

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

DVI BUSINESS CREDIT RECEIVABLES : CIVIL ACTION
CORP., III. :
 :
 v. :
 :
PREFERRED MRI, INC., et al. : NO. 05-1086

MEMORANDUM AND ORDER

McLAUGHLIN, J.

May 19, 2005

Preferred MRI, Inc. has moved to transfer this case to the Northern District of Texas pursuant to 28 U.S.C. § 1404(a). Having weighed all of the private and public factors set out in Jumara v. State Farm Insurance Company, 55 F.3d 873 (3d Cir. 1995), the Court will deny the motion.

This case arises out of the defendant's alleged failure to repay principal and interest under a loan agreement that was entered into between DVI Business Credit Corporation ("DVIBC") and the defendant Preferred MRI, Inc. ("Preferred MRI"). The individual defendants, James Webb, Ted Groesbeck, and Grady Hobbs, are officers and the sole shareholders of Preferred MRI. At the same time that Preferred MRI entered into the loan agreement, the individual defendants each entered into a guaranty and suretyship agreement with DVIBC. DVIBC subsequently transferred and assigned all of its rights and interests in the

agreements to the plaintiff, DVI Business Credit Receivables Corp., III ("DVI").

Section 1404(a) of Title 28 states:

For the convenience of 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.

28 U.S.C. § 1404(a). The party requesting the transfer has the burden of establishing that transfer is warranted. The Court must consider private and public factors to determine in which forum the interests of justice and convenience would be best served. Jumara, 55 F.3d at 879.

Private factors include: (1) the plaintiff's forum preference; (2) the defendant's 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. at 879-80.

The plaintiff's choice of forum weighs against transfer. The defendant argues that the plaintiff's choice of this Court as its forum should carry no weight because the plaintiff is a foreign corporation and the cause of action did not arise here. The Court disagrees. The loan agreement that Preferred MRI entered into with the plaintiff, as well as the suretyship agreements that the individual defendants entered into with the plaintiff, contain provisions which suggest that the parties contemplated Pennsylvania as a proper forum to litigate any disputes which might arise out of the agreements.

Section 13.11 of the loan agreement provides:

(a) Borrower hereby irrevocably submits to the jurisdiction of any state or federal court in the Commonwealth of Pennsylvania, over any action or proceeding arising out of or relating to this agreement

(b) Nothing in this section shall affect the right of lender to serve legal process in any other manner permitted by law or affect the right of lender to bring any action or proceeding against borrower or any of its properties in the courts of other jurisdictions to the extent otherwise permitted by law.

The suretyship agreements each contain the following provision:

The state and federal courts in the Commonwealth of Pennsylvania will have jurisdiction over all matters arising out of this Agreement and the Loan Documents; provided, however, that nothing contained herein will prohibit DVI from initiating action against Surety in any jurisdiction

in which Surety resides or is located, as the case may be Surety waives any right it may have to assert the defense of forum non conveniens or to object to such venue in any such proceeding.

The loan agreement and suretyship agreements also provide that the rights and obligations of the parties will be governed by Pennsylvania law.

Although these provisions are not dispositive of the transfer motion, the Court can consider them in the exercise of its discretion in deciding whether to transfer the case. Stewart Org., Inc. v. Ricon Corp., 487 U.S. 22, 29 (1988); Jumara, 55 F.3d at 880. Contrary to the defendant's argument, therefore, Pennsylvania is not a stranger to this dispute. Preferred MRI has agreed that Pennsylvania law shall apply to the dispute and it has irrevocably submitted itself to the jurisdiction of this Court. The sureties have gone further in their commitment to Pennsylvania. They have waived any right they may have to assert the defense of forum non conveniens or to object to venue. The suretyship agreements state that Pennsylvania state and federal courts "will have jurisdiction" over all matters arising out of the suretyship agreements and loan documents. Under these circumstances, the Court gives great weight to the plaintiff's choice of forum.

The defendant's preference does not weigh heavily in the calculation. All of the defendants would prefer to be in the

Northern District of Texas; but, the Court will not give great weight to that preference in view of the contractual provisions to which the defendants agreed.

Where the claim arose weighs slightly in favor of transfer. Although the plaintiff concedes that the claim did not arise in Pennsylvania, the plaintiff argues that it is not clear whether the claim arose in Texas where the debtor failed to pay or in New York where the debt was to be paid. In any event, it does appear that this factor weighs slightly in favor of the defendant.

Relative financial condition of the parties weighs slightly in favor of the defendant. Preferred MRI argues that its financial position is "tenuous at best" and that the plaintiff is a multi-million dollar company. This argument proves too much because pretrial discovery will proceed in the same way regardless of where the case is pending. It may be true, however, that it would be more expensive for the defendants to try the case in Philadelphia because they will have to travel to Philadelphia for the trial. This factor weighs somewhat in favor of the defendant.

Witness availability is neutral. Preferred MRI argues that all defendants are domiciled or reside in the Northern District of Texas so it would be much more convenient for them to have the trial there. The plaintiff contends that the Court

should not consider the convenience of the individual defendants because they have agreed to waive any right to assert the defense of forum non conveniens or to object to venue. At the oral argument on the motion to transfer, counsel for the plaintiff stated that the individual defendants did not join in the motion because they realize that the suretyship agreements prevent them from doing so. Counsel for the defendants did not take issue with this statement.

The plaintiff also argues that Philadelphia is a more convenient forum for its witnesses than Dallas. The plaintiff listed three necessary witnesses who are located in Chevy Chase, Maryland; Millville, New York; and Marlborough, Massachusetts, respectively. These witnesses are all located on the East Coast of the United States and are in closer geographic proximity to Philadelphia than Dallas. Particularly with respect to the witnesses who are located in Maryland and New York, it will be more convenient for the plaintiff's witnesses to travel to Philadelphia than Dallas.

The defendant's strongest argument on witness availability is that certain individuals may be subject to subpoena in Dallas but not Philadelphia. The defendant lists its auditors, who are located near Houston, Texas, as one example of necessary witnesses who may not be available for trial in Philadelphia. The defendant argues that although the auditors

are not located within 100 miles of the federal courthouse in Dallas, they can be subpoenaed to the trial under a Texas state statute and the Federal Rules of Civil Procedure. See Fed.R.Civ.P. 45(b)(2). The Court will assume that the auditors could be subpoenaed for trial in Dallas, although the defendant has not presented the Court with the state statute that so provides. Other than the auditors, however, the defendant failed to specifically identify any third-party witnesses who may be available for trial in Dallas but not in Philadelphia.

Taking both parties' arguments into consideration, this factor is neutral. Although Philadelphia is more convenient for the plaintiff's witnesses, the defendant's auditors may be subject to subpoena in Dallas but not in Philadelphia. Having said that, however, the Court notes that it would be unusual for auditors to refuse to attend the trial of any matter involving an audit that they had done.

The books and records issue is a neutral factor. The records can be reviewed where they are located and easily shipped for trial.

The public factors are generally neutral. The plaintiff argues that public factor number six weighs in its favor because Pennsylvania law will be applicable to this case. The Court agrees. The defendant argues that public factor number four weighs in its favor because Texas has an interest in

deciding the controversy that involves a Texas corporation and individual residents of Texas. The Court does not view this controversy as a particularly local one. It involves a creditor's attempt to collect money allegedly owed by a debtor. It is true that the debtor is located in Dallas; but, it does not appear that the Northern District of Texas has any particular interest in deciding this case.

Having weighed all of the Jumara factors, the Court concludes that the defendant has not established that transfer is warranted.

An appropriate Order follows.

