IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RMT, INC., OPINION and ORDER

Plaintiff, 11-cv-676-bbc

v.

CABLE SYSTEM INSTALLATION LIMITED
LIABILITY COMPANY and
CABLE SYSTEM INSTALLATIONS CORP.,

Defendants.

- -

In this civil action for monetary and injunctive relief, plaintiff RMT, Inc. brings claims for negligence and breach of contract against defendants Cable System Installation Limited Liability Company and Cable System Installations Corp. for damages caused by defendants' alleged failure to fulfill its obligations under six construction contracts. Diversity jurisdiction exists under 28 U.S.C. § 1332 because more than $75,000 is in controversy and plaintiff's citizenship (Wisconsin) is diverse from Cable System Installation Corp.'s citizenship (New Jersey and California) and Cable System Installation LLC's (New York and New Jersey).

Now before the court is defendants' motion to transfer the case to New Jersey under 28 U.S.C. § 1404. Defendants contend that because the construction projects at issue are all located in New Jersey and the majority of witnesses and evidence are located there, New Jersey is a more convenient forum. In response, plaintiff cites a forum selection clause in the

master subcontract between plaintiff and Cable System Installation LLC that identifies Wisconsin as the forum for resolving disputes between the parties. Additionally, plaintiff argues that Wisconsin is more convenient for its own witnesses.

I conclude that the forum selection clause is valid and weighs against transferring this case to New Jersey. Additionally, I conclude that the convenience of the parties and witnesses and the interests of justice weigh against transfer. Therefore, I am denying defendants' motion.

Solely for the purpose of deciding this motion, I draw the following facts from the complaint and the materials submitted by the parties.

FACTS

Plaintiff RMT, Inc. is a Wisconsin corporation with its principal place of business in Wisconsin. Defendant Cable System Installations Corp. is a California corporation with its principal place of business in New Jersey and defendant Cable System Installation LLC is a Florida limited liability company with five members who are citizens of New York and New Jersey.

Plaintiff is an energy contractor that contracts to provide general construction services for various energy projects. On April 2, 2009, plaintiff and defendant Cable System Installation LLC entered into a "master subcontract," under which Cable System Installation LLC agreed to perform certain work and supply certain equipment and materials as a subcontractor of plaintiff in connection with construction of various photovoltaic solar-

power generation facilities in New Jersey. The master subcontract states that plaintiff and Cable System Installation LLC would enter into one or more "work authorizations" under which they would agree to terms for work on specific projects. Dkt. #14-1. The master subcontract also contains a provision regarding "Disputes and Governing Law," which states that any disputes between the parties related to the subcontract or any work authorization "shall initially be submitted to a senior executive from each party for resolution by mutual agreement between the parties." Id. at 18. If the dispute cannot be resolved within 30 days, "such controversy shall be submitted to a third party mediator. . . ." Id. If mediation does not work, "either Party may litigate the controversy in the state or federal courts sitting in Dane County, Wisconsin and each of the parties consents to the jurisdiction of such courts . . . in any action or proceeding and waives any objection to venue laid therein." Id. Additionally, the "Subcontract and each Work Authorization shall be governed by the internal laws of the State of Wisconsin without regard to conflict principals [sic] thereof." Id.

Under the master subcontract, seven work authorizations were issued for six photovoltaic power generation facilities located in New Jersey. Each work authorization includes a "scope of work" provision, setting forth the technical requirements for defendant Cable System Installation LLC's work for each project. The work authorizations also states:

> The Parties have heretofore entered into that certain Master Subcontract 80157 dated as of 4/02/2009, (the "Subcontract").
>
> The Parties have reached an understanding on certain Work to be performed according to the terms and conditions set forth in the Subcontract and this Work Authorization.

> To the extent not inconsistent with the provisions of this Work Authorization, the terms and conditions of the Subcontract are incorporated herein by this reference as if the same were fully set forth herein. The Parties agree that the terms and conditions set forth in this Work Authorization will control over any conflicting term or condition found in the Subcontract. In all other respects, the Subcontract remains unchanged and in full force and effect.

Dkt. ##14-2-14-7.

In June 2011, a representative of defendant Cable System Installations Corp. began crossing out "LLC" and writing in "Corp." after Cable System Installation on the work authorizations.

Defendants commenced work on the projects in New Jersey. Many of the sub-subcontractors, vendors, suppliers and other people who performed services at or for the job sites are located in or near New Jersey. Plaintiff alleges that after defendants began work, they failed to properly staff the projects, failed to assign sufficient management and supervision to the projects, failed to train workers and electricians and failed to meet the schedule for the projects. Plaintiff alleges that in August 2011, defendants abandoned the projects and removed property from the site, including documents, office supplies, building materials and tools.

In November 2011, defendants filed nine different mechanics liens on the projects. Defendants' unpaid sub-subcontractors, vendors and suppliers have filed more than $7.3 million in mechanics liens on the projects and some have filed lawsuits related to the projects in New Jersey state courts.

OPINION

Under 28 U.S.C. § 1404(a), a court may transfer a case to another district where the action may have been brought if transfer serves the convenience of the parties and witnesses and will promote the interests of justice. 28 U.S.C. § 1404(a); Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219-20 (7th Cir. 1986). All parties agree that the case could have been filed in New Jersey. (Although defendants begin their brief in support of their motion to transfer by suggesting that the court lacks personal jurisdiction over defendant Cable System Installations Corp., dkt. #20 at 1, defendant does not develop this argument or cite any evidence to support it. Thus, I will not consider it. United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir. 1991) ("[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived . . . ."). Therefore, I need only determine whether transfer would serve the convenience of the parties and witnesses and promote the interests of justice.

As the movants, defendants have the burden of establishing that transfer is appropriate. Coffey, 796 F.2d at 219-20. To decide whether defendants have met their burden, I consider the public and private interest facts highlighted by the parties: (1) the forum selection clause in the master subcontract; (2) the convenience to the parties and third party witnesses; and (3) the interests of justice.

A. Forum Selection Clause

Plaintiff contends that the master subcontract's forum selection clause is valid and

enforceable and prohibits defendants from arguing that plaintiff's claims should be transferred to a court outside Dane County, Wisconsin. Defendants respond that the forum selection clause is void and unenforceable for two reasons.

First, defendants contend that plaintiff failed to abide by the contract provision requiring it to seek mediation before filing suit and therefore, breached the contract. Citing Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co., 206 Wis. 2d 158, 183, 557 N.W.2d 67, 77-78 (1996), defendants contend that plaintiff's breach released them from the forum selection clause. In Management Computer, the Wisconsin Supreme Court stated that "a material breach by one party may excuse a subsequent performance by the other." Id. However, this well established principle of contract law is not dispositive of the issue in this case. As the court went on to explain in Management Computer:

> [A] party is not automatically excused from future performance of contract obligations every time the other party breaches. If the breach is relatively minor and not 'of the essence', the [other party] is himself still bound by the contract; he can not abandon performance . . . In other words, there must be so serious a breach of the contract by the other party as to destroy the essential objects of the contract. Moreover, even where such a material breach has occurred, the non-breaching party may waive the claim of materiality through its actions.

Id. (internal quotation marks and citations omitted).

Defendants have not argued that plaintiff's failure to submit its claims to mediation constituted a "material" breach of the contract. Rather, defendants admit in their reply brief that mediation would have been futile and "fruitless." Dfts.' Br., dkt. #31, at 8. Additionally, defendants entered into a stipulation with plaintiff in which they agreed that "mediation has not resolved the controversy between the Parties within thirty (30) calendar

days of submission to mediation and any and all mediation requirements have been satisfied. . . ." Dkt. #25-8. In light of this stipulation and defendants' concession that mediation would be futile, plaintiff's failure to submit the dispute to mediation was not "so serious a breach of the contract" that it released defendants from the forum selection clause.

Defendants' second argument is that the forum selection clause is not enforceable against defendant Cable System Installations Corp. because this defendant was not a party to the master subcontract. It is true that only plaintiff and defendant Cable System Installation LLC were parties to the master subcontract containing the forum selection clause. However, defendants do not deny that Cable Systems Installations Corp. signed several of the work authorizations that plaintiff issued under the master subcontract. Those work authorizations stated expressly that they incorporated "the terms and conditions" of the master subcontract and that the master subcontract "remains unchanged and in full force and effect." This language is unambiguous and is not limited to the terms of the master subcontract regarding the "scope, character and manner of the work to be performed," as defendants suggest. Dfts.' Br., dkt. #31, at 5. Rather, the work authorization agreements state that the terms of the master subcontract were incorporated "as if [those terms] were *fully* set forth herein." E.g., dkt. #14-2 at 1 (emphasis added). This language of incorporation includes the forum selection clause.

The three cases cited by defendants are easily distinguishable. Defendants cite Guerini Stone Co. v. P.J. Carlin Construction Co., 240 U.S. 264, 277-78 (1916) and Fix v. Quantum Industrial Partners LDC, 374 F.3d 549, 553 (7th Cir. 2004) for the general

proposition that "a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified." Fix, 374 F.3d at 553 (quoting Guerini, 240 U.S. at 277). In those cases, the courts rejected arguments that all aspects of an extraneous writing had been incorporated fully into a contract because the contract made it clear that the reference to the extraneous writing was limited to a particular purpose. In contrast, the work authorizations at issue in this case do not limit the applicability of the provisions of the master subcontract. Rather, the work authorizations make clear that they are tied directly to the master subcontract and that all terms of the master subcontract have been incorporated.

The issue in the third case, CooperVision Inc. v. Intek Integration Technologies, Inc., 794 N.Y.S.2d 812, 819-20 (N.Y. Sup. Ct. 2005), is similar to the issue in this case, in that the court considered whether a forum selection clause in a software licensing agreement was incorporated by reference into an implementation agreement between the same parties. Id. at 817. Ultimately, the court concluded that the forum selection clause did not apply to the implementation agreement because there was no "express incorporation by reference" and "the Software License Agreement was referred to in the Implementation Agreement only for the purpose of identifying what the entire agreement of the parties consisted of." Id. The court concluded that "[e]ach agreement served its own purpose." Id. In this case, there is clear incorporation by reference, with the work authorization agreements stating expressly that "the terms and conditions of the Subcontract are *incorporated herein by this reference* as if the same were fully set forth herein."

Although I conclude that the forum selection clause is valid and enforceable against both defendants, this conclusion is not dispositive of the § 1404 transfer analysis. As the Supreme Court has explained,

> Congress has directed that multiple considerations govern transfer within the federal court system. . . . The forum-selection clause, which represents the parties' agreement as to the most proper forum should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a).

Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 31 (1988). In other words, the forum selection clause is only one factor to be considered in § 1404(a) analysis. Id. at 29-30. See also Heller Financial, Inc. v. Midwhey Powder, Co., 883 F.2d 1286, 1293-94 (7th Cir. 1989) ("Despite the existence of a valid forum-selection clause, courts may still transfer a case under § 1404(a).").

That being said, the Court of Appeals for the Seventh Circuit has stated that when a forum selection clause is found to be valid, there is a "strong presumption" against transfer from the forum specified in the clause. IFC Credit Corp. v. Aliano Brothers General Contractors, Inc., 437 F.3d 606, 613 (7th Cir. 2006). The presumption is even stronger where, as here, plaintiff filed in the forum specified in the clause and this forum is clearly more convenient for plaintiff. Plaintiff is headquartered in Wisconsin and has identified several of its employees who are located here and who will provide testimony relevant to the case. Dkt. #24 (identifying several potential witnesses and particular testimony they will provide). Defendants may overcome the presumption only by showing "inconvenience to some third party . . . or to the judicial system itself." Id. Any convenience to defendants is

irrelevant to the analysis. Id. (noting that although valid forum selection clause waives party's right to assert its own inconvenience, parties cannot "waive rights of third parties, or the interest of the federal judiciary in the orderly allocation of judicial business") (citing Northwestern National Insurance Co. v. Donovan, 916 F.2d 372, 377-78 (7th Cir. 1990)). Unless the inconvenience to third parties or the judicial system weighs "strongly in favor" of transfer, plaintiff's choice of forum will not be disturbed. In re National Presto Industries, Inc., 347 F.3d 662, 664 (7th Cir. 2003).

B. Convenience to Third Party Witnesses

Defendants contend that New Jersey would be significantly more convenient for the majority of third party witnesses who will be testifying in this case. They contend that because the solar energy projects were located in New Jersey and involved more than 100 entities, "there are about 1,000 potential witnesses" located in New Jersey, including construction workers, suppliers, union members, local utilities, inspectors and municipal permitting entities. Dfts.' Br., dkt. #20, at 5.

The problem for defendants is that they have not provided any specific details about the witnesses who are located in New Jersey, what their testimony will be, whether their testimony is material and whether they could provide effective deposition testimony. In considering the convenience to third-party witnesses, courts "should look beyond the number of witnesses to be called and instead examine the nature and quality of the witnesses' anticipated testimony with respect to the issues of the case." AT & T Capital

Services, Inc. v. Shore Financial Services, Inc., 2010 WL 2649874, *10 (N.D. Ill. June 30, 2010) (citation omitted). See also Marschke v. Barry-Wehmiller Companies, Inc., 2009 WL 3379356, *3 (W.D. Wis. Oct. 16, 2009) ("the convenience of witnesses analysis cannot be reduced to a numbers game in which the party who names the most witnesses wins"). As the court of appeals explained in Heller, 883 F.2d at 1293, simply arguing that "a fair trial is impossible . . . because the key witnesses are beyond the trial court's reach" is not enough. The party seeking transfer must "go[] beyond vague generalizations . . . [by] clearly specify[ing] the key witnesses to be called and mak[ing] at least a generalized statement of what their testimony would have included." Id. This means that the parties should supply "affidavits, depositions, stipulations, or any other type of document containing facts tending to establish who (specifically) it planned to call or the materiality of that testimony." Id. Additionally, courts must consider whether the third-party witnesses reside within the subpoena power of either the transferor or transferee court. Illumina, Inc. v. Affymetrix, Inc., 2009 WL 3062786, *3 (W.D. Wis. Sept. 21, 2009).

Defendants' simple statement that there are as many as 1,000 "key" witnesses in or near New Jersey is not very helpful. First, regardless whether the trial is held in Wisconsin, New Jersey or somewhere else, no court would allow 1,000 witnesses to testify at trial. Further, even if the United States District Court in New Jersey were inclined to allow many of these witnesses to testify, defendants have made no showing that the witnesses would be subject to the subpoena power of that court. Finally, defendants do not explain how the testimony of these unidentified witnesses is material to the case, why their testimony could

not be offered by deposition or whether any third party witness has refused to provide deposition testimony in this case. Therefore, defendants have failed to show that New Jersey would be a "clearly more convenient" forum for third party witnesses.

C. Interests of Justice

The "interests of justice" element relates to the efficient administration of the court system, and includes factors such as docket congestion, likely speed to trial in the transferor and potential transferee forums, each court's relative familiarity with the relevant law, the respective desirability of resolving controversies in each locale, the relationship of the community to the controversy and the possibility of consolidation with related lawsuits. Research Automation, Inc. v. Schrader-Bridgeport International, Inc., 626 F.3d 973, 978 (7th Cir. 2010); Heller, 883 F.2d at 1293; Coffey, 796 F.2d at 221.

Defendants have not shown that the interests of justice favor transfer. New Jersey arguably has a closer relationship to the controversy because the six projects, as well as many people who worked on the project, are located there. However, Wisconsin also has an interest in the controversy because plaintiff is a Wisconsin corporation and work for the project was done in Wisconsin. According to plaintiff, its own engineers and design staff performed all of the engineering services for the projects from its headquarters in Madison, Wisconsin. Additionally, plaintiff managed the procurement of equipment and materials from its headquarters in Madison. Plt.'s Br., dkt. #23, at 3.

The other factors relevant to the interests of justice analysis weigh against transfer.

The master subcontract at issue states that it shall be governed by the laws of Wisconsin. Although the district court in New Jersey is certainly capable of applying Wisconsin law, this court is likely to have more familiarity with the law because it is called upon more frequently to decide issues of Wisconsin law.

With respect to possible consolidation, defendants contend that there are several cases pending in New Jersey courts related to the six projects. However, defendants provide no details about these cases and have not shown that any case is pending in the United States District Court of New Jersey, as opposed to a state court. There is no possibility of consolidating this case with cases pending in state court.

The last factor is time to resolution. This court has already set a trial date of March 4, 2013 for this case. Court statistics show that a civil case in the District of New Jersey in 2011 had an average of 43.6 months between the time of filing an action and trial. If the case were transferred to New Jersey, the parties might have to wait more than three years before a trial would be held.

In sum, defendants have not shown that enforcing the forum selection clause would affect third party witnesses significantly or inflict an undue burden on the system of justice itself. Accordingly, I am denying defendants' motion to transfer this case to the District of New Jersey.

ORDER

IT IS ORDERED that the motion to transfer filed by defendants Cable System

Installation Limited Liability Company and Cable Systems Installations Corp., dkt. #19, is DENIED.

Entered this 7th day of June, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge