IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MARVIN LUMBER AND CEDAR COMPANY,

Plaintiff,

v.

S&S SALES CORPORATION,

Defendant.

MEMORANDUM AND ORDER

06-C-105-S

Plaintiff Marvin Lumber and Cedar Company commenced this declaratory judgment action against defendant S&S Sales Corporation seeking a declaration that: (1) its plan to operate dealer-direct in the eastern Wisconsin region does not implicate the Wisconsin Fair Dealership Law (WFDL) or any other law; or (2) if its plan to operate dealer-direct in said region does implicate the WFDL or any other law such conduct does not violate any relevant provisions of the WFDL or any other applicable law. Jurisdiction is based on 28 U.S.C. § 1332(a)(1). The matter is presently before the Court on defendant's motion to dismiss or stay or in the alternative to transfer venue to the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. § 1404(a). The following facts relevant to defendant's motion are undisputed.

BACKGROUND

Plaintiff Marvin Lumber and Cedar Company is a Minnesota corporation with its principal place of business in Warroad, Minnesota. Plaintiff is engaged in the business of manufacturing

windows and doors and its products are sold nationally through a system of distributors and dealers. Defendant S&S Sales Corporation is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. Defendant has served as one of plaintiff's distributors in the eastern Wisconsin region since 1987.

In or about March of 2004 plaintiff and defendant began discussing the possibility of plaintiff entering the window and door marketplace in eastern Wisconsin through a dealer-direct system. If plaintiff implemented such a system it would directly compete with defendant. On May 16, 2005 plaintiff by letter informed defendant of its intent to implement a dealer-direct system in eastern Wisconsin in which plaintiff would sell its products directly to retailers. In its letter plaintiff informed defendant that under dealer-direct it could become a retailer for plaintiff's products.

On June 3, 2005 defendant through its counsel responded to plaintiff's letter. Defendant advised plaintiff that it believed any change in plaintiff's distribution process in Wisconsin would constitute a violation of the WFDL, Wis. Stat. § 135.01 *et seq*. Defendant informed plaintiff of its preference to resolve the dispute in a manner beneficial to both parties which would avoid costs associated with litigation. Defendant requested plaintiff respond to its letter on or before June 15, 2005.

On or about June 15, 2005 plaintiff's representative Mr. Duff

Marshall spoke with defendant's representative Mr. Mark Heard concerning defendant's June 3, 2005 letter. Mr. Marshall indicated that plaintiff's May 16, 2005 letter did not terminate defendant's distribution agreement or serve as notice of termination. Additionally, Mr. Marshall indicated his desire to meet with defendant and discuss possible changes to its distribution system. However, Mr. Marshall explained that plaintiff would not respond to defendant's June 15, 2005 letter as requested.

On June 29, 2005 defendant's counsel by letter contacted plaintiff to inquire about possible resolution of the matter short of litigation. On June 30, 2005 defendant received a letter from plaintiff which identified an alternative to the dealer-direct system in which plaintiff would scrutinize its two-step model and mandate strict compliance with its essential and reasonable requirements of performance criteria. However, in its letter plaintiff also expressed its belief that a dealer-direct system would best serve the interests of both parties.

On or about August 17, 2005 defendant's representative Mr. Peter Sprinkmann attended a meeting in which plaintiff presented a draft document entitled "World Class Distributor Dealer Program." Said document described plaintiff's requirements for its dealers. Accordingly, defendant believed plaintiff's intent was to continue using its two-step distribution system in eastern Wisconsin.

Discussions between the parties on this issue ceased until both parties attended a meeting on February 27, 2006. At this

meeting Mr. Marshall presented a letter to defendant which was dated February 24, 2006. Said letter informed defendant that effective June 1, 2006 plaintiff would commence selling its products dealer-direct in eastern Wisconsin. Plaintiff's letter encouraged defendant to consider participating in its full service retailer program. Additionally, Mr. Marshall informed defendant that on February 24, 2006 plaintiff commenced its declaratory judgment action in this Court seeking a declaration that its intent to operate dealer-direct did not violate the WFDL or any other law.

On March 2, 2006 defendant commenced an action against plaintiff in Milwaukee County Circuit Court alleging violations of the WFDL seeking monetary and injunctive relief. On March 23, 2006 plaintiff removed defendant's Milwaukee action to the United States District Court for the Eastern District of Wisconsin where it is currently pending.

MEMORANDUM

Defendant asserts after it received plaintiff's draft "World Class Distributor Dealer Program" document it was unnecessary to commence litigation because it believed plaintiff decided against implementing a dealer-direct system in eastern Wisconsin. As a result, defendant argues plaintiff's declaratory judgment action is merely an improper preemptive strike intended to wrest the choice of forum from defendant. Accordingly, defendant argues the Court should grant its motion to dismiss. Alternatively, defendant argues this action should be transferred to the United States

District Court for the Eastern District of Wisconsin because said district is more convenient for both the parties and witnesses.

Plaintiff asserts it filed this action not to wrest the choice of forum from defendant but to clarify and settle the controversy surrounding its anticipated commencement of dealer-direct distribution. Accordingly, plaintiff argues no justification exists for disregarding the first-to-file rule and as such defendant's motion to dismiss should be denied. Additionally, plaintiff argues defendant's alternative motion to transfer venue should be denied because this forum is equally convenient for both the parties and third-party witnesses.

The Court concludes dismissal of this action would not serve the interests of justice. However, the Court finds that transfer of this action to the United States District Court for the Eastern District of Wisconsin is warranted because it best serves the convenience of third-party witnesses as well as the interests of justice.

A district court may transfer any civil action "to any other district or division where it might have been brought" if it is convenient for the parties and witnesses and if transfer is in the interest of justice. 28 U.S.C. § 1404(a). There is no question this action might have been brought in the United States District Court for the Eastern District of Wisconsin. Accordingly, the Court's inquiry focuses solely on "the convenience of parties and witnesses, in the interest of justice." Id.

In deciding defendant's motion to transfer venue the Court must consider 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)(citations omitted). Defendant bears the burden to establish by reference to particular circumstances that the transferee forum is clearly more convenient. Id. at 219-220 (citations omitted). Defendant has met this burden.

A. Convenience of the parties

Plaintiff is a Minnesota corporation with its principal place of business in Warroad, Minnesota. Defendant is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. Accordingly, the Eastern District of Wisconsin is defendant's home forum which demonstrates that it is clearly more convenient for it to litigate this action in Milwaukee. However, neither the Western District of Wisconsin nor the Eastern District of Wisconsin is plaintiff's home forum and plaintiff did not argue that litigating this action in Madison would be more convenient than litigating it in Milwaukee. Accordingly, the convenience of the parties factor favors transfer.

B. Convenience of the 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., No. 05-C-104-S, 2005 WL 1181952 at 3 (W.D.Wis. May 18, 2005). Accordingly, the existence of such

witnesses is frequently an important consideration in a transfer motion analysis. Id. However, the party seeking a transfer must clearly specify the key witnesses it intends to call and it must make a general statement of their testimony. Heller Fin., Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1293 (7th Cir. 1989)(citations omitted).

Defendant asserts its dealer customers are potential witnesses and they will be called upon to testify concerning the manner in which defendant has discharged its responsibilities as a distributor. Seventeen of defendant's largest dealer customers are located in the Eastern District of Wisconsin. Additionally, defendant specifically identified its dealer customer Weather-Tek as a potential witness in this action. Defendant asserts a Weather-Tek representative will likely be called upon to testify concerning plaintiff's violations of the WFDL because defendant discovered plaintiff has been training Weather-Tek on its product despite plaintiff's contention that commencement of its dealer-direct system would not occur until June 1, 2006. Weather-Tek's place of business is in Waukesha, Wisconsin which is located in the Eastern District of Wisconsin. While a representative from Weather-Tek would be subject to compulsory process in the Western District of Wisconsin it would be clearly more convenient for him or her to testify in his or her home forum. Accordingly, the convenience of non-party witnesses is best served by transferring this action to the Eastern District of Wisconsin.

C. Interest of Justice

The factors considered in an "interest of justice" analysis relate to "the efficient administration of the court system" not to the merits of the underlying dispute. Coffey, at 221. Accordingly, this factor does not concern the private interests of the litigants. Fondrie v. Casino Res. Corp., 903 F.Supp. 21, 24 (E.D.Wis. 1995)(*citing* Espino v. Top Draw Freight Sys., Inc., 713 F.Supp. 1243, 1245 (N.D.Ill. 1989)). However, the interest of justice factor may often be determinative in a particular case. *See* Coffey, at 220. The Court finds this factor dispositive.

Neither party directly addresses the interest of justice factor in the context of defendant's motion to transfer venue. However, the parties' arguments concerning defendant's motion to dismiss indirectly relate to the interest of justice factor. Accordingly, the Court focuses on said arguments in its analysis. Plaintiff argues it is entitled to proceed in the forum of its choice because its action was the one first-filed. Defendant argues plaintiff's action is an improper preemptive strike intended to wrest the choice of forum from defendant. Accordingly, it argues plaintiff's choice of forum is not entitled to any weight.

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). However, the Seventh Circuit does not rigidly adhere to a first-to-file rule instead holding that in the interest of justice a second-filed action may proceed. Tempco Elec. Heater Corp. v. Omega Eng'g., Inc., 819 F.2d 746, 749-750 (7th Cir. 1987)(citations omitted). Rigid adherence to the first-to-file rule would not serve the interest of justice in this action.

Plaintiff's declaratory judgment action was the one first-filed. However, the undisputed facts demonstrate that no real controversy existed when plaintiff filed its complaint because its draft "World Class Distributor Dealer Program" document (which was the last exchange of communication between the parties on this issue until their meeting on February 27, 2006) expressed plaintiff's intent to maintain its two-step distribution system. Defendant promptly filed suit under the WFDL once it learned of plaintiff's intent to implement a dealer-direct system in eastern Wisconsin. Accordingly, plaintiff engaged in a race to the courthouse and as such the Court declines to rigidly adhere to the first-to-file rule.

However, dismissal of plaintiff's declaratory judgment action which is often the result in such situations would not be in the interest of justice because there is presently a ripe controversy between the parties and forcing plaintiff to refile its action would be a waste of time and resources. Mirror image litigation

involving the parties is currently pending before the United States District Court for the Eastern District of Wisconsin. Related litigation should be transferred to a forum where consolidation is feasible. Coffey, at 221 (citations omitted). Additionally, permitting two cases involving the same issues to continue in separate districts leads to "the wastefulness of time, energy and money that § 1404(a) was designed to prevent." Cont'l. Grain Co. v. The FBL-585, 364 U.S. 19, 26, 80 S.Ct. 1470, 1474, 4 L.Ed.2d 1540 (1960). Accordingly, the efficient administration of the court system is best served by transferring this action to the United States District Court for the Eastern District of Wisconsin.

ORDER

IT IS ORDERED that defendant's motion to transfer venue to the United States District Court for the Eastern District of Wisconsin is GRANTED.

IT IS FURTHER ORDERED that defendant's motion to dismiss is DENIED as moot.

IT IS FURTHER ORDERED that defendant's motion to stay is DENIED as moot.

Entered this 5th day of May, 2006.

BY THE COURT:

S/

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JOHN C. SHABAZ
District Judge