

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

TRAFFICCAST, INC.,

Plaintiff,

MEMORANDUM AND ORDER

v.

05-C-557-S

ROBERT D. PRITCHARD,

Defendant.

Plaintiff TrafficCast, Inc. commenced this action against defendant Robert D. Pritchard in Dane County Circuit Court alleging breach of contract, intentional misrepresentation and theft. Defendant removed pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1446(a). The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1). The matter is presently before the Court on defendant's motion to transfer venue to the United States District Court for the District of Massachusetts or in the alternative to stay proceedings. The following facts relevant to the question of venue are not disputed.

FACTS

Plaintiff TrafficCast, Inc. is a Wisconsin corporation with its principal place of business in Madison, Wisconsin. Defendant Robert D. Pritchard is a resident of Foxboro, Massachusetts.

Plaintiff is engaged in the business of tracking and predicting real-time traffic flow. It also develops software to

track and predict traffic flow. In 1999 plaintiff and defendant entered into a business relationship. The parties dispute the proper classification of their relationship. Plaintiff argues it hired defendant as an independent contractor while defendant argues he was hired as an employee of plaintiff and held the title Executive Vice President. However, regardless of the nature of their relationship it is undisputed it came to an end sometime in 2002.

On or about May 31, 2005 defendant filed a complaint against plaintiff in the United States District Court for the District of Massachusetts alleging six counts: (1) violations of federal securities laws; (2) fraud; (3) breach of fiduciary duty; (4) breach of contract; (5) quantum meruit; (6) wrongful termination. Defendant mailed plaintiff a copy of the complaint approximately one month later and formally served the complaint on August 23, 2005. Plaintiff filed a motion to dismiss the Massachusetts action based on lack of personal jurisdiction and improper venue and in the alternative a motion to transfer the action to the United States District Court for the Western District of Wisconsin. The motions are currently pending.

On or about August 23, 2005 plaintiff filed a complaint against defendant in Dane County Circuit Court alleging three counts: (1) breach of contract; (2) intentional misrepresentation; (3) theft. Defendant removed the action to this Court and filed his motion to transfer venue to the United States District Court for the District of Massachusetts.

MEMORANDUM

When two similar actions are filed the general rule favors the forum of the first-filed suit. Warshawsky & Co. v. Arcata Nat. Corp., 552 F.2d 1257, 1263 (7th Cir. 1977). Under this first to file rule an action is normally dismissed, stayed or transferred "for reasons of wise judicial administration ... whenever it is duplicative of a parallel action already pending in another federal court." Serlin v. Arthur Andersen & Co., 3 F.3d 221, 223 (7th Cir. 1993) (citations omitted). Generally, a suit is duplicative if the "claims, parties, and available relief do not significantly differ between the two actions." Id. (citing Ridge Gold Standard Liquors v. Joseph E. Seagram, 572 F.Supp. 1210, 1213 (N.D.Ill. 1983)).

However, the Seventh Circuit does not rigidly adhere to the first to file rule. Trippe Mfg. Co. v. Am. Power Conversion Corp., 46 F.3d 624, 629 (7th Cir. 1995) (citing Tempco Elec. Heater Corp. v. Omega Eng'g., Inc., 819 F.2d 746, 750-751 (7th Cir. 1987)). Plaintiff does not have an absolute right to choose the forum simply because it filed an action first. Id. Accordingly, second-filed actions may proceed "where favored by the interests of justice." Schwarz v. Nat'l. Van Lines, Inc., 317 F.Supp.2d 829, 833 (N.D.Ill. 2004) (citing Tempco, at 749-750).

There is no question plaintiff's suit is duplicative of the action pending in the United States District Court for the District of Massachusetts. Further, it is undisputed defendant filed his action in Massachusetts first. Accordingly, transfer is warranted

unless the interests of justice favor maintaining the action in this Court. The Court finds they do not and transfer is warranted.

The interests of justice analysis relates to the "efficient functioning of the courts, not to the merits of the underlying dispute." Coffey v. Van Dorn Iron Works, 796 F.2d 217, 221 (7th Cir. 1986). Accordingly, under the interests of justice analysis five basic factors are considered: (1) "the relative ease of access to sources of proof;" (2) "availability of compulsory process for attendance of unwilling witnesses;" (3) "the cost of obtaining attendance of willing witnesses;" (4) "the possibility of a view of the premises;" and (5) "the state of the court calendars." L.B. Sales Corp. v. Dial Mfg., Inc., 593 F.Supp. 290, 296 (E.D.Wis. 1984). None of these factors warrant deviating from the first to file rule.

1. Relative ease of access to sources of proof

The relative ease of access to proof is not a significant factor in this action because much of the evidence is documentary in nature and documents such as contracts and financial records can be "easily copied and transferred" to any forum. Generac Corp. v. Omni Energy Sys., Inc., 19 F.Supp.2d 917, 923 (E.D.Wis. 1998). Accordingly, this factor does not justify deviating from the first to file rule.

The Court next considers factors 2 and 3, availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses

Live testimony cannot be compelled when third party witnesses are distant from the forum court. Merrill Iron & Steel, Inc. v. Yonkers Contracting Co., Inc., 2005 WL 1181952 at 3 (W.D.Wis. 2005). Accordingly, the existence of such witnesses is frequently an important consideration in the analysis. Id. However, neither party identifies any witness who is unwilling to testify in this action.

Additionally, many (if not all) of plaintiff's potential key witnesses within this district are its employees and are under its control. Accordingly there is little risk that any witnesses will fail to appear in the District of Massachusetts since all are closely aligned with plaintiff. See Merrill Iron & Steel, Inc., at 3. Further, plaintiff concedes that if any witnesses are not subject to compulsory process in the District of Massachusetts it can obtain the testimony of such witnesses through depositions. Finally, neither party quantifies the costs of obtaining attendance of willing witnesses. Accordingly, neither of these factors justify deviating from the first to file rule.

4. The possibility of a view of the premises

In many actions it is important for a jury or a court to view a particular piece of property or equipment. See Generac Corp., at

923. However, plaintiff concedes this factor is not relevant to the present action. Accordingly, it does not weigh in favor of disregarding the first to file rule.

5. The state of the court calendars

_____The interests of justice are served when a trial is held in a district court where the litigants are most likely to receive a speedy trial. Coffey, at 221 (citations omitted). Accordingly, the relative speed with which an action may be resolved is an important consideration when selecting a venue. Parsons v. Chesapeake & Ohio Ry. Co., 375 U.S. 71, 73, 84 S.Ct. 185, 187 (1963). However, related litigation should be transferred to a forum where consolidation is feasible. Coffey, at 221 (citations omitted).

According to statistics obtained from the 2004 Judicial Caseload Profile civil litigants in the United States District Court for the District of Massachusetts can expect to proceed to trial in 31.7 months while civil litigants in the United States District Court for the Western District of Wisconsin can expect to proceed to trial in 10.5 months. Defendant concedes the relative speed with which actions proceed to trial in the two districts favors deviating from the first to file rule. However, the relative speed factor is not in and of itself dispositive of the matter.

While the interests of justice are served when an action is transferred to a district where the litigants are more likely to

receive a speedy trial, the interests of justice are also served when related litigation is transferred to a forum where consolidation is feasible. Id. Further, a federal district court has "an ample degree of discretion" in deferring to another federal proceeding involving the same parties and issues to avoid duplicative litigation. Trippe Mfg. Co., at 629 (citing Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952)). There is no question the possibility of inconsistent judgments is present here. Further, it is also feasible to consolidate this action with the action pending in the United States District Court for the District of Massachusetts. Accordingly, even though the parties statistically can expect a more speedy disposition in this district, when that fact is balanced against the other interest of justice factors it does not justify deviating from the first to file rule.

Plaintiff argues since it is not subject to personal jurisdiction in the United States District Court for the District of Massachusetts the first to file rule should not be followed. Plaintiff filed its motion to dismiss for lack of personal jurisdiction and improper venue and its motion to transfer venue to the Western District of Wisconsin in the District of Massachusetts and both are currently pending. This Court does not have the authority to decide a motion pending in another federal district. See Schumacher Elec. Corp. v. Vector Prod., Inc., 286 F.Supp.2d 953, 955 (N.D.Ill. 2003) (citing Galileo Int'l. P'ship v. Global Village Communication, Inc., 1996 WL 452273 at 3 (N.D.Ill. 1996)).

Accordingly, this action should be transferred to the United States District Court for the District of Massachusetts where it can be consolidated with the pending action and all issues of jurisdiction and venue decided together.

ORDER

IT IS ORDERED that defendant Robert D. Pritchard's motion to transfer venue to the United States District Court for the District of Massachusetts is GRANTED.

Entered this 7th day of November, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge