

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

LOCAL TOWING, INC.,

Plaintiff,

Civ. No. 2003/087

v.

COMMISSIONER OF PUBLIC WORKS/
GOVERNMENT OF THE VIRGIN ISLANDS,

Defendant.

ORDER DENYING PLAINTIFF’S MOTION FOR CHANGE OF VENUE

THIS MATTER came for consideration on plaintiff’s motion for a change of venue pursuant to 28 U.S.C. § 1404. Defendant filed opposition to the motion. No further reply is required. LRCi 7.1(f).

Plaintiff, Local Towing, was hired by the Virgin Islands government to construct an “ocean outfall” discharging effluent into a bay on St. Thomas, Virgin Islands. Plaintiff was required to furnish a bond for such undertaking. The bond was provided by Safeco Insurance, a Connecticut company. According to a complaint filed by Safeco against Local Towing, in the District of Connecticut, Local Towing began experiencing financial problems and required additional funds to complete the project.¹ The complaint further alleges that Local Towing defaulted on its payments to Safeco.

Thereafter, Local Towing filed suit against the Department of Public Works/Government of the Virgin Islands and, subsequent to a letter from the Court questioning whether diversity existed, Local Towing filed an Amended Complaint against the “Commissioner of Public

¹See Exh. “1” to Plaintiff’s Complaint.

Works/Government of the Virgin Islands” for the alleged failure to pay plaintiff on its contract which, plaintiff claims, led to the default. As reason for its current request to transfer this matter to Connecticut, plaintiff states that the District Judge in the Connecticut matter has “invited” the plaintiff to join in the Connecticut case and that this request for transfer is based on such invitation.²

Defendant responds that the motion to transfer must be denied because the contract between the parties contains a “forum selection clause” which provides that exclusive jurisdiction resides in the courts of the Virgin Islands. Defendant also submitted the affidavits of government witnesses who aver that the transfer will be substantially inconvenient to them.

DISCUSSION

Title 28 U.S.C. § 1404(a) provides as follows:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The burden of establishing the need for transfer rests with the movant.³ *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). The factors that the Court must weigh in determining whether to grant transfer include the following:

“the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There also may be questions as to the enforceability of a

²See Exh. “2” to Plaintiff’s Complaint.

³Much of the following text is “borrowed from Chief Judge Finch’s Order dated May 10, 2001 in *Savage v. Westin Hotel Co., et al.*, STX Civ.No. 1999/118.

judgment if one is obtained. The court will weigh relative advantages and obstacles to a fair trial.”

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). Additionally, the Court should consider the “fairness factors” set forth in *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1990), as paraphrased in *Burger King Corp. v. Rudzewicz*:

courts in “appropriate case[s]” may evaluate “the burden on the defendant, “the forum state’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive policies.”

471 U.S. at 476-77.

Motion to Transfer by Plaintiff

This matter concerns the unusual procedure of plaintiff moving to transfer his own case. A plaintiff is not bound by his choice of forum, if he later discovers that there are good reasons for transfer. A judge in his discretion may take this into consideration in determining if a transfer should be granted. *Phillip Carey Mfg. Co. V. Taylor*, 286 F.2d 782, 784 (6th Cir. 1961). If the Court finds that “trial in the contractual forum will be so gravely difficult and inconvenient that plaintiff will for all practical purposes be deprived of his day in court” then transfer will be allowed.

Effect of the Forum Selection Clause

In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Supreme Court held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Id.* at 10. A forum selection clause is "unreasonable" where the defendant can make a "strong showing" either that

the forum thus selected is "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court," *Id. at 18*, or that the clause was procured through "fraud or overreaching," *Id. at 15*.

Forum selection clauses are considered material terms to a contract and are a manifestation of the parties' preference as to a convenient forum. *CECG, Inc. v. Software Enterprises, Inc.*, 2002 WL 31248483 (3d Cir. Oct. 8, 2002); *Jumara v. State Farm Insurance Co.*, 55 F.3d 873, 879 (3d Cir. 1995). In federal court, the effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law. Because "[q]uestions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature," *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir.1991), federal law applies in diversity cases irrespective of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

In this case, the contract entered into by the parties contains a forum selection clause which provides for exclusive jurisdiction in the Virgin Islands. The Court assumes that the clause is a manifestation of the parties' intent. Moreover, Local Towing does not claim that the clause was obtained by fraud or coercion. Local Towing also does not claim that trying the case in the Virgin Islands will be inconvenient to it.

Considerations of Convenience

The Court notes that Local Towing's only proffered reason is that this case is intricately linked to another case pending in the District of Connecticut and that the judge in that case has requested joinder of the cases. Plaintiff also argues that it will be more convenient for its bonding companies to have the litigation in Connecticut.

On the other hand, defendant argues that transfer of this case to Connecticut will cause great inconvenience to defendant. “Probably the most important factor and the factor most frequently mentioned in passing on a motion to transfer under 28 U.S.C. § 1404(a) is the convenience of witnesses. If the forum chosen by plaintiff will be most convenient for the witnesses, this is a powerful argument against transfer, while if some other forum will better serve the convenience of witnesses, transfer is likely to be granted.” Wright, Miller, & Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2d § 3851. Defendants submitted the sworn statements of two crucial government witnesses who aver that in addition to the considerable travel costs, all relevant documents are located in the Virgin Islands, and the government can not afford to allow “several engineers and commissioners” to be away from the territory for the purpose of this litigation.

In any event, the jurisdiction of this matter is tenuous. (*See Letter from Court dated May 15, 2003, Docket No. 2*). Plaintiff’s Amended Complaint naming “Commissioner of Public Works/Government of the Virgin Islands” as defendant will be examined pursuant to Fed.R.Civ.P. 17(a) (Real Party in Interest). It is likely that the correct party is the Government of the Virgin Islands. (*See cases cited in May 15, 2003 Letter, and Brown et al. v. Francis, 75 F.3d 860, 865 (3d Cir. 1996)*).

The only convenience cited by the plaintiff is that of the Connecticut bonding companies. However, these companies are neither parties nor likely witnesses in the Virgin Islands case.

CONCLUSION

Upon consideration, the Court finds that the inconvenience to defendant's witnesses would be substantial. The case concerns matters which occurred in the Virgin Islands; all the relevant documents and discovery are located here; and the witnesses are located here. Plaintiff entered an arms length agreement regarding her choice of forum and has failed to establish that such agreement is not valid.

Accordingly, it is hereby

ORDERED that the plaintiff's motion to transfer this matter to the District of Connecticut is DENIED.

Dated: October 15, 2003

ENTER:

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

A T T E S T:
Wilfredo F. Morales, Clerk of Court
by: _____
Deputy Clerk

cc: Wilfredo Geigel, Esq.
AAG Melvin H. Evans, Jr., Esq. (AG STX - FAX 773-1425)