

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUDE SANDT, : CIVIL ACTION
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 v. :
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 ROBERT JOHN LUKE, ET AL. : NO. 03-4379

MEMORANDUM

November 2, 2004

GENE E.K. PRATTER, J.

This matter involves an alleged physical altercation between Plaintiff Sandt and Defendants Luke and Cosby, occurring outside the Phi Kappa Psi fraternity house on or about July 29, 2001, in State College, Centre County, Pennsylvania. The events allegedly resulted in Sandt being propelled through a glass window. Sandt contends that the impact with the window resulted in serious injuries to his wrists, including major lacerations, significant tendon damage, permanent functional deficits and extensive scarring. Defendant Luke, in addition to his general denials of the allegations raised by Sandt, has raised the affirmative defense that venue for this case is not properly laid in the United States District Court for the Eastern District of Pennsylvania.

The venue statute, 28 U.S.C. § 1391, states, generally,

- (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in
- (1) a judicial district where any defendant resides, if all defendants reside in the same State [or]
 - (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 [. . .].

Furthermore, pursuant to 28 U.S.C. § 1406, a district court maintains the discretion to transfer or dismiss an action if venue is improper:

- (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
- (b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

This case involves an alleged physical altercation between parties who are residents of different states. See 28 U.S.C. § 1391(a). There is no question that the Court maintains personal jurisdiction over the parties, nor has a challenge to diversity jurisdiction been raised. See 28 U.S.C. § 1332(a). Venue, however, is another matter.

Plaintiff Sandt is a citizen of Allentown, Pennsylvania. Sandt alleges that Defendant Luke is a citizen of either Illinois or Tennessee. Defendant Cosby, who has not yet been served, is alleged to be a citizen of Maryland. In his Answer, Defendant Luke specifically denies that he lives at the address listed in the Complaint; however, he has not raised a challenge with regard to jurisdiction based on diversity of citizenship. It is undisputed that the alleged altercation occurred in the borough of State College, Pennsylvania. State College is located in Centre County. Venue for matters arising or occurring in Centre County, Pennsylvania falls under the aegis of the United States District Court for the Middle District of Pennsylvania.

Defendant Luke, in his Answer filed more than a year ago on September 23, 2003, raises the affirmative defense that venue is improper in the Eastern District of Pennsylvania for this case. More than a year has passed since this affirmative defense was raised without Defendant Luke filing a motion with the Court to consider the venue issue. While a challenge to venue may be waived pursuant to 28 U.S.C. §1406, either (1) affirmatively, see McCoy v. Siler, 205 F.2d 498, 499 (3d Cir. 1953), cert. denied, 346 U.S. 872 (1953), or (2) by inaction of the defendant in his first responsive pleading following the filing of a complaint, see Hoffman v. Blaski, 363 U.S. 335, 343 (1960); United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, Local 102 v. Lee Rubber & Tire Corp., 394 F.2d 362, 364 (3d Cir. 1968), cert. denied, 393 U.S. 835 (1968), neither type of waiver has occurred here. By the same token, Defendant Luke has not withdrawn this affirmative defense even though the Court raised a question about it at a pretrial conference with counsel.¹

The Court of Appeals for the Third Circuit has not rendered any definitive opinion that would preclude a district court from examining venue on its own motion. See DiFilippo v. Sherenian, 1996 WL 58255 at *2 (E.D. Pa. Feb. 9, 1996). However, it has been suggested by other courts within this district that, when no motion has been made to transfer an action to the appropriate venue, the court may transfer the case in the absence of such a motion, but ought to provide the parties with an opportunity to brief the transfer issue. See Library Publ'n v. Heartland Samplers, 825 F. Supp. 701, 705 n.3 (E.D. Pa. 1993) (exercising discretion to transfer

¹ If a defendant waives his objection to venue, the court may hear the matter, despite the fact that venue would not otherwise be proper under section 1391. See 28 U.S.C. § 1406(b) (the venue statute will not "impair the jurisdiction of a district court" if a party does not raise a prompt and adequate challenge to venue).

the case sua sponte pursuant 28 U.S.C. §1404); Associated Business Tel. Sys. v. Danihels, 829 F. Supp. 707, 713 n.3 (D.N.J. 1993) (same); Klugman v. Anderson, 1991 WL 171392 at *2 (E.D. Pa. Aug. 30, 1991) (exercising discretion to transfer the case sua sponte pursuant to 28 U.S.C. §1406); Wims v. Beach Terrace Motor Inn, Inc., 759 F. Supp. 264, 270 (E.D. Pa.1991) (same).

Looking to another circuit, the Court of Appeals for the Second Circuit has held that “a district court may not dismiss a case sua sponte for improper venue absent extraordinary circumstances.” Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999) (per curium) (citing Concession Consultants, Inc. v. Mirisch, 355 F.2d 369, 371 (2d Cir. 1966)). Nevertheless, the Mirisch court also held that “[o]nce a proper objection to venue is made by a party, 1406(a) allows the district judge to ‘dismiss, or if it be in the interest of justice, transfer such case’ to a proper venue.” Id.

In the instant matter, because Defendant Luke affirmatively raised the issue of improper venue in his Answer, the decisions from the district courts above and the Court of Appeals for the Second Circuit are distinguishable on their respective facts. By raising the affirmative defense of improper venue, Defendant Luke has taken the same action in this Court as if he filed a motion with the Court that the Eastern District of Pennsylvania is not the proper venue for this matter. Furthermore, based on the facts alleged by Sandt and the Answer filed by Defendant Luke, it is abundantly clear that venue is not proper in this District. Moreover, based on the uncontroverted locale of the alleged incident underlying the Complaint, the Court is concerned that judicial and the parties’ resources will be unnecessarily wasted if the Eastern District of Pennsylvania retains jurisdiction over this matter now inasmuch as there is an obvious likelihood that, should this case proceed to trial, venue may become an issue on the eve of trial. See Cross

v. Snee, 1992 WL 252811 at *1 (E.D. Pa. Sept. 30, 1992) (holding that if venue is lacking in the district, rather than dismiss the suit outright the court should, “in the interests of judicial economy and justice, simply transfer this matter to the United States District Court for the Middle District of Pennsylvania”). Thus, the parties and the Court could expend their efforts on this case only to have it be transferable to another court where the cause would then need to be reviewed, scheduled, evaluated and the like.

In the instant matter, a proper objection to venue was made by Defendant Luke in his Answer, and, in the absence of controlling authority from the Court of Appeals for the Third Circuit, this Court holds that (1) in the interest of conserving judicial resources and (2) in the interest of justice, this matter shall be transferred to the United States District Court for the Middle District of Pennsylvania. See Mirisch, 355 F.2d at 371; 28 U.S.C. §1406(a); Snee, 1992 WL 252811 at *1. An appropriate Order follows.

BY THE COURT:

/S Gene E.K. Pratter
GENE E.K. PRATTER,
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUDE SANDT, : CIVIL ACTION
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ORDER

November 2, 2004

GENE E.K. PRATTER, J.

AND NOW, this 2nd day of November, 2004, for the foregoing reasons and upon consideration of the Complaint filed by Jude Sandt and the Answer filed by Robert John Luke, in which Defendant Luke raises the affirmative defense that, pursuant to 28 U.S.C. §1391, the United States District Court for the Eastern District of Pennsylvania (the "Court") is not the proper venue for the above-captioned action, IT IS HEREBY ORDERED that:

1. The Clerk of the Court shall transfer the above-captioned matter to the United States District Court for the Middle District of Pennsylvania; and
2. All further proceedings, including the drafting of a scheduling order, shall be addressed by the court to which this matter is reassigned.

It is so ORDERED.

/S Gene E.K. Pratter
GENE E.K. PRATTER,
United States District Judge