defendant has minimum contacts with a forum but jurisdiction would be unfair or unjust).

Jurisdiction demands a “highly realistic approach,” Mellon Bank, 960 F.2d at 1224, taking into account the relationship among the forum, the defendant, and the litigation. Id. at 1221. In a contract case, the court examines the terms of the contract, prior negotiations, anticipated future consequences, and the parties’ actual course of dealing. Id. at 1224. Personal jurisdiction may be specific, in that the particular cause of action arises from the defendant’s activities within the forum state, or it may be general, in that the defendant has continuous and systematic contacts with the forum. Provident Nat’l. Bank, 819 F.2d at 437 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)). Because there is specific jurisdiction in the instant case, this court need not reach the question of general jurisdiction.

The parties focus their briefing primarily on whether Joseph Banasiak's contacts with Pennsylvania during the course of the construction project, performed in his capacity as an officer of National, are sufficient to establish jurisdiction over him and over Kimberly individually. See Rittenhouse & Lee v. Dollars & Sense, Inc., No. 83-5996, 1987 WL 9665, \* 4-5 & n.6 (E.D. Pa. 1987) (Scirica, J.) (discussing the narrow circumstances under which an individual's contacts in his corporate capacity may be imputed for jurisdiction over the individual). The court does not reach the question of whether to pierce the corporate shield, however, because it finds that both Joseph and Kimberly had individual contacts with Pennsylvania apart from their capacities as officers of National.

Both Joseph and Kimberly Banasiak signed, in their individual capacities, the Agreement that is the subject of this lawsuit. By that contract, the Banasiaks agreed to indemnify Frontier for any loss incurred on the performance and payment bonds that guaranteed National's construction work in Pennsylvania. (Compl. ¶¶ 11-15). In effect, the Banasiaks stepped into Frontier's shoes and themselves guaranteed the Pennsylvania construction work performed by National. Serving as a guarantor may amount to minimum contacts where, as in the instant case, the guarantor has a financial interest in the business or person whose obligation it guarantees. See Hale v. MRM Trucking, Inc., No. 90-6072, 1991 WL 114829, \*2 (E.D. Pa. 1991) (citing Koff v. Brighton Pharm., Inc., 709 F. Supp. 520, 526 (D N.J. 1988)).

This rule typically applies in a lawsuit arising directly from the work that was guaranteed. See Hale, 1991 WL 114829, at \*1 (describing facts of action to recover money owed brought against the other party to lease agreement and the guarantor). The instant case is removed by one additional layer--the Banasiaks guaranteed the bonding of the construction work and Frontier

seeks recovery under the Agreement that created the secondary guarantee. However, the principle extends to this additional layer. The Agreement itself is a contract by both of the Banasiaks individually with the construction work and therefore with Pennsylvania, and is sufficient to establish specific jurisdiction on a lawsuit arising out of the Agreement.

Both Joseph and Kimberly Banasiak have disclaimed any personal liability for the payments to subcontractors and/or suppliers on the Pennsylvania railroad project. (Aff. of Joseph Banasiak ¶ 5; Aff. of Kimberly Banasiak ¶ 5). This may be true as far as direct payments by National to its supplier or subcontractors. However, it appears to contradict the plain language of the General Agreement of Indemnity, signed by both Joseph and Kimberly individually, as to payments made by Frontier, which is the issue in this case. (Compl. Ex. A). The court must resolve any factual disputes in favor of the plaintiff for purposes of this motion. See DiMark, 913 F. Supp. at 405. Therefore, for purposes of the motion, the Banasiaks could be individually liable under the Agreement for payments made by Frontier to subcontractors or suppliers on the Pennsylvania railroad construction project.

Moreover, performance of the Agreement is centered in Pennsylvania. The very purpose of the Agreement focuses on Pennsylvania. Frontier entered the Agreement with the Banasiaks as security for issuing the performance bonds, which bonds in turn were necessary to enable National to contract to perform the railroad construction work in Pennsylvania. Absent that connection with Pennsylvania, neither party would have entered the Agreement. Performance of the Agreement turned on the execution and completion of the bonded work in Pennsylvania and on Frontier's paying on the bond obligations in Pennsylvania. Frontier brought this lawsuit to recover for payments under the Agreement and expenses that it had incurred in Pennsylvania.

The Banasiaks argue that the contract was not signed or breached in Pennsylvania. (Reply ¶ 7). However, the question of breach or performance relates to Pennsylvania-focused events. This relationship among Pennsylvania, the parties, and their contract makes it reasonable for the Banasiaks to have anticipated being haled into court in Pennsylvania in a dispute over the indemnity Agreement. See Burger King, 471 U.S. at 474.

Having determined that the Banasiaks had minimum contacts with Pennsylvania, the court must address whether jurisdiction comports with fair play and substantial justice. Among the factors to be evaluated are the burden on the defendants, the forum's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the states in furthering fundamental substantive social policies. Id. at 477. The defendants must present a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." Grand Entertainment, 988 F.2d at 483 (citations and internal quotation marks omitted). The Banasiaks have not carried that burden. They have offered no suggestions that being subjected to jurisdiction in Pennsylvania is so burdensome or so offensive to the interstate judicial system as to offend fair play and substantial justice. See Burger King, 471 U.S. at 476-77. Thus, the court concludes that it has in personam jurisdiction over both Joseph Banasiak and Kimberly Banasiak; dismissal on that ground is denied.

### **Improper Venue**

The Banasiaks claim that venue is improper in this District. In this circuit, defendants bringing a motion to dismiss bear the burden of establishing affirmatively that venue is improper. Myers v. American Dental Ass'n., 695 F.2d 716, 724-25 (3d Cir. 1982), cert. denied, 462 U.S.

1006 (1983); Grissinger v. Young, No. 98-1710, 98 WL 376040, \*2 (E.D. Pa. 1998).

Subject matter jurisdiction in this case is based solely on diversity of citizenship, 28 U.S.C. § 1332. Thus venue is proper in, inter alia, “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.” 28 U.S.C. § 1391(a)(2). In a breach of contract action, courts in this district will look to the place of performance of the contract in determining whether venue is proper. J.L. Clark Mfg. Co. v. Gold Bond Corp., 629 F. Supp. 788, 791 (E.D. Pa. 1985) (citing Moore’s Federal Practice, § 0.1425.2 at 1435 (2d ed. 1985)); Waste Management of Pennsylvania, Inc. v. Pollution Control Fin. Auth. of Camden County, No. 96-1683, 1997 WL 22575, \*1 (E.D. Pa. 1997).

As already has been discussed, supra, the Agreement turned on execution and completion of the bonded railroad construction work and the payment on the performance bond, both of which occurred in Pennsylvania. The Agreement made the Banasiaks effective guarantors of National’s construction work in Pennsylvania. The existence and performance of the Agreement thus were centered and focused in Pennsylvania, making it the place of occurrence of substantial events giving rise to the claim in the instant case. Venue therefore is proper in this district; dismissal on that ground is denied.

### **Transfer of Venue**

The Banasiaks also seek to have this case transferred to the United States District Court for the Eastern District of Michigan. “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). Venue in a diversity case is proper in a

district where any defendant resides, if all defendants reside in the same state. 28 U.S.C. § 1391(a)(1). As all the defendants in the instant case reside in Michigan (Complaint ¶¶ 7-9), venue also would be proper in the Eastern District of Michigan, making that a district where the action might have been brought. The issue thus becomes whether the case should be transferred.

The district court has broad discretion to transfer an action under § 1404(a)<sup>2</sup>, but transfers should not be liberally granted. Elbeco Inc. v. Estrella de Plato, Corp., 989 F. Supp. 669, 679 (E.D. Pa. 1997). The defendants bear the burden of establishing the need for transfer. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). The purpose of transfer is not to shift the inconvenience from one party to another. Elbeco, 989 F. Supp. at 679.

The court must “consider all relevant factors to determine whether on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum.” Jumara, 55 F.3d at 879 (quoting 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 3847). Courts balance many variants of the private and public interests protected by § 1404(a), although there is no definitive formula or list of factors. Jumara, 55 F.3d at 879.

The private interests include: 1) plaintiff’s forum preference; 2) defendant’s preference; 3) whether the claim arose elsewhere; 4) convenience of the parties; 5) convenience of witnesses to the extent that a witness may be unavailable for trial in one of the fora; 6) location of books and records to the extent they may be unavailable in one of the fora. Id. The public interests

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<sup>2</sup> In their response to the motion to dismiss, plaintiffs refer to the motion as one for transfer under the doctrine of forum non conveniens. However, the venue statute has limited the federal doctrine of forum non conveniens only to cases where the alternative forum is located abroad. American Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994). The motion is properly addressed as one under § 1404(a) and not forum non conveniens.

include: 1) enforceability of the judgment; 2) practical considerations that could make the trial easy, expeditious, or inexpensive; 3) relative administrative difficulty in the two fora resulting from court congestion; 4) local interest in deciding local controversies at home; 5) public policies of the fora; and 6) familiarity of the trial judge with the applicable state law in diversity cases. Id. at 879-80. Moreover, the plaintiff's choice of forum should not be lightly disturbed. Id. at 879. Although a court may accord less deference to that choice where, as here, the plaintiff is not a resident of the forum, American Littoral Soc. v. United States Env'tl. Protection Agency, 943 F. Supp. 548, 551 (E.D. Pa. 1996), that choice does not become irrelevant and cannot be ignored altogether.

The Banasiaks have not established that Michigan is a more convenient forum. It is true that they are Michigan residents and that their documents and other sources of proof are located there. They also argue that one non-party witness, the lawyer whose malpractice allegedly caused the plaintiff to pay on the performance bond and therefore will be at issue in the case, is located in Michigan.

That is not enough to warrant transfer. Pennsylvania, where Frontier has chosen to bring this action, is a geographically more convenient forum for the New York-based plaintiff than is Michigan. Although Michigan would be more convenient for the Banasiaks, transfer cannot merely shift the inconvenience. Convenience of the parties is roughly in equipoise, therefore transfer should not be granted. The Banasiaks concede that this is not a document-intensive case; thus producing documents in Pennsylvania will not represent a burden on them any more than producing documents would represent a burden on Frontier. (Mem. Supp. Mot. Dismiss at 11). Again, this factor is roughly in equipoise, therefore transfer should not be granted.

The claims did arise in Pennsylvania; key events underlying the performance and execution of the Agreement occurred in Pennsylvania and the Agreement was necessary to allow the railroad construction to proceed in Pennsylvania. Thus there is a local interest in deciding this case and in furthering Pennsylvania public policy. Only one witness, Frontier's former attorney, apparently will not be subject to compulsory process in this court who would be so subject in Michigan. That one witness does not make trial in Michigan so much quicker, less expensive, or otherwise more expeditious than trial in this court as to warrant transfer. The Banasiaks therefore have not carried their burden of establishing the need for transfer and the motion to transfer is denied.

#### CONCLUSION

This court has personal jurisdiction over the Banasiaks; venue is proper in this forum; and the Banasiaks have not shown that transfer is proper. Thus the motion to dismiss is denied.

An appropriate order follows.

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KIMBERLY A. BANASIAK :

**ORDER**

AND NOW, this \_\_\_\_ day of November 1998, upon consideration of defendants' Joseph S. Banasiak and Kimberly A. Banasiak motion to dismiss and having considered the arguments of the parties, it hereby is ORDERED that the motion is DENIED. Further, it is ORDERED that the motion to transfer the case to a different district is DENIED.

BY THE COURT:

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JAMES T. GILES J.

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