

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

MERRILL IRON & STEEL, INC.,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-104-S

YONKERS CONTRACTING COMPANY, INC.,
TULLY CONSTRUCTION CO., INC.,
A.J. PEGNO CONSTRUCTION CORP.,
ST. PAUL FIRE & MARINE INSURANCE COMPANY,
and FEDERAL INSURANCE COMPANY

Defendants.

Plaintiff Merrill Iron & Steel, Inc. commenced this civil action alleging unjust enrichment, violation of Wis. Stat. § 779.02(5), and breach of fiduciary duty against defendants Yonkers Contracting Company, Inc., Tully Construction Co., Inc. and A.J. Pegno Construction Corp. and breach of a surety bond against defendants St. Paul Fire & Marine Insurance Company and Federal Insurance Company. Jurisdiction is based on diversity of citizenship, 28 U.S.C. § 1332. Presently before the Court are motions to dismiss for lack of personal jurisdiction, for summary judgment, and to transfer venue. The following facts are undisputed for the purposes of the pending motion to transfer venue.

BACKGROUND

YTP is a joint venture organized under the laws of the state of New York. It comprises defendants Yonkers Contracting Company,

Inc., Tully Construction Co., Inc. and A.J. Pegno Construction Corp. Yonkers, Tully and A.J. Pegno are New York corporations with principal places of business in New York.

In February 2002 YTP contracted with the Port Authority Trans-Hudson Corporation (PATH) to serve as general contractor for the "Downtown Path Restoration Program-Phase 1, New York and New Jersey," a public construction project to restore train services lost as a result of the September 11, 2001 World Trade Center disaster. PATH is a wholly-owned subsidiary of the Port Authority of New York and New Jersey.

Defendant St. Paul Fire & Marine Insurance Company is a Minnesota corporation with its principal place of business in Maryland. Defendant Federal Insurance Company is an Indiana corporation with its principal place of business in New Jersey. St. Paul and Federal jointly issued the payment and performance bond that PATH required YTP to furnish for the project.

Leonard Kunkin & Associates is a Pennsylvania corporation with its principal place of business in Pennsylvania. Kunkin entered into an agreement with YTP to supply fabricated steel components for the project's main entrance canopy. The canopy was to be fabricated from over 30 trusses. Each truss was to be fabricated from tubular steel pipe sections.

Plaintiff Merrill Iron & Steel, Inc. is a Wisconsin corporation with its principal place of business in Schofield,

Wisconsin. Merrill entered into an agreement with Kunkin to supply the two main canopy supply towers and approximately 1/3 of the ornamental steel necessary for Kunkin to fabricate the trusses. Merrill requested and received a joint-check agreement from YTP providing that all checks issued by YTP would be made jointly payable to Kunkin and Merrill.

A PATH inspector visited Merrill's plant in Schofield and inspected Merrill's work. The materials fabricated by Merrill were later delivered to the project site in New York. During YTP's assembly of the canopy, however, PATH's on-site inspector discovered deficient welding in some of the materials supplied by Kunkin. YTP was unable to return the materials to Kunkin because Kunkin had gone out of business. YTP incurred significant expenses to correct the defective materials and backcharged these expenses against Kunkin's account, which resulted in a balance due from Kunkin to YTP of over \$350,000. Consequently, YTP did not pay Kunkin the full amount specified in their agreement.

Kunkin never paid Merrill. In September 2003 Merrill commenced an action in the Circuit Court for Marathon County, Wisconsin against Yonkers, Tully, A.J. Pegno, Kunkin and PATH seeking damages in the amount of \$495,932 for the materials that it had supplied to Kunkin. Marathon County Circuit Court Judge Dorothy L. Bain awarded judgment in favor of Merrill and against Kunkin in the amount of \$495,932. Judge Bain dismissed Merrill's

claims against Yonkers, Tully, A.J. Pegno and PATH for lack of personal jurisdiction. Merrill did not appeal. Instead, it commenced the present action.

MEMORANDUM

Defendants Yonkers Contracting Company, Inc., Tully Construction Co., Inc. and A.J. Pegno Construction Corp. move to dismiss for lack of personal jurisdiction. Defendants St. Paul Fire & Marine Insurance Company and Federal Insurance Company move for partial summary judgment. In the alternative, defendants move to transfer venue to the Southern District of New York pursuant to 1404(a). Personal jurisdiction is not required to transfer an action pursuant to 28 U.S.C. § 1404. Coté v. Wadel, 796 F.2d 981, 985 (7th Cir. 1986). Because transfer is clearly warranted, the Court now grants the motion to transfer without addressing the motions to dismiss or for partial summary judgment.

Defendants' motion for change of venue is governed by 28 U.S.C. § 1404(a), which provides: "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."

There is no question that this action might have been brought in the United States District Court for the Southern District of New York. Accordingly, the Court's inquiry focuses solely on "the

convenience of parties and witnesses, in the interest of justice." In ruling on this motion the Court considers all circumstances of the case using the three statutory factors as place holders in its analysis. Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219 (7th Cir. 1986). Defendants bear the burden to prove that the Southern District of New York is clearly a more convenient venue.

The Convenience of the Parties and Witnesses

Plaintiff has its principal place of business in Schofield, Wisconsin and identifies several witnesses and the bulk of its documents as located in Wisconsin. Defendants Yonkers, Tully and A.J. Pegno have their principal places of business in New York and identify several witnesses and the bulk of their documents as located in New York. Defendants St. Paul and Federal also identify several witnesses and the bulk of their documents as located in or near New York.

The Court accepts each party's assessment of its own convenience. The Western District of Wisconsin is a more convenient venue to plaintiff. The Southern District of New York is a more convenient venue to defendants. A transfer would accomplish a mere shift in party inconvenience. Accordingly, the convenience of the parties does not weigh in favor of either district. Heller Fin., Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1293 (7th Cir. 1989).

Technological advancements have diminished traditional forum non conveniens and 1404(a) concerns related to the ease of access to sources of proof and the cost of obtaining the attendance of witnesses. While geographic concerns remain a part of the analysis, the Court is mindful that the relevant documents and witnesses can be transported to either district in a speedy and relatively inexpensive manner.

Certainly each party would prefer to avoid the expense and inconvenience of having its employees travel to a more remote venue. Of greater concern are witnesses who are outside the parties' control. The existence of such witnesses is frequently an important consideration. Live testimony cannot be compelled when such witnesses are distant from the forum court. The interest of justice favors transfer to a venue where such witnesses will be available. "Certainly, to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition is to create a condition not satisfactory to the court, jury or most litigants." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 511 (1947).

Defendants identify several third-party witnesses who reside in or near the Southern District of New York. Defendants anticipate the need to call as witnesses representatives of Kunkin whose principal place of business is in Pennsylvania. Defendants also anticipate the need to call representatives from PATH

including the on-site inspector who rejected the materials supplied by Kunkin and representatives of Severud & Associates Consulting Engineers who provided engineering services to PATH for the project. Severud's principal place of business is in Manhattan. Finally, defendants anticipate the need to call welding inspector Bob Waite and representatives of Metropolitan Steel Industries, each of which participated in the repair of the defective components. Waite works in Long Island, New York. Metropolitan Steel's principal place of business is in Pennsylvania.

Plaintiff does not suggest the presence within this district of any potential witnesses who are not either employed by or otherwise within the control of the parties. Accordingly, there is little risk that any witness within this district will fail to appear in the Southern District of New York since all are closely aligned with the parties. 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3851, at 420-32 (2d ed. 1986).

Plaintiff suggests one potential third-party witness who lives in or near Chicago, Illinois. Plaintiff alleges that the inspector who visited its Schofield plant and inspected its work on behalf of PATH is an employee in the firm R.W. Hunt's Chicago office. There is no suggestion that this person lives or works within the subpoena power of this Court, but the Court recognizes that it would be more convenient for this witness to travel to this

district than to New York. Nevertheless, the balance of third-party witnesses weighs heavily in favor of transfer.

Plaintiff's Choice of Forum and Interests of Justice

As a general rule a plaintiff's choice of forum is entitled to substantial weight. Plaintiff has selected its home forum and there is no suggestion that its choice was motivated by any improper purpose such as a desire to vex, harass, or oppress defendant. Gulf Oil, 330 U.S. at 508. In this instance, however, broader interests of justice, in addition to the convenience of third-party witnesses, override plaintiff's choice of forum and require transfer.

Of greatest concern is the lack of personal jurisdiction over defendants Yonkers, Tully and A.J. Pegno in this district. A Wisconsin court has already determined that personal jurisdiction over these defendants is not available under Wisconsin's long-arm statute. Plaintiff suggests no other basis to assert personal jurisdiction over these defendants. Certainly, the interests of justice would not be served by conducting trial in a venue where there is a significant chance that personal jurisdiction is lacking. The facts so far presented by plaintiff in support of jurisdiction over defendant leave significant doubt as to the appropriateness of exercising jurisdiction in this Court. Conservation of judicial resources and avoidance of unnecessary

legal expenses are advanced by a transfer from a forum in which there is a genuine question of personal jurisdiction to a district in which there are no such uncertainties. 15 Wright, Miller & Cooper, supra, § 3854, at 469-70 & n.31.

The convenience of witnesses and the interests of justice clearly favor transfer. Accordingly, the matter will be transferred to the Southern District of New York pursuant to 28 U.S.C. § 1404(a).

ORDER

IT IS ORDERED that defendants' motion to transfer venue is GRANTED and the matter shall be transferred to the Southern District of New York pursuant to 28 U.S.C. § 1404(a).

Entered this 18th day of May, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge