

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11
: :
DVI, INC., DVI FINANCIAL : Bankruptcy Case No. 03-12656
SERVICES, INC., and DVI : MFW
BUSINESS CREDIT CORPORATION, :
: :
Debtors. :
: :
----- :
MIROSLAV ANIC, an individual, :
: :
Plaintiff/Counter- :
Defendant, :
: :
v. : Civil Action No. 04-170 JJF
: :
DVI Financial Services, Inc., :
DVI, Inc., Michael A. :
O'Hanlon, Anthony J. Turek, :
Gerald L. Cohn, :
: :
Defendants/Counter- :
Claimants. :
: :

Mark Minuti, Esquire, Donald J. Detweiler, Esquire, Michael F. Bonkowski, Esquire, and Patrick J. Reilley, Esquire of SAUL EWING, LLP, Wilmington, Delaware.
Attorneys for Plaintiff/Counter-defendant.

Raymond H. Lemisch, Esquire of ADELMAN LAVINE GOLD AND LEVIN, Wilmington, Delaware.
Of Counsel: Ronald S. Safer, Esquire, Eugene J. Geekie, Jr., Esquire, and Kelly S. Martin, Esquire of SCHIFF HARDIN LLP, Chicago, Illinois.
Attorneys for DVI Financial Services, Inc. and DVI, Inc.

OPINION

June 23, 2004

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court is the Motion To Transfer Filed By DVI, Inc. And DVI Financial Services Inc. (collectively "DVI"). (D.I. 159.) For the reasons that follow, the Court will grant the Motion.

BACKGROUND

Plaintiff initiated this lawsuit on December 29, 2000, in the Circuit Court for Cook County, Illinois (the "Illinois Litigation") against DVI, alleging claims of fraud, unjust enrichment, conversion, unfair competition, violation of the Illinois Consumer Fraud Act, and breaches of contract arising from Plaintiff's sale of certain assets to DVI. DVI removed this action to the United States District Court for the Northern District of Illinois, where it was assigned to the Honorable David Coar. This action was actively pending before Judge Coar for approximately three years.

On August 25, 2003, close to two months before trial was scheduled to begin, DVI filed a voluntary Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). Plaintiff's lawsuit in Illinois was stayed pursuant to the automatic stay provision, 11 U.S.C. § 362. Judge Coar subsequently transferred the lawsuit to this district.

In presiding over DVI's Chapter 11 filing, the Bankruptcy

Court addressed various issues that implicate the Illinois Litigation. Among its rulings was a determination that Plaintiff's constructive trust claim arises at the time of the alleged wrong or fraud and not when it is imposed by a court. In re DVI, Inc., 306 B.R. 496, 499-500 (Bankr. D. Del. 2004).¹ This holding by the Bankruptcy Court is now on appeal before this Court. (D.I. 1 in C.A. No. 04-235.) By its Motion, DVI moves for a transfer of this proceeding back to Illinois.

DISCUSSION

I. Parties' Contentions

DVI contends that a transfer is appropriate in this case pursuant to the factors identified in Jumara v. State Farm Insurance Co., 55 F.3d 873 (3d Cir. 1995). DVI contends that both the private and public interests favor a transfer to Illinois. DVI asserts that sixteen non-party witnesses reside in Illinois, that Illinois is a more convenient state to litigate for both parties, and that it is Plaintiff's choice of forum. DVI also contends that it would be more expensive to try this action in Delaware and that Judge Coar is very familiar with this case. Further, DVI maintains that Illinois has a local interest

¹ For reasons discussed in more detail below, it is important to note that the Bankruptcy Court did not resolve all of the issues presented in the Illinois Litigation, and, that for the purposes of deciding when a constructive trust claim would arise, the Bankruptcy Court assumed that Plaintiff had prevailed in the Illinois Litigation. See DVI, 306 B.R. at 500.

in this dispute and that the pendency of DVI's reorganization in the Bankruptcy Court does not make a transfer inappropriate.

Plaintiff responds that the overarching concern in determining whether a transfer is appropriate is the efficient distribution of DVI's assets. Plaintiff asserts that trying this action in Delaware would better promote this policy because this Court is already faced with an appeal concerning what he maintains is the "central issue" in this case. In addition, Plaintiff maintains that the Jumara factors do not support a transfer.

II. Applicable Legal Principles

DVI moves for a transfer to Illinois pursuant to 28 U.S.C. § 1404(a) and 1412. Section 1404(a) is the general transfer statute that provides, "For the convenience of the parties and the witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it may have been brought." Section 1412, the transfer statute governing bankruptcy proceedings, similarly provides, "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties."

In the Third Circuit, the considerations used to determine whether a transfer is appropriate are the same under either Section 1404(a) or Section 1412, I.R.S. v. CM Holdings, Inc.,

Civ. A. No. 97-695 MMS, 1999 WL 459754 (D. Del. June 10, 1999) (citing In re Emerson Radio Corp., 52 F.3d 50, 55 (3d Cir. 1995)), with the exception that Section 1412 does not require that the action could have been brought in the transferee district. Emerson, 52 F.3d at 55. Accordingly, courts apply the public and private interest factors outlined in Jumara v. State Farm Insurance Co., 55 F.3d 873 (3d Cir. 1995), to decide if they should order a transfer.² However, in a bankruptcy action, there is a strong presumption for maintaining venue where the bankruptcy case is pending. Burtch v. Allou Health & Beauty Care, Inc., No. Adv. 00-00445, 2000 WL 33712310, *1 (Bankr. D. Del. 2000); Continental Airlines, Inc. v. Chrysler, 133 B.R. 585, 587 (Bankr. D. Del. 1991); Southwinds Assoc. Ltd. v. Reedy, 115 B.R. 857, 862 (Bankr. W.D. Pa. 1990). Thus, the party seeking transfer bears the burden of proof. In re Centennial Coal, Inc.,

² The private interests outlined in Jumara include: [P]laintiff's forum preference as manifested in the original choice, the defendant's preference, whether the claim arose elsewhere, the convenience of the parties . . . , the convenience of the witnesses - but only to the extent that the witnesses may actually be unavailable for trial in one of the fora, and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum). Id. at 879 (citations omitted).

The public interests include "the enforceability of the judgment, practical considerations that could make the trial easy, expeditious, or inexpensive, the relative administrative difficulty in the two fora resulting from court congestion, the local interest . . . , [and] the public policies of the fora." Id.

282 B.R. 140, 144 (Bankr. D. Del. 2002).

III. Decision

After consideration of the parties' arguments and the legal standards discussed above, the Court concludes that DVI has overcome the strong presumption against transferring this action, and therefore, will transfer this proceeding to Illinois. Beginning with the private interest factors, the Court concludes that Plaintiff's stated venue preference does not militate against transfer to Illinois. As the Third Circuit stated in Jumara, a court is to consider a "plaintiff's forum preference as manifested in the original choice[.]" Jumara, 55 F.3d at 879. In the instant matter, Plaintiff filed his lawsuit in Illinois state court.³ Accordingly, the fact that Plaintiff now prefers Delaware as his choice of forum does not weigh strongly in favor of maintaining this action in this district.

Next, the Court concludes that the convenience of the witnesses weighs strongly in favor of transferring this action to Illinois. DVI represents that it has sixteen (16) non-party witnesses it intends to call in the Illinois Litigation. (D.I. 173 at 8.) One of these sixteen witnesses, Kathleen Wilkerson, has been identified as a "key" witness by DVI. Therefore, the

³ Plaintiff filed suit in Illinois state court because Illinois was the situs of a number of events leading to this dispute. Accordingly, the Court also concludes that the third Jumara factor - where the claim arose - also supports a transfer to Illinois.

Court concludes that the presence of these witnesses, particularly Ms. Wilkerson, all of whom reside outside of the subpoena power of the Court, weighs heavily in favor of transferring this action. See Pennwalt Corp. v. Purex Indus., Inc., 659 F. Supp. 287 (D. Del. 1986) ("The availability of witnesses, in particular the amenability of nonparty witnesses to subpoena, is in the context of this case the most crucial factor in deciding this motion to transfer"); James Wm. Moore, et al., Moore's Federal Practice § 111.13[1][g] (3d ed. rev. 2004).⁴ In addition, the Court notes that it has previously rejected the argument made by Plaintiff that deposition testimony may serve as an adequate substitute for material non-party witnesses that a party is unable to procure for trial. See Nilssen v. Everbrite, Inc., C.A. No. 00-189 JJF, 2001 WL 34368396, *3 (D. Del. Feb. 16, 2001) (holding that depositions, even videotaped depositions, are not considered adequate substitutes for trial testimony when conducting a transfer analysis) (citing Allied Signal, Inc. v. Cooper Auto., Inc., 1997 U.S. Dist. LEXIS 22902, at *11 n. 4 (D. Del. July 30, 1997)).

Finally, although the Court appreciates the additional expense Plaintiff may incur as a result of a transfer to

⁴ Because neither party has asserted that the relevant books and records would be unavailable in either Illinois or in Delaware, the Court concludes that the fifth Jumara factor does not weigh more heavily in favor of either parties' forum choice. See Jumara, 55 F.3d at 879.

Illinois, the Court finds that this hardship is substantially outweighed by the private interest considerations.

The Court also concludes that the public interest factors weigh in favor of a transfer. First, the Court concludes that the local interest and public policy of Illinois support a transfer of this action. A number of events involved in the Illinois Litigation arose in that state and, moreover, the action involves questions of Illinois state law.

In addition, the Court observes that the Jumara factor which requires examining the difficulty in enforcing a judgment, were Plaintiff to prevail in the Illinois Litigation, does not weigh in favor or against a transfer because there has been no dispute in either state over in personam jurisdiction. See Hechinger Inv. Co. of Delaware, Inc. v. M.G.H., 288 B.R. 398, 403 (Bankr. D. Del. 2003).

With respect to the practical considerations, the Court finds it significant that Judge Coar presided over the Illinois Litigation for approximately three years. Thus, the Court agrees with DVI that Judge Coar has extensive familiarity with this action, and, although this Court will be faced with the pending appeal and cross-appeal, it is unlikely that a trial of the Illinois Litigation in this district would move as quickly and efficiently as in Illinois, particularly because Judge Coar has decided numerous evidentiary issues, resolved dispositive

motions, and conducted other pretrial matters. See Docket for Civil Case No. 01-383 DHC in the United States District Court, Northern District of Illinois.

Notwithstanding Judge Coar's involvement in the Illinois Litigation, Plaintiff contends that the "paramount consideration" in deciding whether to transfer a bankruptcy action would be defeated if the Court were to grant a transfer. See Burtch, 2000 WL 33712310 at *1 (stating that the paramount consideration in a bankruptcy case is the speedy and economic administration of the action).⁵ Plaintiff asserts that because the Court must already decide what he considers to be the "central issue" in this lawsuit, presented on appeal from the Bankruptcy Court, it would hinder the efficient and economic administration of DVI's bankruptcy if the Court were to grant a transfer. (D.I. 170 at 5.)

Although the Court understands the potential impact the pending appeal may have if Plaintiff were to prevail in the Illinois Litigation, the Court finds it significant that many of the underlying issues in the Illinois Litigation are not presented in the appeal from the Bankruptcy Court. Based on these facts, in the Court's view, the court best situated to

⁵ As noted above, the Bankruptcy Court assumed, only for the purposes of when the constructive trust would arise, that Plaintiff had prevailed in the Illinois Litigation. See supra note 1.

promptly, efficiently, and inexpensively resolve the Illinois Litigation is the Illinois court. Therefore, the Court finds that a transfer will promote the policy of preserving DVI's assets with a speedy and economic resolution of the Illinois Litigation.⁶

In sum, the Court concludes that the private and public interests weigh strongly in favor of transferring this action to the Northern District of Illinois.

An appropriate Order will be entered.

⁶ The Court is also persuaded that the difference in time between the resolution of civil cases in Delaware and Illinois, twenty-four months to twenty-six months, respectively (D.I. 170, Ex. A), only minimally weighs against a transfer.

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Defendants/Counter- :
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ORDER

At Wilmington, this 23rd day of June, 2004, for the reasons discussed in the Opinion issued this date;

IT IS HEREBY ORDERED that:

1) The Motion To Transfer Filed By DVI, Inc. And DVI Financial Services Inc. (D.I. 159) is **GRANTED**;

2) This matter is hereby **TRANSFERRED** to the United States District Court for the Northern District of Illinois, Eastern Division.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE