

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SWISS HERITAGE CHEESE, INC.,
Plaintiff,

ORDER
02-C-0441-C

v.

AHAVA DAIRY PRODUCTS CORP.
and AHAVA FOOD CORP.,
Defendants.

This civil case for money damages is before the court on the motion of defendants Ahava Dairy Products Corp. and Ahava Food Corp. to transfer the case pursuant to 28 U.S.C. § 1404(a) or to stay the action until an earlier filed case has been resolved in the Eastern District of New York. At a hearing held on the motion on November 8, 2002, at which Todd Schluesche appeared for plaintiff and defendant was represented by Robert Mich and Susan Kellman, I denied defendants' motion. This order incorporates my oral ruling.

The case arises out of a dispute among the parties over defendants' failure to pay plaintiff Swiss Heritage Cheese, Inc. \$150,000 for cheese shipped to defendants in July, August and September 2001. Defendants maintain that plaintiff breached the contract by failing to observe kosher practices in the production of the cheese; plaintiff argues that defendants failed to provide the rabbinical oversight they promised and that, when plaintiff informed them that the rabbis had failed to show up at the critical

times, defendants told plaintiff to ship the cheese anyway. Plaintiff made demands upon defendants for payment; defendants refused to pay and filed its own action in state court in New York on July 2, 2002. Plaintiff sued defendants in the Circuit Court for Green County, Wisconsin on July 8, 2002. Both the New York case and the Green County case were removed to federal courts in the respective states. In both cases, motions to transferred have been filed. The motion is pending in the Eastern District of New York.

First-filed cases often have priority when mirror-image cases are filed in separate courts. In this case, however, I am convinced that other factors outweigh the priority of filing consideration. The balancing of convenience that § 1404 requires comes out in favor of plaintiff, given the situs of material events, the relative ease of access to sources of proof and the convenience of the parties in relation to their respective residences and abilities to bear the expense of trial in one forum or the other.

Plaintiff has filed the affidavits of dairy farmers and a milk hauler, attesting to their unwillingness to leave their dairy work to travel to New York for the purpose of testifying. Their testimony is critical to an understanding of the facts of this case to the extent they show the rabbis' presence or absence at the farms and what, if anything, the rabbis said or did not say to the farmers about their absences. On the other hand, defendants argue that the rabbis are crucial to their case and that it will be difficult for them to leave their congregations to travel to Wisconsin. Defendants' argument is less persuasive because one of the rabbis would have to travel in any event because he lives in Baltimore, Maryland and, inconvenient as it would be for the rabbis to leave their work, it is not nearly as difficult as leaving a dairy herd that needs twice-daily attention. Indeed, neither rabbi has averred that

he would have any difficulty traveling to Wisconsin for a trial. Both rabbis were able to travel to Wisconsin for periods of time in the past under their arrangements with Ahava.

Defendants argue that they want to call the broker who introduced the parties so that he could testify about plaintiff's understanding of the critical aspect of the kosher supervision and the monetary premium that plaintiff demanded and received for complying with the rules of kosher production. Defendants suggest that the broker could not afford to make the trip to Wisconsin, although they do not say that he could not afford to come if they paid his travel expenses. More important, nothing about his testimony seems relevant to the dispute. I do not understand that plaintiff is arguing that it did not agree to the rules on kosher supervision or that it did not understand that it was receiving a premium for its agreement but rather that defendants failed to produce the rabbis they required and that they told plaintiff to ship the cheese anyway. The broker would not have any relevant testimony on these key disputes of fact.

The issues in this case have their situs in this judicial district. Defendants began their business relationship with plaintiff in 1992, when their president traveled to Wisconsin to solicit cheese from plaintiff. This is where the cheese was produced, where the rabbis were present or absent and where the cheese was shipped.

Defendants argue that their records are in New York but, given the ease with which records can be shipped or electronically transmitted, this is not a consideration of any weight. Certainly, it is minimal in relation to the convenience of the witnesses who would have to travel to attend court.

This court has many fewer pending cases per judge than does the Eastern District of New York.

It is likely that this case could go to trial much more quickly here than in New York. Transferring the case to New York would add another burden to an already over-burdened court.

Moreover, it appears from the timing of the events in this case that defendants took advantage of plaintiff's efforts to work out a compromise by filing a case in the New York courts while plaintiff believed they were still negotiating. Under the circumstances, this race to the courthouse does not favor transfer.

Finally, there is some question whether plaintiff has been served properly in the New York action. Although this is not a determinative consideration in light of the ease with which the problem could be corrected, it does weaken defendants' priority of filing claim.

I conclude that defendants have failed to show that the convenience of the parties warrants a transfer of this case to the Eastern District of New York. I conclude also that a stay is not proper when the indications are that this case is progressing more rapidly toward resolution than the case in New York.

ORDER

IT IS ORDERED that the motion of defendants Ahava Dairy Products Corp. and Ahava Food Corp. to transfer or stay this case is DENIED.

Entered this 12th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge