

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

HENSHELL CORPORATION	:	CIVIL ACTION
	:	
v.	:	
	:	
H. JAMES CHILDERSTON, ESQ.	:	NO. 99-2972

MEMORANDUM AND ORDER

YOHN, J. July , 1999

Henshell Corporation (“Henshell”) brings this legal malpractice action against H. James Childerston, Esq. (“Childerston”). According to Henshell, Childerston agreed to represent the company in litigation in Delaware state court, but belatedly failed to file an answer to the complaint, failed to pay sanctions imposed for the late filing, advised the company that it need not post a court-ordered bond, and failed to attend court hearings on a motion to strike the company’s answer and counterclaim. See Complaint, ¶¶ 3-21. The result of Childerston’s negligence, Henshell asserts, is that a default judgment was entered against it, garnishment proceedings were commenced against it, it was unable to post a bond to stay the execution of judgment against it because the garnishment had frozen its assets, and it was thus required to file for bankruptcy. See Complaint, ¶¶ 24, 25.

Childerston removed this case from the Philadelphia Court of Common Pleas and asserts that, pursuant to 28 U.S.C. § 1332, this court has diversity jurisdiction over the dispute because Henshell is a Pennsylvania citizen, he is a Delaware citizen, and the amount in controversy exceeds \$100,000. Childerston then filed a motion to dismiss the complaint under Fed. R. Civ.

P. 12 (b)(6), asserting that Henshell failed to plead that Childerston's negligence proximately caused its harm. See Memorandum of Law in Support of Defendant's Motion to Dismiss, or in the Alternative, to Transfer ("Defendant's Mem."), at 4-6. In the alternative, Childerston asked the court to transfer this action to the District of Delaware under either 28 U.S.C. § 1404 (a) or 28 U.S.C. § 1406 (a). See id. at 7-11. For the reasons described below, Childerston's motion to dismiss will be denied and the case will be transferred to the District of Delaware, as venue is improper in the Eastern District of Pennsylvania.

FACTUAL BACKGROUND

Childerston is a Delaware attorney with both a principal place of business and a residence in Delaware. See Complaint, ¶ 2; Childerston Dec., ¶¶ 2, 3 (attached to Defendant's Mem. as Ex. B). Childerston contends, and Henshell does not contest, that though Childerston is admitted to the Pennsylvania Bar, he has no office in Pennsylvania and practices exclusively from his Wilmington, Delaware office. See Childerston Dec., ¶ 4; Memorandum of Law Against Defendant's Motion to Dismiss or, in the Alternative, to Transfer ("Opposition"), at 2, 7, 10.

Henshell, a Pennsylvania corporation, retained Childerston to represent it in litigation in Delaware state court. See Complaint, ¶¶ 3-5. Default judgment was entered against Henshell on or about April 28, 1997, allegedly as a result of Childerston's failure to answer the complaint. See id., ¶¶ 6-9. Though the default was vacated on May 13, 1997, the court sanctioned Henshell \$500 and ordered Henshell to post a \$145,000 bond by May 23, 1997, in order to continue with the litigation. See id., ¶¶ 10-11. Henshell alleges that Childerston failed to pay the sanctions though he had promised to do so, and "led Henshell to believe that . . . the bond did not have to be posted." Id., ¶¶ 12-15.

Childerston filed Henshell's answer and counterclaim on May 20, 1997, but opposing counsel filed a motion to strike these pleadings based on Henshell's failure to post the required bond and to pay the sanctions. See id., ¶¶ 16-17. According to Henshell, Childerston failed to inform it of its opponent's motion to strike, and failed to attend the court hearing on that motion, with the result that the motion was granted, Henshell's answer was stricken, and judgment was entered against it. See id., ¶¶ 18-22. On the basis of the Delaware judgment, Henshell's opponent commenced garnishment proceedings against Henshell in Pennsylvania which operated to freeze Henshell's assets. See id., ¶ 24. Though the Delaware court later agreed to stay the execution of the judgment against Henshell if Henshell would post a bond and pay its opponent's attorney's fees, Henshell claims that it was unable to do so because its assets were already frozen and the "garnishee refused to release the garnishment." Id., ¶ 23. Therefore, Henshell asserts, it was forced to file for bankruptcy as it was unable to post the bond required by the court. See id., at ¶ 25. In the complaint, Henshell seeks damages for the harm it suffered as a result of Childerston's allegedly negligent representation. See Complaint, at 5.

DISCUSSION

I. Childerston's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12 (b)(6)

Childerston first contends that the complaint should be dismissed because it fails to state a claim for legal malpractice under Delaware law.¹ See Defendant's Mem., at 6. In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court must

¹ Childerston asserts, and Henshell appears to agree for purposes of this motion, that Delaware law governs Henshell's legal malpractice claim because Delaware has the "most significant relationship" with the events forming the basis of this claim. See Defendant's Mem. at 5; Opposition, at 8 (commenting that "if Delaware law were to apply," it could be adequately interpreted by this court).

accept as true all well-pleaded allegations of fact, and any reasonable inferences that may be drawn therefrom, in the plaintiff's complaint and must determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996) (citations omitted); Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989) (citations omitted). Although the court must construe the complaint in the light most favorable to the plaintiff, it need not accept as true legal conclusions or unwarranted factual inferences. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Claims should be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." Id.

In order to maintain a cause of action for legal malpractice under Delaware law, Henshell must prove "[1] the employment of an attorney and [2] the attorney's neglect of a reasonable duty, as well as [3] the fact that such negligence resulted in and was the proximate cause of loss to the client." David B. Lilly Co. v. Fisher, 18 F.3d 1112, 1120 (3d Cir. 1994) (applying Delaware law); Sanders v. Malik, No. 97C-10-231, 1997 WL 817854, at * 2 (Del. Super. Ct. Nov. 21, 1997). Childerston claims that Henshell has failed to allege that his asserted negligence was the proximate cause of Henshell's loss. See Defendant's Mem., at 6. Contrary to Childerston's assertion, the allegations of Henshell's complaint, and reasonable inferences based on those allegations, could entitle Henshell to relief. Henshell has adequately alleged that Childerston failed to take specific actions which prevented Henshell from placing counterclaims and defenses before the Delaware courts. See Complaint, ¶¶ 6, 11-15, 21. Henshell also asserts that Childerston's negligence resulted in the entry of a default judgment against it which

Henshell was unable to vacate because Childerston's negligence had also enabled Henshell's opponents to freeze its assets in a garnishment proceeding based on the default judgment. See Complaint, ¶¶ 23-25. Based on these allegations, the court cannot conclude that Henshell will be unable to prove a set of facts entitling it to relief against Childerston. See Conley, 355 U.S. at 45-46. Accordingly, Childerston's motion to dismiss based on Fed. R. Civ. P. 12 (b)(6) is denied.

II Childerston's Motion to Transfer Pursuant to 28 U.S.C. § 1406 (a)

In the alternative, Childerston contends that the Eastern District of Pennsylvania is an improper venue for this action, and that it should be transferred to the District of Delaware pursuant to 28 U.S.C. § 1406 (a) (1993) (permitting court to transfer a case filed in an improper venue to "any district . . . in which it could have been brought"). In a case where federal jurisdiction is based on diversity, such as this one, venue is proper only in

(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, . . . or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391 (a) (1993 & Supp. 1999).

None of these provisions authorizes venue in the Eastern District of Pennsylvania. First, venue is inappropriate under § 1391 (a)(1) because the record is undisputed that Childerston, an individual, resides in Delaware. See Childerston Dec., ¶ 3. Residence, for purposes of determining venue, is the place where an individual has his domicile or permanent home. See Manley v. Engram, 755 F.2d 1463, 1466 n.3 (11th Cir. 1985) ("it is the individual's 'permanent' residence - i.e., his domicile - that is the benchmark for determining proper venue"); Rosenfeld v.

S.F.C. Corp., 702 F.2d 282, 283 (1st Cir. 1983) (noting that individual defendants “reside” where they “make their home”); 15 Charles A. Wright et al., Federal Practice And Procedure § 3805, at 33-35 (2d ed. 1985) (noting that courts apply the “same test of domicile in determining ‘residence’ for venue purposes as is applied in determining ‘citizenship’ for jurisdictional purposes”). There is no evidence to suggest that Childerston is not, as he claims to be, a Delaware resident. The parties’ arguments about whether the court may exercise personal jurisdiction over Childerston are inapposite to the inquiry demanded under § 1391 (a)(1). See Defendant’s Mem., at 10-11; Opposition, at 9-11. Under § 1391 (a)(1), venue would be appropriate in Delaware, where Childerston resides. Because there is a district, namely Delaware, where venue is proper, § 1391 (a)(3) will not provide a basis for venue in the Eastern District of Pennsylvania as there exists a “district in which the action may otherwise be brought.” § 1391 (a)(3); Tucker v. Interscope Records, Inc., No. 98-4288, 1999 WL 80363, at * 3 (E.D. Pa. Feb. 17, 1999) (noting that venue may not be based on (a)(3) when the action could have been brought in another district); Modern Mailers, Inc. v. Johnson & Quin, Inc., 844 F. Supp. 1048, 1055 (E.D. Pa. 1994) (same).

Finally, § 1391 (a)(2) does not provide a basis for jurisdiction in the Eastern District of Pennsylvania because few of the actions or omissions giving rise to Henshell’s legal malpractice claim occurred in this district. The statute recognizes that a “substantial” part of the events or omissions forming the basis of a cause of action may occur in more than one district, but “[e]vents or omissions that might only have some tangential connection with the dispute in litigation are not enough.” Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994) (observing that, in breach of contract and trademark infringement case, venue was

appropriate in district where contract was formed, infringing conduct occurred and where trademarked materials were retained); Babn Technologies Corp. v. Bruno, 25 F. Supp. 2d 593, 597-98 (E.D. Pa. 1998) (finding venue proper in district where allegedly breached contract was formed and took effect).

Henshell contends that venue is proper in this district because Childerston “contracted with a Pennsylvania corporation to provide services, sent documents to Henshell’s Pennsylvania address and contacted Henshell at its Pennsylvania offices.” Opposition, at 10. Henshell also contends that because the harm it suffered as a result of Childerston’s malpractice occurred in this district, venue is also proper. See id. Even assuming that the contacts Henshell identified would constitute “minimum contacts” such that this court would have personal jurisdiction over Childerston,² these contacts are more tangential than substantial and do not establish that venue is proper in this district under § 1391 (a)(2). See Tucker, 1999 WL 80363, at * 2 (finding that venue for claims concerning abuse of process in California litigation was proper in California

² Though Henshell contends that Childerston would be subject to personal jurisdiction in this district because he has the constitutionally-required “minimum contacts” with Pennsylvania, such claim is dubious in light of a number of decisions rejecting similar contentions. See Klump v. Duffus, 71 F.3d 1368, 1372 (7th Cir. 1995), cert. denied, 518 U.S. 1004 (1996) (finding that North Carolina attorney was subject to personal jurisdiction in Illinois for malpractice claim when “case would exclusively involve Illinois parties, Illinois law and would take place in Illinois”); Sawtelle v. Farrell, 70 F.3d 1381, 1390-91 (1st Cir. 1995) (finding no personal jurisdiction over Virginia or Florida attorneys who represented New Hampshire resident in Florida wrongful death action because there were only phone calls into New Hampshire, all negligent legal services were performed elsewhere and where basis of asserted jurisdiction was harm felt in New Hampshire); Trinity Indus., Inc. v. Myers & Assoc., Ltd., 41 F.3d 229, 231 (5th Cir.), cert. denied, 516 U.S. 807 (1995) (finding that attorney-client relationship with in-forum client alone is insufficient to subject attorney to personal jurisdiction in the forum); FDIC v. Malmø, 939 F.2d 535, 536-37 (8th Cir. 1991) (finding that Missouri court had no personal jurisdiction over Tennessee attorney when attorney’s only contact with Missouri was a letter soliciting business from Missouri bank, and rejecting bank’s argument that jurisdiction existed because the effects of the attorney’s negligence were felt in Missouri).

and that Pennsylvania events were only tangentially related to claims arising from California litigation). The events and omissions giving rise to Henshell's claim, including Childerston's failure to file documents, pay sanctions, and appear for court hearings, all occurred in Delaware, where Childerston was representing Henshell in Delaware litigation. See supra, p. 2-3. Thus, as an insubstantial part of the events giving rise to Henshell's claim occurred in this district, venue is inappropriate under § 1391 (a)(2). See Saferstein v. Paul, Mardinly, Durham, James, Flandreau & Rodger, P.C., 927 F. Supp. 731, 736 (S.D.N.Y. 1996) (finding venue for legal malpractice claim was appropriate only in districts where attorneys resided, prepared for, and litigated the underlying action); Nagele v. Holy Redeemer Visiting Nurse Agency, Inc., 813 F. Supp. 1143, 1146 (E.D. Pa. 1993) (in negligence case, venue was improper in Pennsylvania when all of allegedly negligent nursing care was provided in New Jersey); Berube v. Brister, 140 F.R.D. 258, 260 (D.R.I. 1992) (finding venue inappropriate in Rhode Island in legal malpractice action against Massachusetts law firm based on firm's representation in Massachusetts litigation concerning a fire on Massachusetts property).

Henshell requests that, in the event this court concludes that venue is inappropriate in the Eastern District of Pennsylvania, the action be transferred to the District of Delaware. See Opposition, at 11. As venue is inappropriate in this district, the court will, in the interests of justice, transfer this action to the District of Delaware, where the action could have been brought originally. See 28 U.S.C. § 1406 (a).

III. Childerston's Motion to Transfer Pursuant to 28 U.S.C. § 1404 (a)

Because this action will be transferred to the District of Delaware under § 1406 (a), the

court need not consider Childerston's argument that transfer is also appropriate under 28 U.S.C. § 1404 (a). This motion will, accordingly, be denied as moot.

An appropriate order follows.

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ORDER

AND NOW, this ____ day of July, 1999, after consideration of Defendant H. James Childerston's motion to dismiss under Fed. R. Civ. P. 12 (b)(6), or in the alternative, to transfer this action to the District of Delaware, and the Plaintiff's reply, IT IS ORDERED that

- II Defendant's Motion to Dismiss is DENIED;

- II Defendant's Motion to Transfer Pursuant to 28 U.S.C. § 1406 (a) is GRANTED and this action is TRANSFERRED to the United States District Court for the District of Delaware; and

- II Defendant's Motion to Transfer Pursuant to 28 U.S.C. § 1404 (a) is DENIED as MOOT.

William H. Yohn, Jr., J.