IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs and Relators,

v.

PAYNE AND DOLAN, INC.,
a Wisconsin corporation,

Defendant.

OPINION AND ORDER

01-C-0383-C

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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.

On June 19, 2003, I ordered relators to show cause why their claims regarding the Wisconsin and Illinois highway construction projects should not be dismissed for failure to

comply with a February 7, 2003 order, which required relators' complaint to be served on defendant. As suspected, relators did not receive a copy of the February 7 order from the court, although they received a copy of it from the United States sometime the following month. In any event, in response to the court's June 19 show cause order, relators filed a motion to voluntarily dismiss their complaint without prejudice and adopt the United States' complaint in intervention. See 31 U.S.C. § 3730(b)(1) (if court and government give written consent to dismissal, relators may voluntarily dismiss qui tam action). Because the government has consented to the dismissal of relators' complaint and defendant does not oppose relators' motion, it will be granted.

Also in the June 19 order, I reserved a ruling on defendant's motion to transfer venue to the United States District Court for the Western District of Michigan pursuant to 28 U.S.C. § 1404(a), concluding that it was impossible to decide the motion without first resolving whether relators were continuing to pursue their allegations of false claims as to the Wisconsin and Illinois highway construction projects alleged only in their complaint. Because that issue has been resolved, defendant's motion to transfer venue is now before the court.

Because the convenience of the parties and witnesses and the interest of justice weigh in favor of transferring this cause of action to the Western District of Michigan, I will grant defendant's motion to transfer under 28 U.S.C. 1404(a).

In the complaint and attachments, plaintiff and relators allege the following facts. (Because the government's complaint in intervention is now the operative complaint in this lawsuit, I will refer to it as simply the complaint.)

ALLEGATIONS OF FACT

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 headquartered in Waukesha, Wisconsin, which is in the Eastern District of Wisconsin. Defendant conducts business in both the Western District of Wisconsin and the Western District of Michigan.

From 1991 through 2001, defendant failed to provide the required quality assurance and quality control testing to the government by submitting false testing data and statements regarding the Maas Street (in Nagaunee, Michigan), US-41 (near Baraga, Michigan) and M-28 (near Raco, Michigan) highway projects, all of which are located in the Western District of Michigan.

(For some unknown reason, relators treat the false claims concerning the US-41 project as if they do not exist, even though the complaint includes that project. See Cpt., dkt. #5, at ¶ 20 (alleging that defendant submitted false test data as to "the projects

identified on Exhibit 1: the Maas Street project, US-41 (near Baraga, Michigan) and M-28 (near Raco, Michigan)"). Adding to the confusion is the fact that Exhibit 1 (cited in ¶ 20 of the complaint) lists the US-41 and M-28 projects and not the Maas Street project. In any event, because the complaint alleges false claims as to all three construction projects, I assume that all three projects remain at issue in this lawsuit for purposes of deciding the present motion to transfer.)

OPINION

Before a court weighs the appropriate factors to determine whether to transfer a case under § 1404(a), it must conclude that (1) venue is proper in the transferor district and (2) the transferee district is one in which the action could have been brought. See Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219 (7th Cir. 1986). As the parties concede, venue and personal jurisdiction would be proper in either the transferor and transferee district. See 31 U.S.C. § 3732 (action under False Claims Act may be brought in any judicial district in which defendant resides, transacts business or can be found or in which any act proscribed under the statute occurred). Therefore, I turn to the question whether this case should be transferred to the Western District of Michigan.

In a motion to transfer venue brought pursuant to 28 U.S.C. § 1404(a), the moving party bears the burden of establishing that the transferee forum is "clearly more convenient."

Coffey, 796 F.2d at 219-20. In weighing the motion, a court must decide whether the transfer serves the convenience of the parties and witnesses and will promote the interest of justice. See 28 U.S.C. 1404(a); Coffey, 796 F.2d at 219-20; see also Roberts & Schaefer Co. v. Merit Contracting, Inc., 99 F.3d 248, 254 (7th Cir. 1996) (question is whether plaintiff's interest in choosing forum is outweighed by either convenience concerns of parties and witnesses or interest of justice). The court should view these factors as placeholders among a broader set of considerations and evaluate them in light of all the circumstances of the case. See Coffey, 796 F.2d at 219 n.3. Such broader considerations include the situs of material events, ease of access to sources of proof and plaintiff's choice of forum. See Harley-Davidson, Inc. v. Columbia Tristar Home Video, Inc., 851 F. Supp. 1265, 1269 (E.D. Wis. 1994); Kinney v. Anchorlock Corp., 736 F. Supp. 818, 829 (N.D. Ill. 1990).

Instead of offering evidence to support their position, relators simply rest on their argument that defendant has not met its burden of showing that a transfer to the transferee forum would be (1) clearly more convenient for the witnesses; (2) clearly more convenient for the parties; and (3) in the interest of justice. Therefore, relators argue, defendant has not justified upsetting relators' choice of forum.

1. Choice of forum

Generally, the court should give deference to a plaintiff's choice of forum, especially

when it is the district in which the plaintiff resides. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981). Although defendant acknowledges that a plaintiff's choice of forum typically is entitled to substantial weight under § 1404(a), it argues that in a qui tam action, the United States is the real plaintiff in interest, not relators. See United States ex rel. Hall v. Tribal Development Corp., 49 F.3d 1208, 1212-13 (7th Cir. 1995) (holding that because United States is real plaintiff in interest in qui tam action, challenging standing of relator is irrelevant). Thus, defendant argues, the United States is no more a resident of the Western District of Wisconsin than it is of the Western District of Michigan and, as a result, relators' choice of forum does not deserve the same level of deference. See United States v. Klearman, 82 F. Supp. 2d 372, 375 (E.D. Pa. 1999) ("[T]he plaintiff is the federal government, which is no more a resident of the Eastern District of Pennsylvania than it is of the Eastern District of Missouri. Thus, while its choice is properly granted significant weight, it is not a choice that deserves the same level of deference as does a choice by a plaintiff to bring an action in her home district."). In contrast, relators argue that in a qui tam action, the relator continues to be a party to the action under 31 U.S.C. § 3730(c)(1) and, moreover, the holding in Hall, 49 F.3d at 1212-13, is inapplicable because that case involved a question of standing, not transfer of venue.

Even assuming that relators' residency has some bearing in a qui tam action, in this case relators do not reside in the Western District of Wisconsin, but rather in the Western

District of Michigan. Moreover, if plaintiff's chosen forum is not the situs of material events, courts have held that a plaintiff's choice has weight equal to the other factors and will not receive deference. See Chicago, Rock Island & Pacific Railroad Co. v. Igoe, 220 F.2d 299, 304 (7th Cir. 1955) (plaintiff's choice of forum given less deference if few operative facts occurred in that forum); see also Carillo v. Darden, 992 F. Supp. 1024, 1026 (N.D. Ill. 1998); Sanders v. Franklin, 25 F. Supp. 2d 855, 858 (N.D. Ill. 1998). It is undisputed that all three of the highway projects at issue were built in the Western District of Michigan. Accordingly, because relators reside in the transferee forum and the situs of events is in the transferee forum, relators' choice of forum in the transferor district is not subject to deference.

2. Convenience of parties

Defendant argues that (1) relators reside in the transferee forum; (2) all employees with knowledge of the highway projects reside in the transferee forum; and (3) all records concerning the Maas Street project are located in the transferee forum. The only substantive argument relators make in opposition to these assertions is that defendant maintains four offices in Wisconsin. However, relators do not explain how these offices are relevant to the highway projects at issue. Moreover, relators concede that the records concerning the Maas Street project are located in Gladstone, Michigan, which is in the transferee forum.

Although the parties do not indicate where the records for the US-41 and M-28 projects are located, this is of little significance because shipping documents is not difficult. Because the parties reside in the transferee forum and all employees with knowledge of the projects at issue reside in the transferee forum, the convenience of the parties weighs in favor of transfer.

2. Convenience of witnesses

Although relators concede that "a number of witnesses and experts are in Michigan," they argue that this is not a sufficient basis to transfer venue. Relators' Resp., dkt. #17, at 8. Notwithstanding this concession, relators argue that although defendant provided the court with a list of 18 possible witnesses (present and former employees, all of whom live substantially closer to the transferee forum than to the transferor forum), it failed to tell the court how these witnesses will be material to this lawsuit. In addition, relators assert that defendant's proposed witnesses are only those that defendant believes the United States (rather than defendant) has or will interview in connection with this case. Remarkably, relators fail to identify even one potential witness that resides in or is located closer to the transferee forum. Instead, they argue that defendant has not met its burden of proving that the transferor forum is clearly more convenient to the witnesses. Relators' stance is unpersuasive. In the face of defendant's laundry list of possible witnesses, relators must offer

something more than a recitation of the burden of proof.

To the extent that relators argue that it is "highly irregular" for a *defendant* to seek a transfer of venue to make it more convenient for the *government's* witnesses to testify, this argument carries little weight. First, the United States' witnesses are defendant's present and former employees. Second, and perhaps more important, the United States does not oppose defendant's motion to transfer venue. In fact, the United States moved to transfer venue to the transferee forum earlier in this lawsuit. (That motion was denied as prematurely filed because the government had not yet formally intervened in the lawsuit.) Because all potential witnesses reside in or are located closer to the transferee forum and relators fail to identify any witnesses located closer to the transferor forum, the convenience of witnesses weighs in favor of transfer.

4. Interest of justice

The final factor considered is whether the transfer will serve the interest of justice. The "interest of justice" includes such concerns as trying related litigation together, having a judge who is familiar with the applicable law try the case and insuring speedy trials. See Coffey, 796 F. 2d at 221; see also Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988) (interest of justice embraces public-interest factors of systemic integrity and fairness, rather than private interests of litigants and their witnesses).

Relators argue that this case has been in this district for two years and, therefore, judicial economy dictates that it remain here. However, notwithstanding this time lag, relators lawsuit is in only the preliminary stages of litigation (as evidenced by the present motions to transfer and voluntarily dismiss) because of a related criminal investigation and the nature of a qui tam action, not because this court has expended any significant judicial resources on it. Therefore, this argument is unpersuasive.

Because this case does not involve diversity issues or separate lawsuits (although it appears relators may have filed a similar lawsuit in the *transferee* forum), the only relevant interest of justice concern is insuring a speedy trial. On this point I agree with relators. Their lawsuit will proceed more quickly in this district. According to the latest Federal Court Management Statistics prepared by the Administrative Office of the U.S. Courts, the docket in the Western District of Wisconsin is far less congested than the docket in the Western District of Michigan. For the 12-month period ending September 30, 2002, civil litigants in the Western District of Wisconsin could expect to go to trial in 7.5 months, whereas in the Western District of Michigan, the median time from filing to trial was 23.0 months. Because relators can expect to go to trial more quickly in this district, this factor does not weigh in favor of transfer.

In sum, defendant has met its burden of establishing that the transferee forum is

clearly more convenient. All potential witnesses, the Maas Street documents, all parties and the situs of events are located in the Western District of Michigan. To the extent that documents relating to the US-41 and M-28 projects *may* be located in Wisconsin, this is of little import because documents can be shipped easily. Additionally, the deference generally afforded a plaintiff in a motion to transfer is diminished because Wisconsin lacks any significant relationship to the underlying claims and is not relators' home forum. The only factor weighing against transfer is the speed with which this case can be expected to go to trial, but this difference does not outweigh the factors in favor of transfer. Therefore, the convenience of the parties, witnesses and the interest of justice dictate transfer of this lawsuit to the Western District of Michigan.

ORDER

IT IS ORDERED that

1. The motion by plaintiffs-relators Todd Gervae and Michael Inman to voluntarily dismiss without prejudice their complaint and adopt plaintiff United States' complaint in intervention is GRANTED;

2. The motion by defendant Payne and Dolan to transfer this case is GRANTED. This case is transferred to the United States District Court for the Western District of Michigan; and

3. The clerk of court is directed to transmit the file to the United States District Court for the Western District of Michigan.

Entered this 14th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge