

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

UNITED STATES OF AMERICA, ex rel.
Todd Gervae and Michael Inman, AND
TODD GERVAE and MICHAEL INMAN,
individually,

ORDER

Plaintiffs and Relators,

01-C-0383-C

v.

PAYNE AND DOLAN, INC.,
a Wisconsin corporation,

Defendant.

This is a civil action for monetary relief in which plaintiff United States and plaintiffs-relators Todd Gervae and Michael Inman allege that defendant Payne and Dolan, Inc., an asphalt paving company, submitted false claims to the United States regarding the quality of asphalt used on certain highway projects. (For simplicity, I will refer to plaintiffs-relators Gervae and Inman as relators.) Jurisdiction is present under the False Claims Act, 31 U.S.C. § 3732.

Presently before the court are defendant's motion to transfer venue to the United States District Court for the Western District of Michigan, Northern Division, pursuant to

28 U.S.C. § 1404(a) and defendant's motion to unseal and furnish materials filed in camera.

Because it is unclear whether relators received a February 7, 2003 order directing service of their complaint on defendant or whether they or the United States actually served defendant, relators may have until June 30, 2003, to show cause why their claims regarding the Wisconsin and Illinois construction projects should not be dismissed for failure to comply with that order. Defendant and the United States may have until July 7, 2003, to respond. There will be no reply brief. I will reserve a ruling on defendant's motion to transfer venue until the parties have had an opportunity to be heard on the show cause order. Finally, because defendant's motion to unseal and furnish the materials filed in camera is unopposed, it will be granted.

Some background information and procedural history is necessary before I turn to the present motions. Defendant employed relator Gervae for 16 years; he was the plant foreman at its asphalt plant in Marquette, Michigan. Defendant employed relator Inman for eight years as a density lab technician; he worked out of one of defendant's offices, which is located in Gladstone, Michigan. Defendant is incorporated in Wisconsin and is headquartered in Waukesha, Wisconsin. Defendant maintains regional offices throughout Wisconsin, Michigan and Illinois.

On July 5, 2001, relators filed a qui tam complaint in their own names as well as in the name of the United States as required under the False Claims Act. See 31 U.S.C. §

3730(b). In their complaint, relators alleged that defendant submitted false claims in connection with highway construction projects located in Wisconsin, Michigan and Illinois. Under the False Claims Act, the government may elect to intervene and, if it chooses to do so, it will have the primary responsibility for prosecuting the action. See 31 U.S.C. § 3730(c).

Before electing to intervene, the United States moved to transfer venue to the Western District of Michigan. Relators opposed the motion. On May 31, 2002, I denied the motion, explaining that “the government has shown no good reason for a transfer in this case in which it is not yet a party. I am persuaded that until and unless the government decides to intervene, its motion to transfer venue should be denied in light of the objections to the transfer by the plaintiffs-relators.” Sealed Order dated May 31, 2002, dkt. #4, at 2. (Relators argue that because this court decided this issue previously, the case should remain in this district. As should be evident, this argument is without merit. I denied the United States’ motion to transfer venue as premature because it had not yet opted to intervene in the lawsuit.)

On January 31, 2003, the United States filed a notice of election to intervene. In its notice, the United States informed the court that it would file an “amended” complaint outlining exactly which claims it would pursue against defendant. The United States noted that “[t]o the extent that the amended complaint does not adopt all of relators’ claims,

relators will be free to pursue those claims, if any.” Notice of Intervention, dkt. #1, at 1.

On March 10, 2003, the United States filed a “complaint in intervention” (not an “amended” complaint) in which it notified the court that “it was intervening in part of the civil action and declining to intervene in the remaining part of the action.” Intervention Cpt., dkt. #5, at ¶ 1. In its complaint, the United States intervened only as to relators’ claims regarding highway projects that took place in Michigan (specifically, Maas Street, US-42 and M-28, all of which are located in the Western District of Michigan). Thus, the United States declined to intervene as to relators’ claims regarding the highway projects performed in Wisconsin and Illinois.

Defendant asserts explicitly that it has not been served with relators’ complaint. See Dft.’s Br. in Supp., dkt. #14, at 2 & n.1. Moreover, defendant contends that as a result of relators’ failure to serve it with their complaint, relators have abandoned their claims relating to Wisconsin and Illinois (that is, those claims that were not included in the United States’ intervention complaint). See Dft.’s Br. in Supp., dkt. #14, at 3. Although relators appear to continue to assert those claims in their brief in opposition to defendant’s motion to transfer venue, see, e.g., Rltrs.’ Resp., dkt. #17, at 6 (“Moreover, Wisconsin, like Michigan, is one of the States in which Relators claimed [defendant] has committed fraud.”), they are silent as to defendant’s contentions regarding lack of service of process. In fact, relators appear to acknowledge that their complaint has not been served and realize that there is a

difference between their complaint and the United States' complaint. See Rltrs.' Resp., dkt. #17, at 4 ("Upon receiving the Government's Complaint, [defendant] filed this motion requesting a transfer of the action to the Western District of Michigan."). As a result of relators' failure to address the service of process issue raised by defendant, the court is left to question whether relators have chosen to continue to pursue only those claims that the government has opted to intervene in (that is, only the Michigan claims).

This confusion is complicated further by the fact that although I ordered the relators' complaint to be unsealed and served on defendant in early February, the order does not indicate who was supposed to serve it (the United States or relators). See Order dated February 7, 2003, dkt. #2, at ¶ 1. (It appears from the docket that the United States drafted the February 7 order for my signature and that it accompanied the United States' notice of election to intervene.) Moreover, the court's notation at the bottom of the February 7 order indicates that only the United States received a copy of it. Because it is unclear whether relators received this order or whether they or the United States served their complaint on defendant, relators may have until June 30, 2003, to show cause why their claims regarding Wisconsin and Illinois should not be dismissed for failure to comply with the order by timely serving their complaint on defendant. Defendant and the United States may have until July 7, 2003, to respond. There will be no reply brief.

Because it is impossible to determine whether a transfer of venue is warranted until

I know whether this lawsuit will encompass claims regarding allegations of false claims concerning Wisconsin and Illinois highway construction projects, I will reserve a ruling on defendant's motion to transfer venue until the parties have had an opportunity to be heard regarding the show cause order.

Finally, defendant has filed a motion to unseal and furnish materials filed in camera. According to the April 4, 2003 cover letter accompanying the motion, the lawyers for both the United States (Mullen J. Dowdal) and relators (David L. Haron) received a copy of defendant's motion and brief in support of the motion. Because neither the United States nor relators oppose the motion, it will be granted.

ORDER

IT IS ORDERED that

1. Plaintiffs-relators Todd Gervae and Michael Inman may have until June 30, 2003, to show why their claims regarding Wisconsin and Illinois highway construction projects should not be dismissed for their failure to comply with the February 7, 2003 order by timely serving their complaint on defendant. Defendant Payne and Dolan, Inc. and plaintiff United States may have until July 7, 2003, to respond. There will no reply brief;

2. A ruling is RESERVED on defendant's motion to transfer venue to give the parties an opportunity to be heard regarding the show cause order; and

3. Defendant's motion to unseal and furnish material in camera is GRANTED. The clerk of courts is directed to unseal all remaining materials in this case and furnish a copy of those items to defendant.

Entered this 19th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge