

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

MARLENE MILLER : CIVIL ACTION
formerly known as :
MARLENE LAWLER :
 :
v. :
 :
 :
ATKINS NUTRITIONALS, INC., :
et al. : NO. 04-5775

MEMORANDUM AND ORDER

McLaughlin, J.

March 3, 2005

The plaintiff has brought this action against Atkins Nutritionals, Inc., ("Atkins") and several current and former employees of Atkins, alleging that the defendants misappropriated certain confidential, proprietary information of the plaintiff concerning "low-carb" food recipes. The case was initially brought in the Court of Common Pleas of Philadelphia County, and removed to this Court on December 13, 2004. The defendants have now moved to dismiss the case and/or transfer it to the Eastern District of New York. The plaintiff has opposed that motion and has filed a motion to remand the case to state court. The Court will deny the plaintiff's motion to remand and will grant the defendants' motion to transfer to the Eastern District of New York.

The basis of the plaintiff's motion to remand is that the notice of removal does not state that all the defendants have joined in removal. According to the plaintiff's motion to remand, the only defendant, other than Atkins, who was served at the time that the notice to remand was filed, was Steven Schechter. The notice of removal was filed by a law firm that identified itself as "attorneys for defendant Atkins Nutritionals, Inc." The notice of removal stated that "Atkins has requested the undersigned counsel to pick up defenses of all present and former employee defendants in this action, and therefore consent is provided." Notice, ¶12. There is no other reference to consent of the defendants and the notice of removal does not state who has been served as of the time of the notice.

Only the defendants who have been served with the complaint must consent to removal. See Lewis v. Rego, 757 F.2d 66, 68-69 (3d Cir. 1985). Only Atkins and Mr. Schechter, therefore, need to have consented. Atkins filed the notice so its consent is not an issue. The opposition to the motion to remand was filed by Atkins, Steven Schechter, and Paul D. Wolff. They are described as the only defendants "who may have been served." (They refer to themselves in this way because they want to retain any argument that service was improper.) These three defendants make two arguments in opposition to remand: the notice of removal adequately alleges the consent of Messrs. Schechter

and Wolff; and if the notice is inadequate, they ought to be permitted to file a supplemental notice that states explicitly that Messrs. Schechter and Wolff consent to the removal. The three defendants have submitted affidavits of Messrs. Schechter and Wolff, each of whom swears that he did consent to the notice filed on December 13, 2004. The Court is not persuaded by the argument that the notice adequately pleads the consent of the individual defendants; but the Court will allow the filing of a supplemental notice of removal.

The defendants argue that the statement in paragraph 12 of the notice of removal -- that Atkins has accepted the tendering of defenses of the other defendants and therefore consent is provided -- is sufficient. The Court is not convinced. The notice does not say that the two other defendants have consented or even that they have agreed to be represented by Atkins' counsel. The form of the notice, therefore, was inadequate.

The Court concludes, however, that there is good cause for allowing the supplemental notice of removal. See *Platoon v. Kraftmaid Cabinetry, Inc.*, No. 03-3304, 2004 U.S. Dist. LEXIS 2721, at *7-8 (E.D. Pa. Feb. 24, 2004); *Miller v. Principal Life Insurance Co.*, 189, F. Supp. 2d 254, 257-58 (E.D. Pa. 2002). The Court finds that Messrs. Schechter and Wolff did consent to

removal, even though the form of the notice did not so state.¹

The Court, therefore, will consider the motion to dismiss and/or transfer the case to the Eastern District of New York.

The defendants move to dismiss on the ground that the confidentiality agreement that is the subject of this action contains a forum selection clause that provides in pertinent part:

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to the conflict of laws or rules of such state. The parties hereto irrevocably submit to the nonexclusive jurisdiction of any court located in the state of New York or the United States Federal Court sitting in the state of New York over any such action or proceeding arising out of or relating to this Agreement.

The plaintiff responds that this provision is not a forum selection clause in the sense that the parties must bring any action in New York. The plaintiff bases her argument on the fact that the provision states that the parties submit to the "nonexclusive" jurisdiction of the courts in New York. The Court agrees with the plaintiff. This provision provides jurisdiction in the New York courts if either party chooses to sue there; but,

¹ The plaintiff filed a reply brief in which she challenged the accuracy of Mr. Schechter's affidavit. She did not, however, present to the Court an affidavit in opposition with specific evidence of "deceit" on the part of the defendants. The Court, therefore, will accept the defendants' affidavit.

it does not require an action to be brought in the courts of New York.

The defendants argue that venue is improper in this district under 28 U.S.C. § 1391 and that the Court should dismiss the case pursuant to 28 U.S.C. § 1406(a) which provides in pertinent part:

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.

28 U.S.C. § 1406(a) (emphasis added).

The defendants have not presented to this Court a sufficient record for it to conclude that venue is improper here under 28 U.S.C. § 1391. The Court is convinced, however, that transfer to the Eastern District of New York is appropriate under 28 U.S.C. § 1404(a).

28 U.S.C. § 1404(a) states:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer a civil action to any other district where it might have been brought.

The party requesting the transfer has the burden of establishing that transfer is warranted. The Court must consider private and public interests to determine in which forum the interests of justice and convenience would be best served. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995).

Private factors include: (1) the plaintiff's choice of venue; (2) the defendants' preference; (3) where the claim arose; (4) the relative physical and financial condition of the parties; (5) the extent to which witnesses may be unavailable for trial in one of the forums; and (6) the extent to which books and records would not be produced in one of the forums. Id.

Public factors include: (1) enforceability of a judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty resulting from court congestion; (4) the local interest in deciding the controversy; (5) the public policies of the forums; and (6) the familiarity of the trial judge with the applicable state law in diversity cases. Id.

- Private factor 1 does not weigh heavily in favor of the plaintiff. Generally, a plaintiff's choice of forum should not be disturbed lightly. Id. It should be entitled to less weight here, however, because the plaintiff did agree to jurisdiction in the courts of New York.

- Private factor 2 strongly favors transfer. All the defendants reside in the Eastern District of New York.

- Private factor 3, where the claim arose, favors transfer as well. The plaintiff claims that the defendants misappropriated her unique recipes and trade secrets. This alleged misappropriation must have occurred, if it occurred at

all, in the Eastern District of New York where the defendants reside.

- Private factor 4 probably favors the plaintiff because the plaintiff is an individual. The plaintiff, however, has not presented to the Court much of an argument on any of the specific factors that the Court must consider in deciding whether to transfer a case.

- Private factor 5 is neutral on the record before the Court. Neither side has argued that there are some witnesses that may be unavailable for trial in one of the fora. The corporate defendant and the majority of the other defendants and the "vast majority of the defendants' potential witnesses" reside in New York. More people will be inconvenienced by trial in Philadelphia than in New York. Affidavit of Matthew Spolar, ¶ 12.

- Private factor 6 is neutral. Although the defendants' records are located in the Eastern District of New York, there is no apparent reason why they could not be produced in the Eastern District of Pennsylvania. See Jumara, 55 F.3d at 879 (concluding that whether the records can be produced in the forum is the principle issue for factor 6).

The public factors are at most neutral with respect to transfer, except for factor 6. Because New York law will be applied to this controversy, as required by the Confidentiality

Agreement, the trial judge in the Eastern District of New York is more familiar with New York law than this Court. The Court has not been presented with any evidence with respect to the other public factors.

An appropriate order follows.

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ORDER

AND NOW, this 3rd day of March, 2005, upon consideration of defendants' Motion to Dismiss or, in the Alternative, to Transfer Venue (Docket No. 4), plaintiff's Motion to Remand (Docket No. 6), plaintiff's Answer to Defendants' Motion to Dismiss and/or Transfer Venue, defendants' Memorandum in Opposition to Plaintiff's Motion to Remand, and in Support of Its Cross-Motion for Permission to File a Supplemental Notice of Removal (Docket No. 12), plaintiff's Reply to Defendants' Opposition to Motion to Remand and plaintiff's Motion to Strike Defendants' Supplemental Notice for Removal as Untimely (Docket No. 14), IT IS HEREBY ORDERED that defendants' Motions to File a Supplemental Notice of Removal and to Transfer Venue are GRANTED and all other motions are DENIED, for the reasons set forth in a memorandum of today's date. IT IS FURTHER ORDERED that this case is transferred to the Eastern District of New York.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.