

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GREGORY D. GENTRY,)	
)	
Plaintiff,)	
vs.)	NO. 1:05-cv-00507-SEB-VSS
)	
ENVIRONMENTAL RECYCLING, INC.,)	
H.C. MORRIS,)	
)	
Defendants.)	

development and disposition.

Factual Background

The parties present vastly different versions of the factual disputes in this case; however, most of these issues are not pertinent to the preliminary jurisdictional questions presently before the court. The facts relevant to our determination are as follows:

In 2004, Plaintiff or his business partner, Ed Hammond (“Hammond”), contacted ERI about removing/baling scrap metal from a property Gentry owned in Indiana. Morris Aff. at ¶ 8; Gentry Aff. at ¶ 5. At some point in 2005, after ERI had completed the requested work and been paid by Gentry, Morris, who was an ERI employee, proposed a joint venture between Gentry and Hammond, on the one hand, with H.C. Morris and/or ERI, on the other hand, to do business in Indiana and Kentucky. Gentry Aff. at ¶ 12. Gentry contends that H.C. Morris visited him in Indiana on at least two occasions to discuss this joint venture. Id. Gentry Aff. at ¶ 12. Gentry further contends that, because he declined the joint venture proposal, H.C. Morris repeatedly telephoned him, leaving threatening messages on his voice mail, and contacted his customers (vendors and purchasers). Gentry Aff. at ¶ 11. For their part, Defendants agree that H.C. Morris made two trips to Plaintiff’s property in Indiana to discuss the proposed joint venture; however, they contend that during these visits the parties not only discussed further business together, they actually reached certain agreements. Morris Aff. at ¶ 10. Defendants maintain that it was Gentry who proposed the joint venture and who requested that H.C. Morris visit Indiana. Morris Aff. at ¶¶ 9, 10. Defendants exclude any mention of any alleged phone calls or threatening messages by H.C. Morris. Defendants assert that they undertook various actions in reliance on the agreement they believe they had reached with Plaintiff. Morris Aff. at ¶¶ 11, 15.

Legal Analysis

I. *Rule 12(b)(2) Standard of Review*

Rule 12(b)(2) permits the dismissal of a claim for lack of jurisdiction over the person. FED. R. CIV. P. 12(b)(2).¹ In considering a motion for lack of personal jurisdiction, the Court examines the sufficiency of the Complaint and not the merits of the lawsuit. Int'l Med. Group, Inc. v. Am. Arbitration Ass'n, 149 F. Supp. 2d 615, 623 (S.D. Ind., 2001) (Barker, J.); Gibson v. City of Chicago, 910 F.2d 1510, 1520-21 (7th Cir. 1990). All well-pleaded factual allegations are accepted as true, and we draw all reasonable inferences in favor of the plaintiff, if they weigh on the issue of personal jurisdiction. Int'l Med. Group, 149 F. Supp. 2d at 623; Dawson v. Gen. Motors Corp., 977 F.2d 369, 372 (7th Cir. 1992). However, if a complaint consists of conclusory allegations unsupported by factual assertions, then it would fail even the liberal standard of Rule 12(b). Int'l Med. Group, 149 F. Supp. 2d at 623; Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 792 (7th Cir. 1996). Additionally, the Court may consider affidavits and all other documentary evidence which have been filed, but all conflicts must be construed in favor of the plaintiff. Int'l Med. Group, 149 F. Supp. 2d at 623; McIlwee v. ADM Indus., Inc., 17 F.3d 222, 223 (7th Cir. 1994).

II. *Personal Jurisdiction Analysis*

Federal courts are courts of limited jurisdiction, so a plaintiff must prove personal

¹ Fed. R. Civ. P. 12(b)(2) provides:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person.

jurisdiction exists, if it is challenged, by establishing a prima facie case that jurisdiction over the defendant is proper. Woodruff v. Gen. Conf. of Seventh-Day Adventists, 2004 WL 1660331 at *2 (S.D. Ind. 2004) (Barker, J.). “A federal district court exercising diversity jurisdiction has personal jurisdiction, of course, ‘only if a court of the state in which it sits would have such jurisdiction.’ ” RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272 (1997), 1275-76 (7th Cir. 1997) (quoting Klump v. Duffus, 71 F.3d 1368, 1371 (7th Cir.1995)). A plaintiff “has the burden of demonstrating the existence of personal jurisdiction” consistent with three separate requirements: “1) state statutory law, 2) state constitutional law, and 3) federal constitutional law.” Id. Indiana Trial Rule 4.4(A) was amended in 2003 to include the following: “. . . a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States.” Therefore, a plaintiff must establish only that an exercise of long-arm jurisdiction is, in fact, constitutional. Since the parties do not argue that there is any difference between the federal and state constitutional standards, we shall apply the federal due process standards in conducting the ensuing analysis. See, e.g., Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–73 (1985).

Under federal due process standards, personal jurisdiction can be either specific or general. Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1243 (7th Cir. 1990). Specific jurisdiction exists when the defendant’s contacts give rise to the cause of action and such contacts amount to at least a minimum level to find the exercise of jurisdiction reasonable. See Gallert v. Courtalds Packaging Co., 4 F. Supp. 2d 825, 829 (S.D. Ind. 1998) (McKinney, J.) (citing Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984)). In this case, Gentry argues only that specific jurisdiction exists.

A forum's exercise of specific jurisdiction over a foreign defendant is proper when the

defendant has deliberately directed its activities toward forum residents, and the cause of action results from alleged injuries that “arise out of or relate to” such activities. Burger King, 471 U.S. at 472–73. In Burger King the Supreme Court explained:

Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a ‘substantial connection’ with the forum State. Thus where the defendant “deliberately” has engaged in significant activities within a State, or has created “continuing obligations” between himself and residents of the forum he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by “the benefits and protections” of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id. at 475-76 (internal citations and footnote omitted). The Supreme Court further noted that “where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” Id. at 477.

It is clear in the case at bar that the factual allegations, taken in the light most favorable to the Plaintiff, reveal that Defendants manifestly availed themselves of the privilege of conducting business in Indiana. In particular, as Plaintiff has asserted: H.C. Morris proposed a joint venture to Plaintiff and Mr. Hammond to do business in Indiana and Kentucky; H.C. Morris visited Plaintiff in Indiana on at least two occasions to discuss this proposed joint venture; H.C. Morris repeatedly called Plaintiff regarding the joint venture; H.C. Morris left threatening messages on Plaintiff’s voice mail; and H.C. Morris contacted Plaintiff’s customers (vendors and purchasers). For their part, Defendants do not contest that H.C. Morris made two trips to Plaintiff’s property in Indiana to discuss the proposed joint venture; in fact, they contend that the parties discussed these ventures and actually reached certain agreements. Morris Aff. at ¶ 10.

These factual allegations, if true, indicate that Defendants engaged in significant contract negotiations in the state of Indiana, with an Indiana company, and in regard to an alleged joint venture, which alleged joint venture is the very issue in this litigation. These facts are sufficient to establish specific jurisdiction over Defendants in this matter.² Since the factual allegations indicate that Defendants purposefully directed their activities to an Indiana resident, in order to defeat jurisdiction they must “present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” Burger King, 471 U.S. at 477. Defendants have proffered no such argument. Accordingly, Defendants’ Motion to Dismiss for want of personal jurisdiction is DENIED.

II. *Transfer of Venue Analysis.*

Having determined the existence of personal jurisdiction over Defendants in this litigation, we turn to Defendants’ alternative motion to transfer this action to the Eastern District of Kentucky. Defendants move for transfer under 28 U.S.C. § 1404(a), which provides: “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.” Transfer is

² See, e.g., In re Oil Spill by Amoco Cadiz off Coast of France on March 16, 1978, 699 F.2d 909, 916 (7th Cir. 1983) (holding that the defendant “cannot argue surprise at having to defend a suit arising from a contract negotiated and signed in Illinois with an Illinois enterprise”). Defendants correctly note that “an out-of-state party’s contract with an in-state party is alone not enough to establish the requisite minimum contacts.” Defs.’ Brief in Supp. at 9 (citing Burger King, 471 U.S. at 478). However, the Supreme Court in Burger King recognized that “a contract is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction. It is these factors – prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing – that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.” Burger King, 471 U.S. at 479.

appropriate under § 1404(a) where the moving party establishes that: (1) venue is proper in the transferor district, (2) venue and jurisdiction are proper in the transferee district, and (3) the transfer will serve the convenience of the parties, the convenience of the witnesses, and the interest of justice. State Farm Mut. Auto. Ins. Co. v. Estate of Bussell, 939 F.Supp. 646, 650-51 (S.D.Ind. 1996) (Barker, C.J.) (citing Vandeveld v. Christoph, 877 F.Supp. 1160, 1167 (N.D.Ill.1995); Von Holdt v. Husky Injection Molding Systems, Ltd., 887 F.Supp. 185, 188 (N.D.Ill., 1995). After careful consideration, we conclude that venue in the Southern District of Indiana is proper. Similarly, based on the location of Defendant's residence and the nature of the alleged contract, we conclude that venue would also be proper in the Eastern District of Kentucky. This leaves the third factor as determinative.

Section 1404(a) vests the district court with discretion to ““adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.”” Id. (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988) (internal quotation omitted). Therefore, we analyze the three, specific venue considerations – the convenience of the parties, the convenience of the witnesses, and the interest of justice – in light of all the circumstances of the case. Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219 & n. 3 (7th Cir.1986). The relative weight to be accorded each factor is not included in the text of § 1404(a); rather, “[t]he weighing of factors for and against transfer necessarily involves a large degree of subtlety and latitude, and, therefore, is committed to the sound discretion of the trial judge.” Id. A party moving for transfer has the “burden of establishing, by reference to particular circumstances, that the transferee forum is clearly more convenient” than the transferor forum. Id., at 220. Moreover, a court must accord “[a] large measure of deference . . . to the plaintiff's freedom to select his own forum.” Chicago, R. I. & P. R. Co. v. Igoe, 220 F.2d

299, 304 (7th Cir. 1955) (internal quotation omitted).³

The circumstances in the instant case cause us to conclude that this case should not be transferred to the Eastern District of Kentucky; instead, we are of the view that a proper balancing of all the factors referenced by the parties in their submission to the Court warrants an intra-district transfer to the New Albany Division of our court. An analysis of each of the three considerations is set out below:

1. Convenience of the Parties.

This factor is a “wash” between the two districts: Plaintiff, along with his business partner, is a resident of the Southern District of Indiana. Defendants and their employees are residents of the Eastern District of Kentucky. Neither side has adduced clear evidence that one party’s convenience should outweigh the other’s inconvenience. By transferring venue to the New Albany Division of this district, we would place this case essentially between the respective residences the parties, while still honoring Plaintiff’s forum selection.

2. Convenience of the Witnesses.

Similarly, the parties’ submissions fail to establish that the convenience of the witnesses for one side should trump the convenience of witnesses for the other. Defendants identified four witnesses who reside in the Eastern District of Kentucky (two ERI employees, ERI’s banker, and a representative of a third party company who lives just across the Ohio River from Cincinnati, Ohio, where he works). Defendants also identified witnesses located in the Western District of

³ The Seventh Circuit noted that “this factor has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff.” *Id.* However, this is not the case in the present litigation.

Kentucky, Eastern District of Ohio, and Northern District of Illinois.⁴ See Morris Aff. ¶¶ 12, 16-17. Plaintiff's response to these assertions was at most half-hearted in identifying only three potential witnesses who are located in the Southern District of Indiana (himself, his wife, and his business partner). It is apparent that there would be no clear witness convenience advantage in transferring venue of this case to the Eastern District of Kentucky. However, by moving it to the New Albany Division of the Southern District of Indiana, which is centrally located in terms of the majority of the witnesses, any problems of witness inconvenience would be ameliorated, while at the same time honoring Plaintiff's forum selection.

3. *Interest of Justice.*

The interest of justice factor includes “ensuring speedy trials, trying related litigation together, and having a judge who is familiar with the applicable law try the case.” State Farm, 939 F.Supp. 646, 651 (citing Coffey, 796 F.2d at 221). The parties have not directly addressed these factors, although Plaintiff does note that if a contract had been formed, it would have been formed under Indiana law which favors retention of jurisdiction in this district. In the face of no real opposition, we conclude that the “interest of justice” favors no change of venue.

Accordingly, Defendants' Motion to Transfer Venue to the Eastern District of Kentucky is DENIED. However, as noted, this case will be transferred to the docket of the New Albany Division of the Southern District of Indiana.

Conclusion

For the reasons explained above, Defendants' Motions to Dismiss and to Transfer Venue are both DENIED, and the Clerk is directed to transfer this case to the docket of the New Albany

⁴ The same broad dispersion applies to the locations of documents and records relevant to this trial.

Division for this district of Indiana. IT IS SO ORDERED.

Date: _____

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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