

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

UTI CORPORATION : CIVIL ACTION  
d/b/a MICRO-COAX :  
 :  
v. :  
 :  
 :  
PLATING RESOURCES, INC. : NO. 99-253

M E M O R A N D U M

WALDMAN, J.

May 7, 1999

I. Introduction

Plaintiff has asserted claims for a declaratory judgment that it has not breached an industrial equipment construction contract with defendant and for breach of contract by defendant. Six hours after this action was filed, defendant sued plaintiff in the Northern District of Ohio for breach of contract and for compensation for work performed and materials furnished under a quantum meruit theory. Defendant also asserted claims in that action for breach of contract and indemnification against MetFab Technologies, Inc., defendant's subcontractor.

Plaintiff is a Pennsylvania corporation with its principal place of business in Collegeville. Defendant is an Ohio corporation with its principal place of business in Twinsburg. MetFab is a Rhode Island corporation with its principal place of business in Warwick.

Presently before the court is defendant's motion to transfer this action to the Northern District of Ohio, and alternative motion to stay this action pending resolution of the Ohio action.

## **II. Factual Background**

The pertinent factual allegations are as follow.

On July 11, 1997, defendant submitted to Micro-Coax, a division of plaintiff UTI, a proposal to build a "Continuous Tin/Silver/Solder Plating Facility" for the as-yet unfinished Micro-Coax facility in Pottstown, Pennsylvania. The price was \$1,983,200, with a down payment of 20 percent. Progress payments totaling 55 percent were to be made on August 11, September 11 and October 11, 1997. Ten percent was to be paid upon shipment and the final 15 percent upon start-up. The proposal did not define the term "start-up."

Later on July 11, 1997, Micro-Coax sent defendant a purchase order for the facility in accordance with the terms of the proposal as supplemented by additional requirements, terms and conditions of purchase supplied by Micro-Coax, along with a check for the down payment.

Among the additional requirements was a "delivery" provision which stated that "[t]ime is of the essence" and requiring that the system be "ready for installation" at the opening of Micro-Coax's Pottstown facility, then scheduled for

October 1, 1997, "with an installation time of eight (8) weeks followed by a two (2) week trial/training/debugging phase." The "General Terms and Conditions of Purchase" in Micro-Coax's purchase order contained an acceptance clause providing that:

[a]cceptance of this purchase order is expressly limited to the terms and conditions set forth in the purchase order . . . Any acknowledgments which state terms additional to or different from those set forth in this purchase order will not operate as an acceptance unless such terms are agreed upon in writing by the purchaser. The seller agrees that this purchase order contains the complete and exclusive statement of the agreement, and no other agreement, understanding or proposal which modifies any term or condition of the purchase order shall be binding unless it has been reduced to writing and accepted by the Purchaser.

Micro-Coax also included a provision that no "extras" over the price shown on the purchase order would be allowed unless authorized by Micro-Coax in writing, and a warranty clause which stated that:

Seller warrants the Material furnished . . . (a) to be free from defects in title, labor, material or fabrication, (b) to conform to applicable specifications, drawings, samples, or other descriptions given, (c) to be suitable for the purpose intended, (d) to be of merchantable quality and further warrants that Material of Seller's design will be free from defects in design . . . . Seller agrees to replace, install, or correct promptly without expense to the Purchaser, any material not conforming to the foregoing requirement, when notified by the Purchaser. In the event of failure of the Seller to correct or replace material as required herein, Purchaser may correct, install or

replace material and charge the Seller the cost thereof. Acceptance or use of the material furnished hereunder shall not affect Seller's obligation under this Warranty.

The purchase order also contained a bold captioned arbitration clause. The clause provided that any dispute arising from the purchase order would be submitted to binding arbitration.

On July 16, 1997, defendant advised plaintiff by telefax that it had accepted "as per our Proposal . . . of 7/11/97 with our Standard Terms and Conditions." The acceptance contained provisions stating that:

W. These Terms and Conditions shall prevail. Other terms and conditions, which may be shown on Buyer's purchase order(s) shall be superseded by those listed herein.

X. These Terms and Conditions are to be governed and construed in accordance with the laws of the State of Ohio. Any controversy will be settled by binding arbitration in the city of Twinsburg, Ohio, or other location selected by Plating Resources, Inc.

Y. The Terms and Conditions set forth herein constitute the entire agreement between Buyer and Plating Resources, Inc. and supersedes all prior understandings. Plating Resources, Inc. has made no representations other than those contained herein.

The acceptance also contained a clause defining "start-up" as "having completed the equipment installation and initial test plating." Defendant deposited Micro-Coax's check and commenced

work on the plating line. Plaintiff did not expressly consent to any additional or different terms in defendant's acceptance.

On January 20, 1998, defendant submitted to Micro-Coax a quotation of \$228,750 for a "custom flying saw cutting system" to be used to cut the plated tubing produced by the plating line. The quotation noted that the "cost for a Recoiling System for two (2) coils is not yet included, as engineering is currently under way. This item will be quoted separately, hopefully, within ten days." On February 4, 1998, defendant submitted a recoiler quotation of \$80,600 for two "custom coiler systems" to be used in conjunction with the plating line and custom flying saw. On February 9, 1998, defendant submitted to Micro-Coax a letter containing "operational details" pertaining to the custom flying saw and recoiler.

On February 13, 1998, Micro-Coax sent a purchase order in the amounts of \$228,750 and \$80,600 in response to the quotations. This was described in a letter as a "supplement" to the July 11, 1997 purchase order. According to the letter, the "fully integrated system would have to meet the performance specifications contained in Micro-Coax's July 11, 1997 purchase order." The purchase order was accompanied by "General Terms and Conditions of Acceptance" identical to those contained in Micro-Coax's plating line purchase order. Defendant accepted the custom flying saw and recoiler purchase order.

Micro-Coax moved into its Pottstown facility on May 1, 1998. Ten weeks later, defendant had still not delivered, installed and debugged a plating line that met all of Micro-Coax's specifications. The plating line could not plate tin, silver or solder on a substrate of aluminum. On July 21, 1998, defendant demanded immediate payment of the final 15 percent of the contract price, less a \$50,000 hold-back due in 30 days.

Micro-Coax believed that it was not obligated to pay the final 15 percent until defendant installed a completely conforming plating line. It rejected the demand for immediate payment but did pay \$25,000 to defendant on July 30, 1998 to help ensure it would remain able and willing to deliver plaintiff's plating system. Plaintiff asserts that defendant refused to complete the debugging of the plating line, withheld personnel needed to complete debugging, refused to provide Micro-Coax with vital technical information regarding the contents of the plating line's chemical baths and refused to provide certain necessary chemicals. Defendant took the position that "start-up" had been achieved and that the final 15 percent of the contract price was due.

By letter of November 12, 1998, defendant informed Micro-Coax that it was "now forced to proceed with collection" of the balance of the contract price and attached an invoice for \$38,589, described as interest owed on the "past due" balance.

By letter of November 16, 1998, Micro-Coax responded that the final 15 percent was not yet due because "start-up" had not been achieved, that defendant was in breach of its contractual obligations and that if the deficiencies were not cured by November 25, 1998, Micro-Coax would hire third-party vendors to do so at defendant's expense. Micro-Coax specifically complained about deficiencies of the custom flying saw and recoiler. When defendant failed to cure the alleged deficiencies to Micro-Coax's satisfaction, it retained third-party vendors to do so.

On December 12, 1997 and January 23, 1998, defendant submitted invoices for \$171,297 and \$91,672.40 respectively for extras for which Micro-Coax had not agreed to pay, including \$64,575 for "[a]dditional technical services." Micro-Coax objected to the invoices and demanded the opportunity to audit the charges. Defendant refused to permit an audit and insisted that its invoices be paid, but offered to discount them by 10 percent. Micro-Coax then paid the invoices under protest.

### **III. Discussion**

#### **A. Transfer**

For "the convenience of the 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." See 28 U.S.C. § 1404(a). The relevant private and public interest considerations in deciding a § 1404(a) motion include the plaintiff's choice of venue; the defendant's preference; where the claim arose; the relative physical and financial condition of the parties; the extent to which witnesses may be unavailable for trial in one of the fora; the extent to which records or other documentary evidence could not be produced in one of the fora; the enforceability of any judgment; practical considerations that could make the trial easy, expeditious or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and, the familiarity of the trial judge with the applicable state law in diversity cases. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). The moving party bears the burden of showing the case should be transferred. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988); Jumara, 55 F.3d at 879.

A plaintiff's choice of forum is generally entitled to great weight and "should not lightly be disturbed." Id. An exception exists, however, when the parties agreed to litigate any dispute in another forum. A forum selection clause is normally entitled to substantial consideration in the decision of whether to transfer a case. Id. at 880; Shore Slurry Seal, Inc. v. CMI Corp., 964 F. Supp. 152, 156 (D.N.J. 1997). This, of

course, rests on an assumption that the parties in fact agreed to the forum selection clause.

Plaintiff's purchase order provided that acknowledgments which stated terms additional to or different from those contained in the purchase order would not operate as an acceptance unless plaintiff agreed to any such terms in writing. The purchase order contained a traditional commercial arbitration provision which specified no location. Defendant's acceptance provided that any terms shown on plaintiff's purchase order inconsistent with those listed in the acceptance "shall be superseded." While both parties apparently agreed to settle any disputes by binding arbitration, plaintiff never consented in writing to the term in defendant's acceptance providing for arbitration in Ohio. Further, although a party who has agreed to arbitrate in Ohio will generally be unable to complain with conviction that litigating in Ohio would be unduly inconvenient, this case need not be transferred to a court in Ohio to effectuate any agreement to arbitrate.

Moreover, movant has not proceeded in a manner consistent with the forum selection clause on which it relies. There is no suggestion that defendant has demanded or sought in

any court to compel arbitration. Rather, it filed substantive claims in an Ohio federal court.<sup>1</sup>

Defendant asserts that this court "may not have jurisdiction over MetFab because the Subcontract designates proper venue in Ohio and because MetFab maintains insufficient contacts with Pennsylvania." The contract and subcontract at issue called for the delivery and installation of equipment and the provision of services by defendant and MetFab in this district. See 28 U.S.C. § 1391(a)(2). Defendant and MetFab clearly appear to be subject to personal jurisdiction here on claims arising from those obligations. Venue would thus be proper as a corporate defendant is amenable to suit in any district in which it is subject to personal jurisdiction. See 28 U.S.C. § 1391(c).

A party also may consent to a court's exercise of personal jurisdiction over it. See In re Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litigation, 15 F.3d 1230, 1236 (3d Cir.), cert. denied, 513 U.S. 915 (1994); John Hancock Property & Cas. Co. v. Hanover Ins. Co., 859 F. Supp. 165, 168-69 (E.D. Pa. 1994). MetFab's president has filed an affidavit in which he expressly consents to this court's

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<sup>1</sup> Of course, defendant also may waive any right it has to compel arbitration by substantially invoking the judicial process and actively participating in litigation. See PaineWebber, Inc. v. Faragalli, 61 F.3d 1063, 1068-69 (3d Cir. 1995); Subway Equipment Leasing Corp. v. Forte, 1999 WL 123967, \*2 (5th Cir. Mar. 24, 1999); Windward Agency, Inc. v. Cologne Life Reins. Co., 1997 WL 164269, \*2 (E.D. Pa. Apr. 1, 1997).

exercise of personal jurisdiction over it. Defendant's protestation that MetFab is "disingenuous" since it "will probably later file a motion to dismiss or stay pending arbitration" is unavailing. If defendant or MetFab believes that the claims against it are subject to mandatory arbitration, that party may demand or seek to compel arbitration just as well as if the action were proceeding in an Ohio court.

Defendant also asserts that MetFab is a necessary party as defined by Fed. R. Civ. P. 19. MetFab is not claiming an interest relating to the subject of the action and there is no apparent reason why in its absence complete relief could not be accorded among plaintiff and defendant. Defendant is principally seeking indemnification from MetFab should defendant be found liable to plaintiff. A party is not indispensable under Rule 19(b) when he may be joined as a third-party defendant. See United States v. Glenn, 585 F.2d 366, 368 (8th Cir. 1978); Clements v. Holiday Inns, Inc., 105 F.R.D. 467, 470-71 (E.D. Pa. 1984) (licensee not indispensable party even when it would likely bear financial burden of judgment against licensor due to indemnification agreement when licensee could be impleaded or could intervene).

What defendant actually appears to argue is that MetFab would not be a proper party in this action because the subcontract contained an arbitration provision and Ohio forum selection clause. MetFab is willing to have the claims against it or the issue of arbitrability adjudicated by this court.

Defendant can implead MetFab and have any issue regarding arbitrability decided by this court, or it can pursue its claims against MetFab in Ohio and have an Ohio court resolve any issues regarding arbitrability. What defendant may not reasonably do is complain that it is unjust or inconvenient to proceed with this litigation in a forum chosen by plaintiff because of a forum selection clause in a subcontract to which it was not a signatory or because MetFab ostensibly cannot be impleaded when the only reason is that defendant prefers not to do so.

Defendant also argues that it would be more efficient for the parties' respective claims to be consolidated and tried in one action. Each of the parties' claims, however, can effectively be consolidated and or stayed in favor of arbitration just as efficiently here as in the Northern District of Ohio.<sup>2</sup>

Defendant also predicates its motion to transfer on 28 U.S.C. § 1406(a). By its terms, however, § 1406(a) applies only when venue is not properly laid in the court in which plaintiff

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<sup>2</sup> Indeed, while the parties were filing supplemental, reply and sur-reply briefs on the instant motions, the Ohio court declined to proceed with the Ohio case on the basis of the first-filed rule. The usual action in such a circumstance is a stay of proceedings in the court of second-filing. See Univ. of Pa. v. EEOC, 493 U.S. 182, 187 (1990); Kahn v. General Motors, Inc., 889 F.2d 1978, 1982-83 (Fed. Cir. 1989); Wehr Corp. v. Commercial Construction Corp., 464 F. Supp. 676, 677 (S.D. Fla. 1979). It appears that the Ohio court, however, has directed the transfer of the second-filed case to this district. As it did not engage in a § 1404(a) analysis or purport to transfer the case pursuant to that provision, the authority for the apparent transfer order is not altogether clear. Nevertheless, the Ohio Court has now expressed an unmistakable intention not to proceed with litigation between the parties arising from their current dispute, at least so long as the first-filed action is pending in this district.

filed. See, e.g., Gorman v. Grand Casino of Louisiana, Inc. - Coushatta, 1 F. Supp.2d 656, 660 (E.D. Tex. 1998). Even in cases involving a forum selection clause, transfer pursuant to § 1406(a) is not appropriate if venue would otherwise be proper. See Stewart Org., 487 U.S. at 29 (1988). See also Maltz v. Union Carbide Chemical & Plastics Co., 992 F. Supp. 286, 295-96 (S.D.N.Y. 1998) (transfers pursuant to forum selection clauses are consistently construed under the rubric of § 1404(a)) (collecting cases). Venue is proper in this court. This action cannot be transferred pursuant to § 1406(a).

Defendant has made no showing regarding the relative physical and financial condition of the parties, let alone one which would overcome plaintiff's choice of forum. Defendant has identified no witnesses who would be available for trial in Ohio but unavailable for trial in this district and no books, records or other documentary evidence which could be produced in Ohio but not here.

Defendant suggests no reason why a judgment of this court would be less enforceable than one rendered in the Northern District of Ohio. Defendant does not suggest that the docket in the Northern District of Ohio is significantly less congested. Defendant has identified no public policy of Pennsylvania or Ohio which would be frustrated by trial in one district rather than the other. The local interest in the resolution of the instant

case is at least as great in this district as Northern Ohio. This action involves the parties' obligations and rights under a contract for the delivery and installation of industrial equipment in this district to a corporate citizen of the district.

There are no apparent practical considerations that would make a trial in Ohio easier, more expeditious or less expensive than a trial here. Even if the law of Ohio or a third state may govern some or all of the claims in this case, this would not be sufficient to overcome plaintiff's choice of forum. Federal courts sitting in diversity are frequently called upon to apply the substantive law of a variety of states.

Defendant simply has not met its burden to justify a transfer of this action.

B. Stay

Under the "first-filed" rule, in cases of concurrent federal jurisdiction, the court which first has possession of the subject must decide it. EEOC v. Univ. of Pa., 850 F.2d 969, 971 (3d Cir. 1988). Exceptions to the rule are "rare," id. at 976, and are to be made only in "exceptional circumstances." Id. at 979.

Defendant presents several arguments as to why the first-filed rule should not be applied in this case.

Defendant argues that the first-filed rule should be disregarded or given less weight when the time between the two filings is short. Defendant, however, cites no decision from any court within the Third Circuit, and this court has found none, which holds that a short interval between filings is itself grounds for a "rare" departure from the rule. Of course, what is "short" is in the eye of the beholder. See, e.g., Mobil Oil Exploration Co. v. Federal Energy Regulatory Comm'n, 814 F.2d 998, 1000 (5th Cir. 1987) (agreement between Fifth and District of Columbia Circuits that court to decide venue issue would be decided by coin toss when filings were precisely concurrent or separated by no more than one second).

Defendant cites one case, Affinity Memory & Micro, Inc. v. K & O Enters., Inc., 20 F. Supp.2d 948 (E.D. Va. 1998) in which a court departed from the first-filed rule after noting that although the defendant had filed its complaint second, it was the first to effect service of process. Id. at 955. A substantial number of courts, however, have held that "first-filed" means first-filed and not first served. See Fat Possum Records, Ltd. v. Capricorn Records, Inc., 909 F. Supp. 442, (N.D. Miss. 1995) (collecting cases and noting that plaintiff's "argument that first to file really means first to serve is not well-taken" in light of "almost unanimous" authority that first-filed action takes precedence); Peregrine Corp. v. Peregrine

Industries, Inc., 769 F. Supp. 169, 172 (E.D. Pa. 1991) (first-filed means first-filed even if second-served).

Defendant also argues that "application of the first-filed rule is not warranted when the second action can better resolve the issues disputed by the parties." There is no apparent reason why the claims of the parties to the instant action can be better resolved in Ohio. This case presents relatively straightforward questions of which party, if any, breached contractual obligations and, if any party wishes to raise the question, whether some or all of the claims are subject to arbitration.

Defendant further argues that this case presents "compelling circumstances" comparable to those in EEOC v. Univ. of Pa.. In that case the EEOC gave the University a 20-day grace period to produce documents in response to an administrative subpoena, stating that it would initiate enforcement proceedings at the end of that period. With three days left in the grace period, the University sought a declaration in the United States District Court for the District of Columbia that the requested materials could not constitutionally be subpoenaed. The University admitted that it did so to avoid unfavorable Third Circuit precedent. No such flagrant conduct appears in this case. There is no indication that either party filed its action

in an attempt to foreclose the jurisdiction of a court bound by unfavorable precedent.

Some courts have held that when the first-filed action seeks a declaratory judgment, a judge should consider whether the filing was in bad faith or represents an attempt to preempt an imminent suit by the defendant in another forum. See, e.g., Northwest Airlines, Inc. v. American Airlines, Inc., 989 F.2d 1002, 1007 (8th Cir. 1993); Ven-Fuel, Inc. v. Dep't of the Treasury, 673 F.2d 1194, 1195 (11th Cir. 1982). The first-filed rule, however, has "routinely been applied to cases where the first-filed case is an action for declaratory judgment." The Pep Boys -- Manny, Moe & Jack v. American Waste Oil Services Corp., 1997 WL 367048, \*6 (E.D. Pa. June 25, 1997). See also Fischer & Porter Co. v. Moorco Int'l Inc., 869 F. Supp. 323, 325 (E.D. Pa. 1994).

Defendant has not justified a disregard of the first-filled rule in this case. Moreover, even in circumstances where the force of the rule is diminished the second-filer must still show that a transfer is warranted. It does not follow that the parties are constrained to litigate in the court of second-filing.

#### **IV. Conclusion**

Defendant has failed to demonstrate that the convenience of the witnesses and parties or the interest of justice requires that this action be transferred pursuant to 28 U.S.C. § 1404(a). The court has venue and thus transfer pursuant to 28 U.S.C. § 1406(a) is inappropriate. Defendant has not demonstrated "exceptional circumstances" or bad faith by plaintiff or otherwise justified a departure from the first-filed rule.

Accordingly, defendant's motions will be denied. An appropriate order will be entered.

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UTI CORPORATION, : CIVIL ACTION  
d/b/a MICRO-COAX :  
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v. :  
 :  
PLATING RESOURCES, INC. : NO. 99-253

O R D E R

AND NOW, this                    day of May, 1999, upon  
consideration of defendant's Motion to Transfer Venue to the  
Northern District of Ohio and alternative Motion to Stay  
Pennsylvania Action Pending Resolution of Ohio Action (Doc. #3,  
Parts 1 and 2), and plaintiff's response thereto, consistent with  
the accompanying memorandum, **IT IS HEREBY ORDERED** that said  
Motions are **DENIED**.

BY THE COURT:

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JAY C. WALDMAN, J.