

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

PHILIP CASTLEBERG,

Plaintiff,

v.

TOMMY DAVIDSON and
KELLOR HOLDINGS, INC.,

Defendants.

OPINION AND ORDER

10-cv-647-bbc

This is a civil action in which plaintiff Philip Castleberg is alleging breach of contract and breach of fiduciary duty against defendants Tommy Davidson and Kellor Holdings, Inc. Plaintiff contends that defendants, his partners in a limited partnership known as Covenant Healthcare of Eau Claire, L.P., or Covenant LP for brevity, treated him shabbily in various ways. He alleges that they negotiated mortgage loan transactions that affected partnership property without obtaining the required approval of partners; negotiated lease agreements with another entity, Covenant Healthcare LLC (Covenant LLC), for the lease of real estate owned by Covenant LP without obtaining plaintiff's approval; agreed to convey to a third entity, Meadowlark, real property owned by Covenant LP to Covenant LP's detriment; failed

to hold partnership meetings as required; failed to notify plaintiff of the meetings; and failed to comply with plaintiff's requests for documents. The case is before the court on defendants' motion to transfer it to the District Court for the Eastern District of Tennessee under 28 U.S.C. § 1404(a) and on the court's order directing the parties to show that diversity jurisdiction exists.

In the original and amended complaints that plaintiff filed in the Circuit Court for Eau Claire County, Wisconsin, he asserted direct claims on his own behalf and derivative claims on behalf of Covenant LP, whom he named as an involuntary plaintiff. After defendants removed the case to this court, Covenant LP was realigned as a defendant by stipulation of the parties. This realignment raised questions about the existence of diversity jurisdiction because plaintiff is a limited partner of Covenant LP and the citizenship of a limited partnership is determined by the citizenship of its partners. As a consequence, Covenant is considered a citizen of Florida along with plaintiff. (It is also considered a citizen of Tennessee along with defendants.) If plaintiff and Covenant LP were not diverse from one another, this court would not have jurisdiction to hear the case. When this problem was brought to the parties' attention, the parties stipulated to the dismissal of Covenant LP from the lawsuit.

With the issue of diversity jurisdiction resolved, I turn to defendants' motion for transfer. It is within the court's discretion to grant or deny such a motion, giving due

consideration to convenience and fairness. In deciding the issue of convenience, courts consider the availability and access to witnesses, each party's access to resources in each forum, the location of material events and the relative ease of access to sources of proof. Research Automation, Inc. v. Schrader-Bridgeport International, Inc., 2010 WL 47211588, *3 (7th Cir. Nov. 23, 2010). In addition, they consider matters that come under the "interest of justice" umbrella, such as docket congestion in the transferor or transferee court, relative speed to trial, each court's relatively familiarity with the relevant law, the respective desirability of resolving controversies in each locale and the relationship of each community to the controversy. Id.

As a general rule, the plaintiff's choice of forum is honored unless the defendant can show that when the various factors are weighed, the balance tips strongly in its favor. In re National Presto Industries, Inc., 347 F.3d 662, 664 (7th Cir. 2003). I conclude that in this case, defendants have made that showing. Their own convenience strongly outweighs that of defendant; there is a slight possibility that the convenience of the witnesses weighs in their favor; they have shown that the situs of the relevant events is in Tennessee; and they have shown that the interest of justice favors transfer. (I have ignored the factor of access to sources of proof, which in an electronic age is not ordinarily a factor entitled to any weight.)

For the purpose of deciding the motion, I find the following facts from the record.

RECORD FACTS

Plaintiff Philip Castleberg is a citizen of Florida. Defendant Tommy Davidson is a citizen of Tennessee and defendant Kellor Holdings is a Tennessee corporation with its principal place of business in Tennessee. Defendant Kellor Holdings is the general partner of Covenant Health Care of Eau Claire, L.P. (Covenant LP). Kellor Holdings, plaintiff and defendant Davidson are the current partners of the partnership, which is a Tennessee limited partnership with its principal place of business located in that state.

Sometime before or in February 1997, plaintiff and defendant Davidson formed Covenant Healthcare LLC (Covenant LLC), a Tennessee limited liability company that purchased a skilled nursing home from the county of Eau Claire, in Wisconsin, sometime around February 1997. On November 13, 1997, plaintiff executed an agreement of limited partnership with defendants and a Tennessee general partnership, S and R Finance, that set out the terms and governance of Covenant LP. At the time Covenant LP was formed, plaintiff had a 30% interest in Covenant LP; defendants had a total interest of 30% and S and R Finance had a 40% interest.

Covenant LP was formed to hold the real estate of the Eau Claire nursing home. On November 25, 1997, the two entities, Covenant LP and Covenant LLC, filed a warranty deed evidencing the transfer of the real estate and associated loan from Covenant LLC to Covenant LP. When plaintiff contributed funds to Covenant LP to reduce the loan,

defendant Davidson failed to record the payment as a capital contribution to the partnership. Covenant LP took out a mortgage for \$6.46 million on the real estate but failed to obtain approval of the loan by a super majority of the partners, as required under the limited partnership agreement. Plaintiff did not give his approval.

On February 25, 2002, defendant Davidson held a meeting of the members of Covenant LLC and voted to expel plaintiff as a member. Later defendant Davidson settled his dispute with plaintiff over the expulsion and plaintiff agreed to withdraw from the company.

Plaintiff makes other allegations of wrongdoing by defendants in connection with Covenant LLC and Covenant LP, all supposedly benefiting defendant Davidson, in violation of his fiduciary duty to act in the best interests of Covenant LP. For example, defendant Davidson is a member of another Tennessee limited liability company known as Meadowlark Health Services LLC. On or around August 30, 2004, Meadowlark obtained land in Eau Claire from Covenant LP on which it has built an assisted living facility that is physically attached to Covenant LP's skilled nursing facility. Plaintiff alleges that the consideration for the land purchase was inadequate and that the building of the new facility reduced the value of the existing one owned by Covenant LP.

The partnership agreement establishing Covenant LP requires the application of Tennessee law to all partnership disputes.

Over the years, plaintiff has participated in meetings in Chattanooga, Tennessee, regarding the business operations, management decisions and business strategy for Covenant LP, Covenant LLC, Meadowlark, Arcadia Healthcare, LLC, Scenic Highway Holdings, LLC, and Dove Healthcare, LLC, all of which are Tennessee companies located in Chattanooga. In some instances, he was present in person; in others, he participated by telephone.

Defendants intend to call as witnesses Kevin Pennington, Ellsworth McKee, Sharon McKee, Rusty McKee and Barry Hand, all of whom are residents of Tennessee. All but Pennington are identified as connected with S and R Finance, which was a limited partner in Covenant LP when it was formed in 1997. Plaintiff intends to call as witnesses lawyers from the law firm that handled the recording of the deed for the real property Covenant LP sold to Meadowlark. In addition, he wants to call Wisconsin real estate experts to testify about the value of the real property, along with one Dennis Hyde, who would testify about having personal and business dealings with defendant Davidson that are similar to those that plaintiff has had with Davidson. Also, Hyde would testify about defendant Davidson's motives, habits, practices and reputation in the community.

OPINION

Under 28 U.S.C. § 1404(a), a federal trial court may transfer a case to another federal court for the parties' or witnesses' convenience or in the interest of justice, provided that the

transferee court is one in which the case could have been brought originally. The parties do not deny that this case could have been brought originally in the Eastern District of Tennessee; venue is proper there and the court would have personal jurisdiction over the defendants, who are Tennessee citizens. Thus, the only issue is whether defendants have shown that Tennessee is so much more convenient for the parties and witnesses as to outweigh plaintiff's choice of forum.

Plaintiff's choice is entitled to deference. “[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.” In re National Presto Industries, Inc., 347 F.3d at 664 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)). In this case, however, defendants have shown that the balance tips strongly in their favor. Not only is Wisconsin not the situs of the material events in the case, but defendants have shown that the factors of convenience and the interest of justice support a transfer.

Although plaintiff emphasizes those aspects of his case that favor keeping the case in this district, such as the location of the disputed real estate and the existence of the nursing homes in Wisconsin, a closer look at those aspects reveals their tangential importance to his breach of contract and breach of fiduciary duty claims. These claims are premised on plaintiff's allegations that defendants negotiated mortgages, lease agreements and property transfers without obtaining the necessary approval of the other partners, to the detriment

of Covenant LP, that they failed to hold partnership meetings as required, failed to notify plaintiff of the meetings and failed to comply with plaintiff's requests for documentation regarding Covenant LP and its business dealings. Plaintiff does not allege any wrongdoing by defendants in the state of Wisconsin, with the possible exception of Meadowlark's purchase of land and building of the assisted living facility in Eau Claire. It appears that all of the other alleged wrongs would have taken place in Tennessee, the headquarters of Covenant LP, Covenant LLC and Meadowlark. Even the purchase of the land and the construction of the facility are merely manifestations of the allegedly illegal decisions defendants made in Tennessee. Plaintiff's alleged connection to Wisconsin is the real estate, but little about the real estate is at stake in the case. What is at stake is the way in which the conveyance of the real estate was decided upon, carried out and reported on the books of the entities involved. There may be disputes about the valuation of the property, but these disputes would be peripheral to the liability issues that plaintiff is asserting.

As for the convenience of the parties factor, plaintiff has shown only that it might be more convenient for him to litigate here because he has rental property and business interests here, albeit several hours away from the courthouse in Madison. The record facts show that plaintiff has had a number of occasions to visit Tennessee for meetings involving Covenant LP. Indeed, it is odd that plaintiff would be claiming inconvenience now when it is evident that he entered purposefully into agreements with Tennessee residents and participated in

the creation of Tennessee entities. As for defendants, it is clear that it would be far more convenient for them to try the case in Tennessee, where defendant Davidson resides and where Kellor Holdings is headquartered.

As for the convenience of witnesses factor, plaintiff has listed the members of the firm that handled the recording of the deed and other tasks following the decision to have Meadowlark purchase land from Covenant LP and build on it. Plaintiff does not say that these lawyers would have knowledge of any of the details of the transaction, such as why it was entered into, the benefits to the parties or the detrimental effect on the other partners or the details of the transaction.

Plaintiff wants to call experts in Wisconsin real estate values to testify about the value of the property Covenant LP conveyed to Meadowlark. He asserts, no doubt correctly, that such witnesses would be likely to be residents of Wisconsin, but even if they are, plaintiff will be able to call them as witnesses in a Tennessee court. Unlike witnesses who could refuse to come to court unless legally required to do so, expert witnesses need no subpoena to show up. Testifying is inherent in their agreement to serve as expert witnesses.

Plaintiff has listed only one anticipated witness by name, saying that he wants to call Dennis Hyde to testify about his own experiences with defendant Davidson. It is unlikely that any of that testimony would be admissible. The question at trial will not be whether defendant acted in conformity with his past acts but whether the acts he is alleged to have

performed in this case were legal. Hyde's testimony about defendant Davidson's reputation would be admissible if it related to defendant's reputation for truthfulness, but plaintiff has not shown either that Hyde would be unwilling to appear voluntarily at a trial in Tennessee to give such testimony or that the testimony is important enough to outweigh the inconvenience to defendants' witnesses of traveling to Wisconsin.

Finally, plaintiff says that he wants to call administrators and staff of the Eau Claire nursing facility; again, he does not say what they would testify about. It is improbable that any of these persons would have knowledge of the decisions made in Chattanooga about which entity should hold title to which property, whether plaintiff's approval was required for certain transactions or the legality of defendants' decisions regarding the transactions between Covenant LP and Covenant LLC or with Meadowlark.

Neither side has given the court a firm idea of what its witnesses would testify about, but it seems likely that at least four of the witnesses defendants have identified (the three members of S and R Finance (Rusty, Sharon and Ellsworth McKee), together with their financial adviser, Barry Hand), would have admissible and relevant testimony about the meetings, decisions and operations of the entities involved in this case, at least during the period that S and R Finance was involved in the partnership. With the limited information in the record, I am persuaded that the convenience of the witnesses factor favors defendants slightly.

As I have indicated, the situs of the material events is Tennessee, the state in which the partnership and company meetings took place and where the decisions that plaintiff challenges were made. Defendants recorded deeds in Wisconsin to preserve their claims to real estate but plaintiff is not challenging anything about the recording itself or any other acts performed by Wisconsin lawyers. His objections are to the acts leading up to the challenged conveyances.

It is undisputed that the documentary proof is more readily available in Tennessee than in Wisconsin, although plaintiff alleges that some of that proof is located at the skilled nursing facility in Eau Claire. Defendants deny that allegation, but it is not necessary to decide whether they are correct. As I have said in numerous opinions, *e.g.*, Gibson v. Unum Life Insurance Co. of America, 2010 WL 3244901, *2 (W.D. Wis. 2010); Illumina, Inc. v. Affymetrix, Inc., 2009 WL 3062786, *2 (W.D. Wis. 2009), now that it is so easy to store and move documentary proof electronically, it would be an unusual case in which this factor would have any weight in the transfer determination.

On the convenience side of the transfer analysis, defendants are ahead. This leaves the final factor, the interest of justice. This factor relates to the efficient administration of the court system. Research Automation, Inc., 2010 WL 4721588, *3. It includes such considerations as docket congestion, likely speed to trial, each court's relative familiarity with the relevant law, Van Dusen v. Barrack, 376 U.S. 612, 622 (1964), the respective desirability

of resolving controversies in each locale and the relationship of each community to the dispute. Research Automation 2010 WL 4721588, *3.

Starting with the first of these considerations, the information submitted by plaintiff shows that in 2009, civil cases in this district took 5.3 months from filing to disposition and 15 months from filing to trial and that civil cases in the Eastern District of Tennessee took 11.6 months from filing to disposition and 23 months from filing to trial. These differences are not so stark as to be decisive. The Eastern District of Tennessee had 110 fewer filings per judgeship in 2009 than this district; it may very well be that in 2011, that court will have a shorter disposition time than this court. In any event, plaintiff waited for more than six years to bring this lawsuit contesting a 2004 real estate transaction, making it evident that speed is of no concern for him.

The second consideration is of much greater importance. The parties' agreements provide that all disputes are to be decided under Tennessee law. It is indisputable that a court in Tennessee will have more experience interpreting and applying Tennessee law than a court in Wisconsin. Plaintiff maintains that any court can apply the fundamental concepts of breach of contract and breach of fiduciary duty, which is true. If plaintiff had shown that the case must be tried here, I would be able to determine what the Tennessee law is on these subjects, but a Tennessee court would be at a considerable advantage in performing the same task.

Neither side has suggested any reason why it would be more desirable to decide this case in Wisconsin than in Tennessee or vice versa or that the relationship of the community to the controversy is relevant to the transfer decision. Both of these considerations can be ignored.

I conclude that defendants have met their burden to prove that this case should be transferred to the Eastern District of Tennessee. Defendants have shown that Tennessee is more convenient for the parties in several respects and that the interest of justice factor favors transfer to a court that would be familiar with the governing law. Therefore, their motion to transfer will be granted.

ORDER

IT IS ORDERED that the motion of defendants Tommy Davidson and Kellor Holdings, Inc. to transfer this case to the Eastern District of Tennessee under 28 U.S.C. § 1404(a) is GRANTED.

Entered this 30th day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge