

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

VERSAR, INC. :
 :
 : CIVIL ACTION
 :
 v. :
 : No. 01-1302
 :
 :
 ROY O. BALL, TRUSTEE, URS CORP., :
 ENVIRONMENTAL RESOURCES :
 MANAGEMENT :
 :

MEMORANDUM

Ludwig, J.

July 12, 2001

Defendant Roy O. Ball, as trustee for the Enviro-Chem Superfund Site, and defendants Environmental Resources Management, Inc. and URS Corporation move to dismiss under Fed R. Civ. P. 12(b)(3) and 12(b)(6), or, alternatively, to transfer under 28 U.S.C. § 1404(a).¹ Subject matter jurisdiction is diversity. 28 U.S.C. § 1332. The motion to transfer will be granted.

Plaintiff Versar, Inc. is a Delaware corporation with its principal place of business in Springfield, Va. Am. cmplt. ¶ 1. Ball resides in Illinois; URS is a Michigan corporation with its principal place of business in San Francisco, Ca.; and Environmental Resource Management (ERM) is a Pennsylvania corporation with its principal place of business in Exton, Pa. Id. ¶¶ 2-4.

This dispute arises from an agreement for environmental clean-up services

¹ The motion was filed by Ball and subsequently joined in by Environmental Resource Management and URS. Ball also moved to dismiss for lack of personal jurisdiction, Fed. R. Civ. P. 12(b)(2). Because the action will be transferred, the 12(b)(3) and 12(b)(6) grounds for dismissal will not be discussed. See, e.g., Cardinal Business Media, Inc. v. Rockpress Publishing Co., No. Civ. A. No. 96-3872, 1996 WL 729943, at *3 (E.D. Pa. Dec. 11, 1996).

at the Enviro-Chem Superfund Site, located in Evansville, Ind.² Id. ¶2. On August 28, 1997, trustees for the site, including Ball, contracted with Versar to “conduct certain parts of a revised remedial action at the Enviro-Chem Site, specifically, but not limited to, the construction and operation of a soil vapor extraction system.” Id. ¶ 14. The trustees had previously hired URS³ to test and investigate the environmental conditions at the site and ERM to participate in the design of the remediation systems. Id. ¶¶ 15, 18. According to the amended complaint, defendants withheld critical information from Versar about physical conditions at the site and did not pay adequate compensation for its services.⁴ The action sounds in both contract and tort.

In their motion, defendants rely on the forum-selection clause contained in

² On September 10, 1991, the United States District Court for the Southern District of Indiana entered a consent decree that established a trust fund for the removal and destruction of contaminants at the site. Ball mem. ex. C.

³ According to the amended complaint, the trustees retained URS’s predecessor, AWD. Am. cmplt. ¶ 15.

⁴ The amended complaint contains the following claims: breach of contract against Ball (count I); willful misrepresentation and interference with contractual relationships against Ball (count II); negligent misrepresentation regarding future incentives against all defendants (count III); breach of good faith and fair dealing against all defendants (counts IV and V); unjust enrichment against Ball (count VI); implied contract against Ball (count VII); and negligent misrepresentation against all defendants (count VII).

On April 19, 2001, one month after Versar instituted this action, Ball and his co-trustee, Norman Bernstein, filed a six-count complaint against Versar in the United States District Court for the Southern District of Indiana, Roy O. Ball and Norman Bernstein, Trustees v. Versar, Inc., Cause No. IP 01-0531-C. Ball mem. ex. L. On June 8, 2001, Versar moved for a stay “pending resolution of jurisdictional issues regarding a lawsuit arising out of the same contract filed by Versar in the United States District Court for the Eastern District of Pennsylvania.” Versar mem. ex. D.

the agreement between Versar and Ball,⁵ which provides:

10.1 Court – Since the purpose of this Contract is the continuing implementation of the Consent Decree over which the United States District Court for the Southern District of Indiana has continuing jurisdiction, all the disputes arising out of this Contract involve a Federal question and shall be resolved in that court. The Trustees and the Contractor expressly consent to the jurisdiction of that court.

Ball mem. ex. D.

Under 28 U.S.C. § 1404(a), venue may be transferred “[f]or the convenience of parties and witnesses, [or] in the interest of justice.” 28 U.S.C. § 1404(a).⁶ Transfer of venue involves a balancing of the “private and public interests protected by the language of § 1404(a).” Jumara v. State Farm Insurance Company, 55 F.3d 873, 879 (3d Cir. 1995).

Within this framework, a forum selection clause is treated as a manifestation of the parties’ preferences as to a convenient forum. Hence, within the framework of § 1404, Congress ‘encompass[e]d consideration of the parties’ private expression of their venue preferences.’ Although the parties’ agreement as to the most proper forum should not receive dispositive weight, it is entitled to substantial consideration. Thus, while courts normally defer to a plaintiff’s choice of forum, such deference is inappropriate where the plaintiff has already freely contractually chosen an appropriate venue. Where the forum selection clause is valid, which requires that there have been no ‘fraud, influence, or overweening bargaining power,’ the plaintiffs bear the

⁵ Contrary to Versar’s assertion, URS and ERM joined in the motion to transfer. Regardless, the general rule in our circuit is that if a claim against one defendant is subject to transfer, the entire action should be transferred. Cottman Transmissions Sys., Inc. v. Martino, 36 F.3d 291, 296 (3d Cir. 1994).

⁶ Section 1404(a): “For the convenience of parties and witnesses, [or] 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 is governed by 28 U.S.C. § 1391(a)(2), which pertinently provides that actions may “be brought only in . . . (2) 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” It is not disputed that this action could have been brought in the Southern District of Indiana.

burden of demonstrating why they should not be bound by their contractual choice of forum.

Id. at 880 (citations omitted); see also Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 287, 297-98 (3d Cir. 2001).

Versar views the forum-selection provision as inapplicable because Ball terminated the contract.⁷ A letter dated January 4, 2001 from the trustees states that they “terminated [Versar] for convenience,” which is authorized in the contract.⁸ Versar mem.

⁷ According to Versar, the forum-selection clause is also unenforceable because it was not subject to negotiation or even discussion, and is “buried in the middle of a thirty-seven page single-space contract of adhesion.” Versar mem. at 18. The record, however, contains no evidence of “fraud, influence, or overweening bargaining power.” Jumara, 55 F.3d at 880 (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13, 92 S. Ct. 1907, 1914-15, 32 L. Ed. 2d 513 (1972)). Particularly inasmuch as the parties involved are experienced business entities, enforcement of the clause in this circumstance is not unreasonable. See BABN Techs. Corp. v. Bruno, 25 F. Supp. 2d 593, 596 (E.D. Pa. 1998) (“the mere fact that Bruno signed a form contract and did not negotiate the forum selection clause is not sufficient to render the clause unenforceable”); Shore Slurry Seal, Inc. v. CMI Corp., 964 F. Supp. 152, 156-57 (D.N.J. 1997) (although the parties did not discuss forum-selection clause during negotiations and the clause was in fine print, it was enforced because both parties were sophisticated business entities).

Versar does not dispute that this controversy “arise[s] out of” the contract. Versar mem. at 14 (this action “is clearly a dispute as to whether or not the Contract was performed and payment made”). See Costal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 203 (3d Cir. 1983) (both tort and contract claims were governed by the forum-selection clause); see also Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514 (9th Cir. 1988) (tort claims were subject to forum-selection clause since “resolution of the claims relates to interpretation of the contract”).

⁸ Section 19.1 of the contract:

Termination For Convenience – The Trustees may terminate this Contract without cause for the convenience of the Trustees. In the event of such termination, the Contractor shall follow the instructions of the Trustees with respect to close-out. The Contractor shall be entitled to a termination settlement equal to the percentage of completion of the Work prior to termination plus reasonable termination settlement costs. . . . Obligations of the Contractor under the Contract Documents not directly affected by the Termination for Convenience shall survive the termination.

ex. F. Therefore, Versar maintains, inasmuch as the contract specifies that representations, warranties and guarantees survive the termination – and nothing else – the forum-selection clause became ineffective and was no longer enforceable.⁹

That reasoning is specious. Unless otherwise expressed, a choice of forum clause does not expire upon termination of the contract from which it derives. See Allied Sound, Inc. v. Dukane Corp., 934 F. Supp. 272, 275 (M.D. Tenn. 1996); Advent Elec., Inc. v. Samsung Semiconductor, Inc., 709 F. Supp. 843, 846 (N.D. Ill. 1989); see also Texas Source Group, Inc. v. CCH, Inc., 967 F. Supp. 234, 236 (S.D. Tex. 1997) (“to rule otherwise, a party could defeat a validly negotiated forum-selection clause by simply alleging that the nonmoving party breached the contract”). Here, the provision cited by Versar preserves certain conditions of the contract that might otherwise be extinguished by termination, but it does not affect the continuing viability of the clause. See note 8, supra. Moreover, to read the contract so as to disregard the forum-selection clause for actions brought following termination would be to distort its usual, common sense meaning and applicability.¹⁰

Ball mem. ex. D.

⁹ Section 19.10 of the contract:

Duties and Obligations Cumulative – The duties and obligations imposed by Contract Documents on the Contractor, and all of the rights and remedies available to Trustees are in addition to, and are not to be construed in any way as a limitation of any rights and remedies available to any or all of them which are otherwise imposed or available by laws. All representations, warranties and guarantees made in the Contract Documents shall survive Final Payment and termination or completion of the Contract.

Ball mem. ex. D.

¹⁰ The presence of the provision, ineffectual as it is, that “all disputes arising out of this contract involve a Federal question” will not be considered as invalidating the entire clause. Ball mem. ex. D. While Versar is correct that subject matter jurisdiction

So viewed, the forum-selection provision is valid, imposing on Versar the burden of showing why the agreed upon choice of forum should not be binding on the parties.¹¹ Jumara, 55 F.3d at 880. Versar puts forth that practical considerations, particularly the convenience of the principal witnesses and parties, weigh against transfer. The affidavit of George Anastos states that he is executive vice-president of Versar and manager of the remediation services at issue here, and that his office and files are located in Bristol, Pa. Anastos aff. ¶¶ 1-4.

The parties' preferences counterbalance each other. While Versar has offices

cannot be conferred by contract, American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 & n. 17, 71 S. Ct. 534, 541-42 & n. 17, 95 L. Ed. 702 (1951), the clause clearly sets forth "continuing jurisdiction" in the Southern District of Indiana for "all the disputes arising out of the Contract."

Versar also contends that the forum-selection clause is not mandatory. "Courts accord more weight to exclusive forum selection provisions, which at a minimum may preclude a signatory from arguing its own inconvenience, than to permissive forum selection clauses by which a party merely consents to personal jurisdiction and venue in a court which may otherwise lack them." De Lage Landen Fin. Serv., Inc. v. Cardservice Int'l, Inc., No. Civ. A. 00-2355, 2000 WL 1593978, at *2 n.3 (E.D. Pa. Oct. 25, 2000) (citing cases). In any event, the § 1404 factors favor this transfer regardless of exclusivity.

¹¹ The relevant private factors to be considered in deciding a motion to transfer include: (1) plaintiff's choice of forum; (2) defendants' preference; (3) whether the claim arose elsewhere; (4) the convenience of the parties as shown by their relative physical and financial conditions; (5) the convenience of witnesses, only to the extent that they may be unavailable for trial in one of the fora; and (6) the location of books and records, again only to the extent that they could not be produced in one of the fora. Jumara, 55 F.3d at 879. Public interests include: (1) enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) relative administrative difficulties in the two fora resulting from court congestion; (4) local interests in deciding local controversies at home; (5) 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.

The analysis under section 1404(a) is "flexible and individualized." Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 2244, 101 L. Ed. 2d 22 (1988).

in Pennsylvania, its choice of forum as plaintiff is entitled to less deference since it is not a Pennsylvania resident. See Matt v. Baxter Healthcare Corp., 74 F. Supp. 2d 467, 470 (E.D. Pa. 1999) (“A locale that is not the home of the plaintiff and where few of the operative facts occurred is entitled to less weight.”); Breker v. Hershey Foods Corp., No. Civ. A. 94-4887, 1994 WL 530146, at *1 (E.D. Pa. Sept. 28, 1994). As for defendants, although ERM is located in Pennsylvania, it requests transfer “to the Southern District of Indiana for the convenience of all the parties.” ERM mem. at 6. Ball’s office and documents are located in Illinois, in close proximity to Indiana.¹² Ball aff. ¶¶ 20, 22. URS will have to travel no matter where the suit is tried. Moreover, none of the parties suggest that financial circumstances present a burden on litigation in either forum. See Jumara, 55 F.3d at 879.

Nor does the convenience of witnesses favor either party. Versar lists seven non-party witnesses located in either Pennsylvania or New Jersey, and names two witnesses who “are probably closer to this Court’s jurisdiction” than to Indiana. Versar mem. at 28-29. Importantly, however, it does not assert that the witnesses would be unavailable or unwilling to testify in Indiana. See Jumara, 55 F.3d at 879 (convenience of the witnesses should be considered “only to the extent that the witnesses may actually be unavailable for trial in one of the fora”); Superior Precast, Inc. v. Safeco Ins. Co., 71 F. Supp. 2d 438, 447 (E.D. Pa. 1999). In addition, Ball claims that two crucial witnesses are located in Illinois, not far from Indiana. Ball aff. ¶ 19. Ball also states that employees of Handex, a partner of Versar, are in Indiana and are essential to this dispute.¹³ Id. ¶¶ 17, 21.

¹² According to Ball, he has “about forty linear feet of documents in [his] Illinois office, all of which would be necessary to defend this action.” Ball aff. ¶ 22.

¹³ Ball explained that “[h]ad Versar not partnered with [that company], Versar’s bid would not have been accepted, because I was seeking a contractor with strong ties to Indiana.” Ball aff. ¶ 17. Anastos disagrees with some of Ball’s contentions

A private factor weighing in favor of transfer is the superfund site's location in Indiana – i.e., where the claim arose. Jumara, 55 F.3d at 879; cf. J.L. Clark Mfg. Co. v. Gold Bond Corp., 629 F. Supp. 788, 791 (E.D. Pa. 1985) (in determining whether venue is proper in a breach of contract case, the place of performance is, typically, where the claim arose). Public interest considerations also point to transfer. Certainly, Indiana has a stronger interest than Pennsylvania in adjudicating an action that relates to environmental clean-up in Indiana. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09, 67 S. Ct. 839, 843, 91 L. Ed. 1055 (1947) (“There is a local interest in having localized controversies decided at home.”); Jumara, 55 F.3d at 879. Also, considering the related suit against Versar pending in the Southern District of Indiana, transfer should lead to a more efficient resolution of this entire dispute. See Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26, 80 S. Ct. 1470, 1474, 4 L. Ed. 2d 1540 (1960) (“To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent.”); Ayling v. Travelers Prop. Cas. Corp., No. 99-3243, 1999 WL 994403, at *4 (E.D. Pa. Oct. 27, 1999).

Upon a review of all the circumstances, plaintiff has not satisfied its burden of showing that the forum-selection clause should not be enforced. Accordingly, defendants' motion must be granted.

Edmund V. Ludwig, J.

as to the importance of certain witnesses, Anastos aff. ¶¶ 21-23.

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ROY O. BALL, TRUSTEE, URS CORP.,	:	
ENVIRONMENTAL RESOURCES	:	
MANAGEMENT	:	

ORDER

AND NOW, this day of June, 2001, upon motion of defendants Roy O. Ball, Trustee, URS Corporation, and Environmental Resources Management, this case is transferred to the United States District Court for the Southern District of Indiana. 28 U.S.C. § 1404.

Edmund V. Ludwig, J.