IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BASF CORPORATION, Plaintiff, v. SNF HOLDING COMPANY, ET AL., Defendants.	Civil Action No. 4:14-cv-02733

MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE ORDER DENYING MOTION TO DISMISS COMPLAINT FOR IMPROPER VENUE IN LIGHT OF *TC HEARTLAND*

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Pursuant to the Federal Circuit's Order, entered November 27, 2017 in *In re Flopam Inc.*, No. 18-107 (Fed. Cir. Nov. 27, 2017), ECF No. 27 (Exhibit A hereto), Defendants Flopam Inc. ("Flopam") and Chemtall Incorporated ("Chemtall") respectfully move for reconsideration of the Court's Order (Dkt. 261) denying their motion (Dkt. 165) to dismiss the complaint without prejudice pursuant to 28 U.S.C. § 1406(a) and request that the Court enter the accompanying proposed Order.

In light of the Federal Circuit's direction in its Order that "the Fifth Circuit has noted that matters of venue should take 'top priority in the handling of this case by the . . . District Court,'" Ex. A at 2 (quoting *In re Horseshoe Entm't*, 337 F.3d 429, 433 (5th Cir. 2003)), Defendants respectfully request that the Court expedite briefing and determination of the within motion for reconsideration, and delay rulings on dispositive motions until such time as the issue of improper venue is finally resolved.

I. NATURE AND STAGE OF THE PROCEEDINGS

On May 22, 2017, while discovery was ongoing and before either party submitted dispositive motions, the Supreme Court restored the meaning of "resides" in 28 U.S.C. § 1400(b): "As applied to domestic corporations, 'reside[nce]' in § 1400(b) refers only to the State of incorporation." *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1521 (2017). Shortly thereafter, on June 9, 2017, Flopam and Chemtall moved to dismiss the entire action as "a case laying venue in the wrong division or district" (28 U.S.C. § 1406(a)). *See* Dkt. 165, 169. At the time of Defendants' motion, the tentative trial date was still at least seven months in the future. *See* Dkt. 132.

In response to Defendants' motion, Plaintiff BASF Corporation argued *not* that venue was proper in the Southern District of Texas, but that Defendants waived their venue defense because *TC Heartland* "did not constitute a change in the law." Dkt. 168 at 2. Four months later, on October 5, 2017, the Court adopted Plaintiff's argument and found that Defendants had waived the defense because "*TC Heartland* was not an 'intervening change in law' that excuses

waiver" and "[a]lthough *Fourco* was decided 60 years ago, Defendants nevertheless had that defense available to them." Dkt. 261 at 2 (citation omitted).

On October 27, 2017, Defendants filed a Petition for Writ of Mandamus, seeking an order directing this Court "to dismiss or, alternatively, to transfer venue of this action pursuant to 28 U.S.C. § 1406(a)." Petition, *In re Flopam Inc.*, No. 18-107 (Fed. Cir. ECF No. 2) at 1. On November 15, 2017, the Federal Circuit resolved a split among the district courts and held that "[t]he Supreme Court changed the controlling law when it decided *TC Heartland* in May 2017." *In re Micron Tech., Inc.*, No. 17-138, slip op. at 12 (Fed. Cir. Nov. 15, 2017) (Dkt. 276-1). The *Micron* decision also announced a new legal framework for analyzing whether a venue defense might be deemed forfeited apart from Federal Rules of Civil Procedure 12(g)(2) and (h)(1)(A). *See id.* at 13–18.

On November 27, 2017, the Federal Circuit issued an Order in *In re Flopam* (Exhibit A) which reaffirmed that "the Supreme Court's decision in *TC Heartland* effected a relevant change in law and, more particularly, that failure to present the venue objection earlier did not come within the waiver rule of Federal Rule of Civil Procedure 12(g)(2) and (h)(1)." Ex. A at 2. The Federal Circuit further ordered: "In light of [the *Micron*] decision, we deem it the proper course here for petitioners to first move the district court for reconsideration of its order denying the motion to dismiss." Ex. A at 2. Pursuant to the Federal Circuit's Order, Defendants hereby move for reconsideration of the Court's Order (Dkt. 261).

II. ISSUE FOR DECISION BY THE COURT

Whether 28 U.S.C. § 1406(a) requires dismissal of this case as one "laying venue in the wrong division or district."

III. LEGAL STANDARD

A motion for reconsideration of an interlocutory Order is governed by Federal Rule of Civil Procedure 54(b). *See Cabral v. Brennan*, 853 F.3d 763, 766 & n.3 (5th Cir. 2017) ("the court should have analyzed the motion for reconsideration under Rule 54(b) instead of Rule 59(e), which applies to final judgments") (footnote omitted)).

"Under Rule 54(b), 'the trial court is free to reconsider and reverse its decision for *any reason* it deems sufficient.'" *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc*., 910 F.2d 167, 185 (5th Cir. 1990)) (emphasis added). Here there is very good reason to grant Defendants' motion: the *Micron* decision overrules the case law that the Court cited and relied on in its Order.

IV. ARGUMENT

A. This Case Lays Venue in a "Wrong" District.

In order for a case to be properly brought in a judicial district, "venue ordinarily must be proper as to each defendant." 17 James Wm. Moore, *Federal Practice* § 111.35[1] (3d ed. 2017). Further, when a motion to dismiss for improper venue is filed, "the burden of proof is on the plaintiff to establish that venue is proper in the district." *Uviado, LLC ex rel. Khan v. U.S. ex rel. I.R.S.*, 755 F. Supp. 2d 767, 779 & n.7 (S.D. Tex. 2010); *accord Seariver Mar. Fin. Holdings, Inc. v. Pena*, 952 F. Supp. 455, 458 (S.D. Tex. 1996).

In response to Defendants' motion to dismiss filed June 9, 2017 (Dkt. 165), the Plaintiff made no showing that *all* of the Defendants were subject to suit for alleged patent infringement in this action. None of the domestic Defendants has been shown to be incorporated in Texas or to have any "regular and established place of business" in this district. *See In re Cray, Inc*., 871 F.3d 1355 (Fed. Cir. 2017) (construing what it means for non-resident defendant to "have" a "place" of business in a forum district). This holds true not just for movants Flopam and Chemtall but also for their non-manufacturing, non-trading immediate corporate parent, SNF Holding Co. ("SNF Georgia").

In these circumstances, the record clearly shows that this "case" is one "laying venue in the wrong division or district." 28 U.S.C. § 1406(a).

B. Defendants Have Persistently Objected to Venue in This District.

"The law is clear that the defenses of improper venue and want of personal jurisdiction are waived if not raised prior to or at the time of the answer." *Queen Noor, Inc. v. McGinn*, 578 F. Supp. 218, 219 (S.D. Tex. 1984); *see also Pickett v. City of Houston*, No. CIV.A. H-08-

2734, 2009 WL 1158842, at *3 (S.D. Tex. Apr. 29, 2009) ("A defense of . . . improper venue, may be waived if not timely raised in accordance with Rule 12(h), which requires such defenses to be raised in the first responsive pleading or the first Rule 12(b) motion.").

As Defendants previously set forth in detail (*e.g.*, Dkt. 169), Defendants objected to venue in their properly and timely filed answer. In particular, Plaintiff's complaint alleged in part:

> "16. Venue is proper in the Southern District of Texas under 28 U.S.C. §§ 1391(b) and 1400(b) because the acts and transactions constituting the violations alleged herein, occurred in part in this judicial district and the Defendants are found and transact business in this judicial district. Venue is also proper in this district under 28 U.S.C. § 1391(c) because Defendants are entities that are subject to personal jurisdiction in this district."

Dkt. 1 ¶ 16. Plaintiff's venue allegations tracked *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), which the Supreme Court overruled in *TC Heartland*.

On December 16, 2014, Defendants filed an answer which denied Plaintiff's venue allegations quoted above (Dkt. 14 ¶ 16) and pleaded a "**Seventh Defense – Improper Venue and Jurisdiction**" which alleged: "This Court does not have personal jurisdiction over Defendants in this case and because of it venue is not proper in this Court" (Dkt. 14 ¶ 36). Defendants' venue defense, like Plaintiff's affirmative venue allegations, tracked the Federal Circuit's *VE Holding* decision.

On April 14, 2015, Defendants moved for an Order transferring venue of this action to the Southern District of Georgia (Dkt. 37), arguing that the accused activities "occur almost exclusively in the Southern District of Georgia." Dkt. 37 at 1. On May 21, 2015, this Court denied Defendants' motion without explanation. Dkt. 47.

On May 28, 2015, Defendants moved for reconsideration and alternatively for leave to file a reply memorandum in support of their motion for transfer of venue. Dkt. 50. On June 10, 2015, co-defendant SNF (China) Flocculant Co., Ltd. ("SNF China") filed its own motion for an Order transferring venue of this action to the Southern District of Georgia. Dkt. 54. On October

5, 2015, the Court denied all then-pending defense motions "without prejudice to re-urging after this case is re-instated on this Court's docket." Dkt. 76.

For nearly a year between October 5, 2015, and September 30, 2016, proceedings in this case were stayed pending resolution of *SNF Holding Co. v. BASF Corp.*, Case IPR2015-00600 (the "IPR Proceeding"). Dkt. 77. On September 30, 2016, following issuance of a final written decision in the IPR Proceeding, this Court lifted the stay of proceedings. Dkt. 88.

On November 1, 2016, Defendants again moved for an Order transferring venue of this action to the Southern District of Georgia. Dkt. 98; Dkt. 114. On December 21, 2016, the Court again denied Defendants' motion without explanation. Dkt. 119.

In sum, starting with their denial of Plaintiff's venue allegations, Defendants have persistently maintained that this action has no substantial connection to this district and have persistently contested both personal jurisdiction and venue since early in this litigation. The patent-in-suit was issued to third-party BASF AG, a German corporation, and names as "inventors" five German resident individuals ("Hähnle et al."). The process disclosed and claimed in the patent-in-suit is not alleged to have originated in Texas or to have ever been commercialized in Texas. None of the entities named as Defendants in this case is incorporated in Texas or has any regular and established place of business in Texas.

C. Defendants Promptly Renewed and Pressed Their Venue Objections Following the Supreme Court's Decision in *TC Heartland*.

In *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), *rev'g* 821 F.3d 1338 (Fed. Cir. 2016), the Supreme Court overruled *VE Holding* and held that for purposes of 28 U.S.C. § 1400(b), "a domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute." *Id.* at 1517. As the Federal Circuit stated in its November 27 Order in this case, "the Supreme Court's decision in *TC Heartland* effected a relevant change in law and, more particularly, that failure to present the venue objection earlier did not come within the waiver rule of Federal Rule of Civil Procedure 12(g)(2) and (h)(1). *In re Micron Tech., Inc.*, No. 17-138 (Fed. Cir. Nov. 15, 2017)." *In re Flopam*, slip op. at 2 (Ex. A).

On June 9, 2017, Defendants Chemtall Inc. and Flopam Inc. promptly moved for dismissal of this action as being "a case laying venue in the wrong division or district." 28 U.S.C. § 1406(a). It is now firmly established that, contrary to what the Court held in its Order (Dkt. 261 at 2), the venue defense raised by Defendants post-*TC Heartland* had not been available to them prior to the Supreme Court's decision in *TC Heartland*. Defendants' motion to dismiss was filed a full seven months before the then-scheduled trial month and before any dispositive motions had been filed. Defendants have urged this Court *eleven times* since then to take no substantive action but to dismiss the entire case for improper venue. *See* Dkt. 190-1 at 2; Dkt. 198 at 4; Dkt. 207 at 2; Dkt. 208 at 2; Dkt. 228 at 3; Dkt. 229 at 2; Dkt. 235 at 3; Dkt. 238 at 3; Dkt. 239 at 2; Dkt. 241 at 2; Dkt. 244 at 2.

The dismissal sought by Defendants *would not* have required the Plaintiff to bring multiple actions in different districts, as the Court stated in its Order (Dkt. 261 at 2). Although the *TC Heartland* decision substantially limits the venues where domestic corporate defendants can be *required* to defend civil actions for alleged patent infringement and the existing complaint includes no venue allegations as to the Southern District of Georgia, the Defendants have never withdrawn or wavered in their position—asserted in multiple filed motions for transfer of venue—that they do not object to personal jurisdiction or venue in the Southern District of Georgia. It was, thus, entirely within the Plaintiff's ability to assert its claims in a single action if it wished to, and Plaintiff can clearly consent to a transfer of venue under 28 U.S.C. § 1404(a).

D. Defendants Have Not Waived Their Venue Objections.

The Court ruled that Defendants waived the venue defense presented in their motion filed June 9, 2017 (Dkt. 165), because it had been "available" to them at all relevant times and had not been included in earlier-filed motions invoking Federal Rule of Civil Procedure 12(b) and had not been pleaded with sufficient specificity. Dkt. 261 at 2. This aspect of the Court's ruling was disapproved in *Micron*, as noted above. Under *Micron*, the waiver rule prescribed in Federal Rule of Civil Procedure 12(h)(1) and 12(g)(2) does not apply here.

Micron left open the possibility that a defendant might, in certain narrow circumstances be deemed to waive a venue defense by conduct. The court gave the example of "a defendant's tactical wait-and-see bypassing of an opportunity to declare a desire for a different forum, where the course of proceedings might well have been altered by such a declaration." *Micron*, slip op. at 18 (Dkt. 276-1). Nothing like such conduct has occurred here. In fact, as noted above, since the filing of their motion to dismiss on June 9, 2017, Defendants have repeatedly urged the Court *not* to take up the merits of dispositive motions but to dismiss the case for improper venue.

Micron cautioned that a district court's authority to find waiver by conduct is narrow, and "is properly exercised within the framework of *Dietz* [*v. Bouldin*, 136 S. Ct. 1885 (2016)], which requires respecting, and not 'circumvent[ing],' relevant rights granted by statute or Rule." *Micron*, slip op. at 16 (Dkt. 276-1). The Federal Circuit emphasized that "[t]his authority must be exercised with caution to avoid the forbidden circumvention," *id.*, and that "[i]n noting issues that might be presented, we are not suggesting that the leeway to find such forfeiture is broad," *id.* at 18.

Micron indicates that inherent authority under the *Dietz* framework may be properly invoked for "untimeliness or consent ('submission,' in the language of *Neirbo* [*Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)])." *Id.* at 16–17. Both of these are entirely inapplicable. As to timeliness, Defendants filed their post-*TC Heartland* motion to dismiss almost immediately after the Supreme Court's decision, when fact discovery was still ongoing, no dispositive motions had been filed, and the tentative trial month was still at least seven months in the future. *See* Dkt. 132. By reason of Hurricane Harvey, the tentative trial month was postponed to February 2018. Dkt. 226. This is, therefore, distinguishable from other cases in which "objections based on *TC Heartland* . . . were presented close to trial." *Micron*, slip op. at 17 (Dkt. 276-1).[1]

[1] It should be of no consequence that trial is now fast-approaching because it would be manifestly unfair to find that Defendants waived their venue defense merely because four (4) months had passed before the Court ruled on their motion.

Likewise, as to "consent" or "submission," Defendants actions have been anything but. Defendants denied that venue was proper in their Answer and raised the affirmative defense of improper venue. *See* Dkt. 14 ¶¶ 16, 36. Time and again, under the then-controlling law, Defendants sought transfer to the Southern District of Georgia. *See, e.g.*, Dkt. 37, 50, 114. Defendants moved for dismissal shortly following *TC Heartland* (Dkt. 165, 169) and filed a Petition seeking a Writ of Mandamus when its motion was denied (Dkt. 261). *See* Petition, *In re Flopam Inc.*, No. 18-107 (ECF No. 2); Reply in Support of Petition, No. 18-107 (ECF No. 23).

Nor is this a "tactical wait-and-see bypassing of an opportunity to declare a desire for a different forum, where the course of proceedings might well have been altered by such a declaration." *Micron*, slip op. at 18 (Dkt. 276-1). Defendants repeatedly urged this Court, on no fewer than eleven (11) occasions, to take no substantive action and to dismiss the case for improper venue in August and September 2017. *See* Dkt. 190-1 at 2; Dkt. 198 at 4; Dkt. 207 at 2; Dkt. 208 at 2; Dkt. 228 at 3; Dkt. 229 at 2; Dkt. 235 at 3; Dkt. 238 at 3; Dkt. 239 at 2; Dkt. 241 at 2; Dkt. 244 at 2. Defendants also sought to stay proceedings so that further developments, including rulings on pending dispositive motions, would *not* occur before the venue issue was finally resolved. *See* Dkt. 276; Emergency Motion to Stay All Proceedings, *In re Flopam Inc.*, No. 18-107 (ECF Nos. 24, 26).

Defendants' actions evince anything but an intent to acquiesce to suit in the Southern District of Texas. *Cf. Laguna Constr. Co. v. Carter*, 828 F.3d 1364, 1372 (Fed. Cir. 2016) ("A waiver is 'an intentional relinquishment or abandonment of a known right.'" (citation omitted)). The narrow exception under the *Dietz* framework is inapplicable here and a decision to the contrary would amount to the "forbidden circumvention" of the rights and protections afforded to Defendants by 28 U.S.C. § 1400(b).

E. Enforcement of Defendants' Venue Rights Need Not Result in Multiple Actions of Trials Because Defendants Have Repeatedly Represented to the Court and Plaintiff That They Do Not Object to Personal Jurisdiction or Venue in the Southern District of Georgia.

The Court appears to have misapprehended what would happen if this case were dismissed for improper venue under 28 U.S.C. § 1406(a). The Court stated, "[u]nder Defendants' theory of venue, this three-year-long case can only be resolved with three separate trials in three different district courts." Dkt. 261 at 2. In fact, the Defendants have never withdrawn or wavered in their position—asserted in multiple filed motions for transfer of venue—that they do not object to personal jurisdiction or venue in the Southern District of Georgia. There is absolutely nothing that prevents the Plaintiff from re-filing its complaint in the Southern District of Georgia or consenting to a transfer of venue under 28 U.S.C. § 1404(a).

28 U.S.C. § 1406(a) provides that "[t]he district court of a district in which is filed *a case* laying venue in the wrong division or district *shall dismiss*, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought" (emphasis added). Under the plain language of the statute, the Court is *required* to dismiss any "case laying venue in the wrong division or district" but can, on an appropriate showing, alternatively "transfer such case to any district or division in which it could have been brought." Plaintiff's opposition to Defendants' motion to dismiss (Dkt. 168) did not dispute that this case is one "laying venue in the wrong division or district" and also did not urge transfer of venue to the Southern District of Georgia, but put forward *only* the waiver argument that the Federal Circuit disapproved in *Micron*.

A district court's exercise of inherent power "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Micron*, slip op. at 15 (quoting *Dietz*, 136 S. Ct. at 1892). Here there is just such an "express . . . limitation," namely, the specific limit prescribed in 28 U.S.C. § 1400(b), which limits where Defendants can rightly be required to defend civil actions for alleged patent infringement. The "venue doctrine" that the Court cited in its Order (Dkt. 261 at 2) concerns *discretionary* transfers of venue from one *proper* venue to another, not a situation in which venue is *improper* as here.

Defendants' venue rights and general considerations of efficiency can both be respected by granting Defendants' motion to dismiss, or in the alternative, offering the Plaintiff the option to consent to a transfer of venue to the Southern District of Georgia as Defendants have previously sought from the Court. Yet further alternatively, the Court could dismiss this action as to Chemtall Inc. and Flopam Inc. and on its own initiative transfer the remainder of the action to the Southern District of Georgia. The point is: enforcement of Defendants' venue rights simply need not result in multiple civil actions asserting the claims the Plaintiff asserted in this "case laying venue in the wrong division or district." 28 U.S.C. § 1406(a). *See, e.g.*, *Gonsalves-Carvalhal v. Aurora Bank, FSB*, No. 12-CV-2790, 2014 WL 201502, at *8–10 (E.D.N.Y. Jan. 16, 2014) (finding venue improper as to one defendant and ordering transfer under § 1406(a), and, to avoid severing the claims, ordering transfer under § 1404(a) of claims against other defendants).

CONCLUSION

For the reasons set forth above and in Defendants' prior briefs to this Court (Dkt. 165, 169), this motion for reconsideration should be granted and the proposed Order entered.

Dated: November 28, 2017

By: */s/ James W. Dabney*
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CERTIFICATE OF CONFERENCE

This motion asks the Court for reconsideration of its Order denying Defendants' motion to dismiss the complaint for improper venue in light of *TC Heartland*, which Plaintiff previously opposed.

/s/ *James W. Dabney*
James W. Dabney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served on November 28, 2017 with a true and correct copy of this document via the Court's ECF system pursuant to L.R. 5.1.

/s/ *James W. Dabney*
James W. Dabney

LEGAL APPENDIX

Tab	Description
Exhibit A	*In re Flopam Inc.*, No. 18-107 (Fed. Cir. Nov. 27, 2017)
Exhibit B	*Gonsalves-Carvalhal v. Aurora Bank, FSB*, No. 12–CV–2790, 2014 WL 201502 (E.D.N.Y. Jan. 16, 2014)
Exhibit C	*Pickett v. City of Houston*, No. CIV.A. H-08-2734, 2009 WL 1158842 (S.D. Tex. Apr. 29, 2009)

EXHIBIT A

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

In re: FLOPAM INC., CHEMTALL, INC.,
Petitioners

2018-107

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas in No. 4:14-CV-02733, Judge Vanessa D. Gilmore.

ON PETITION

Before PROST, *Chief Judge*, MOORE and O'MALLEY, *Circuit Judges*.

O'MALLEY, *Circuit Judge*.

O R D E R

Flopam Inc. and Chemtall, Inc. petition for a writ of mandamus directing the United States District Court for the Southern District of Texas to dismiss this case for improper venue or, alternatively, to transfer to the United States District Court for the Southern District of Georgia. Specifically, petitioners argue that the district court clearly abused its discretion in determining that their venue defense had been waived and that the Supreme Court's decision in *TC Heartland LLC v. Kraft Foods*

Group Brands LLC, 137 S. Ct. 1514 (2017) did not constitute an intervening change in law. Respondent BASF Corporation opposes. Petitioners reply. The petitioners also move to stay the district court proceedings pending consideration of the petition.

We recently held that the Supreme Court's decision in *TC Heartland* effected a relevant change in law and, more particularly, that failure to present the venue objection earlier did not come within the waiver rule of Federal Rule of Civil Procedure 12(g)(2) and (h)(1). *In re Micron Tech., Inc.*, No. 17-138 (Fed. Cir. Nov. 15, 2017). In light of that decision, we deem it the proper course here for petitioners to first move the district court for reconsideration of its order denying the motion to dismiss. We therefore deny the petition for a writ of mandamus. Any new petition for mandamus from the district court's ruling on reconsideration will be considered on its own merits.

With respect to the motion to stay, though we deny the motion as moot, we note that United States Court of Appeals for the Fifth Circuit has noted that matters of venue should take "top priority in the handling of this case by the . . . District Court." *In re Horseshoe Entm't*, 337 F.3d 429, 433 (5th Cir. 2003).

Accordingly,

IT IS ORDERED THAT:

(1) The petition is denied.

(2) The motion to stay is denied as moot.

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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EXHIBIT B

2014 WL 201502
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

Antino GONSALVES–CARVALHAL, Plaintiff,
v.
AURORA BANK, FSB, Aurora Loan Services, LLC, and McCurdy & Candler, LLC, Defendants.

No. 12–CV–2790 (MKB).
|
Jan. 16, 2014.

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MEMORANDUM & ORDER

MARGO K. BRODIE, District Judge.

***1** Plaintiff A nti no Gonsalves–Carval hal, proceeding *pro se,* brings the above-captioned action against Defendants Aurora Bank, FSB ("Aurora Bank"), Aurora Loan Services, LLC ("Aurora Loan") (together "the Aurora Defendants") and McCurdy & Candler, LLC, ("McCurdy & Candler"), pursuant to the Fair Debt Collection Practices Act ("FD CPA"), the Truth in Lending Act ("TI LA"), the Real Estate Settlement Procedures Act ("RESPA"), the Fair Credit Billing Act ("FCBA") and Georgia state law. The Aurora Defendants moved to dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. McCurdy & Candler moved to dismiss the Amended Complaint pursuant to Rule 12(b)(6) and, in the alternative, for a transfer of venue to the Northern District of Georgia pursuant to 28 U.S.C. § 1404 and § 1406. For the reasons set forth below, the Court grants McCurdy & Candler's motion to transfer venue pursuant to 28 U.S.C. § 1406. In addition, the Court finds that a transfer of the claims against the Aurora Defendants is in the interest of justice pursuant to § 1404(a), and transfers the entire action to the Northern District of Georgia.

I. Background

The facts alleged in the Amended Complaint are assumed to be true for the purposes of this Memorandum and Order. Plaintiff's claims arise from a mortgage agreement between Plaintiff and Bayrock Mortgage Corporation ("Bayrock") dated June 15, 2007, to finance the purchase of Plaintiff's retirement home ("the property") in Atlanta, Georgia. (Docket Entry No. 22 "Am. Compl." ¶¶ 12, 17, Ex. A.) As part of the mortgage agreement, Plaintiff signed a security deed conveying a security interest to Mortgage Electronic Registration Systems, Inc. ("MERS"), acting as the nominee for Bayrock and its successors. [1] (Am. Compl. Ex. B ("Security Deed") at 3.) Plaintiff defaulted on the mortgage loan, (Am.Compl.¶ 60), and on January 13, 2011, Plaintiff received a letter from McCurdy & Candler informing Plaintiff that it had been retained by MERS to "collect the debt secured by the above-referenced property, which may involve foreclosure proceedings," and that Plaintiff owed $138,847, (Am. Compl. Ex. 100 at 1). On February 10, 2011, MERS assigned the security interest in Plaintiff's home to Aurora Loan, (Am.Compl.Ex.D), a subsidiary of Aurora Bank, (Am.Compl.¶ 1). [2] On October 12, 2011 and April 10, 2012, McCurdy & Candler sent letters to Plaintiff informing Plaintiff that it "represents Aurora Bank, the creditor on the above referenced loan," and advising Plaintiff that it had been retained to collect the debt secured by the property. [3] (Am. Compl. Ex. 200; Docket Entry No. 32, McCurdy & Candler Motion to Dismiss ("McCurdy Mot.") Ex. B.) The letter listed Aurora Bank as the "Creditor" and Aurora Loan as the "Servicer" in the address heading. (Am. Compl. Ex. 200; McCurdy Mot. Ex. B.)

Plaintiff's Amended Complaint centers around five allegedly unlawful events: (1) his original lender, Bayrock, engaged in predatory lending, (Am.Compl.¶ 49); (2) Bayrock unlawfully named M ERS as its nominee / fiduciary in the security deed signed by Plaintiff, (*Id.* ¶¶ 37, 49(b)); (3) MERS lacked the power to assign a security interest in the property to Aurora Bank in February 2011, (*Id.* ¶¶ 49(e), 72–76); (4) Bayrock and its successor,

Aurora Bank, failed to respond to a rescission notice sent by Plaintiff in November 2011, (*Id.* ¶¶ 79–88); and (5) the Aurora Defendants and McCurdy & Candler acted unlawfully with respect to the attempts to collect on the mortgage loan debt and attempts to foreclosure on the property, (*Id.* ¶¶ 90–110). Plaintiff also alleges that he is the victim of Aurora Bank's "anticipatory breach" of a Consent Order entered into between Aurora Bank and the federal Office of Thrift Supervision. (*Id.* ¶¶ 2, 45, 68; *see also* Am. Compl. Ex. 850, "Consent Order".) Plaintiff seeks equitable and injunctive relief, including declaratory judgments and an immediate cease and desist order, as well as damages under various state and federal statutes.

***2** The Aurora Defendants moved to dismiss for failure to state a claim, on the basis that Plaintiff's Amended Complaint is an impermissible "shotgun pleading," that Plaintiff fails to plead fraud with particularity, and that there is no basis for declaratory relief that would enjoin the pending state proceeding of the foreclosure on Plaintiff's home. (Docket Entry No. 37, "Aurora Mem." 1.) McCurdy & Candler moved to dismiss or in the alternative, to transfer venue pursuant to 28 U.S.C. § 1404 and § 1406, arguing that the case is improperly venued and should be transferred to federal court in Georgia. (Docket Entry No. 32, Attach. 1 "McCurdy Mem.")

Plaintiff opposes Defendants' motions on the basis that another party, "RALI Series 2007—Q05 purports to own [Plaintiff's] loan," and argues that neither the mortgage nor the promissory note were legally transferred to this party, and that "Aurora is not the proper party in interest to foreclose Plaintiff's property...." (Docket Entry No. 37, Attach. 6 "Pl. Opp. Aff." ¶¶ 3–6.) Plaintiff seeks discovery to "determine whether Plaintiff is obligated to make payments to Aurora or RA L I Series 2007—Q05," (*Id.* ¶¶ 8–9), and appends a "Property Securitization Analysis Report" prepared by Certified Forensic Loan Auditors, LLC, (Docket Entry No. 32 Attach. 7 "Pl. Opp. Aff. Ex.2000") to his opposition papers.

II. Discussion

a. Standard of Review

In reviewing a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must "accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party." *Matson v. Bd. ofEduc.,* 631 F.3d 57, 63 (2d Cir.2011) (quoting *Connecticut v. Am. Elec. Power Co.,* 582 F.3d 309, 320 (2d Cir.2009)). A complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Matson,* 631 F.3d at 63 (quoting *Iqbal,* 556 U.S. at 678). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Iqbal,* 556 U.S. at 679 (quoting Fed.R.Civ.P. 8(a)(2)). In reviewing a *pro se* complaint, the Court must be mindful that the plaintiff's pleadings should be held "to less stringent standards than formal pleadings drafted by lawyers." *Ahlers v. Rabinowitz,* 684 F.3d 53, 60 (2d Cir.2012) (quoting *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)), *cert. denied,* 568 —— U.S. ——, 133 S.Ct. 466 (2012). "While *pro se* complaints must contain sufficient factual allegations to meet the plausibility standard, we are obliged to construe a *pro se* complaint liberally to raise the strongest arguments it suggests." *Bamba v. U.S. Dep' t of* Homeland Sec., 533 F. App'x 33, ——, 2013 WL 5485916, at * 1 (2d Cir. Oct.3, 2013) (alteration and internal quotation marks omitted) (citing *Walker v. Schult,* 717 F.3d 119, 124 (2d Cir.2013) and *Harris v. Mills,* 572 F.3d 66, 71–72 (2d Cir.2009)).

b. Venue is Not Proper in the Eastern District of New York

***3** McCurdy & Candler seeks to transfer venue of this proceeding to the Northern District of Georgia, (Docket Entry No. 32 "McCurdy Notice of Mot."; McCurdy Mem. ¶¶ 43–51), pursuant to 28 U.S.C. § 1404 and § 1406. Once venue is challenged, "the plaintiff has the burden of establishing that it has chosen the proper venue." *Jackson v. Am. Brokers Conduit,* No. 09–CV6045, 2010 WL 2034508, at *1 (S.D.N.Y. May 13, 2010) (citing *Bell v. Classic Auto Grp., Inc.,* No. 04–CV–0693, 2005 WL 659196, at *4 (S.D.N.Y. Mar. 21, 2005)). However, at the motion to dismiss stage, where the Court relies only on pleadings and affidavits, "the plaintiff need only make a *prima facie* showing of [venue]." *Gulf Ins. Co. v. Glasbrenner,* 417 F.3d 353, 355 (2d Cir.2005) (alteration in original) (citing *CutCo Indus. v. Naughton,* 806 F.2d

361, 364–65 (2d Cir.1986)). "Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of jurisdiction." *Dorchester Fi n. Sec., Inc. v. Banco BRJ, S.A.,* 722 F.3d 81, 84 (2d Cir.2013) (quoting *Ball v. Metallurgie Hoboken—Overpelt, S.A .,* 902 F.2d 194, 197 (2d Cir.1990)). "In analyzing whether the plaintiff has made the requisite prima facie showing that venue is proper, we view all the facts in a light most favorable to plaintiff ." *Magi XXI, Inc. v. Stato della Citta del Vaticano,* 714 F.3d 714, 720 (2d Cir.2013) (citing *Phillips v. Audio Active Ltd.,* 494 F.3d 378, 384 (2d Cir.2007)).

Improper venue is a waivable defense. Any objection to venue must be raised in a defendant's responsive pleading or pre-answer motion, otherwise a party is deemed to have waived the obj ection. [4] Fed.R.Civ.P. 12(b)(3), 12(h); *Tri–State Employment Servs., Inc. v. Mountbatten Sur. Co., Inc.,* 295 F.3d 256, 261 (2d Cir.2002) (finding that a "[d]efendant [who] failed to raise any venue challenge in a pre-answer motion or responsive pleading ... is deemed to have waived any objection to venue." (citing Fed.R.Civ.P. 12(h)(1)(B) and *Concession Consultants, Inc. v. Mirisch,* 355 F.2d 369, 371 & n. 1 (2d Cir.1966)); *see also Joe Hand Promotions, Inc. v. Elmore,* No. 11–CV–3761, 2013 WL 2352855, at * 1 n. 2 (E.D.N.Y. May 29, 2013) (noting that "it is well settled that improper venue is a waivable defense") (collecting cases).

When a defendant raises a proper objection to venue, and the plaintiff has not made a prima facie showing of venue, 28 U.S.C. § 1406 requires that the court "dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a); *Gonzalez v. Hasty,* 651 F.3d 318, 324 (2d Cir.2011); *see also First State Ins. v. Nat'l Cas. Co.,* No. 13–CV–0704, 2013 WL 5439143, at * 3 (S .D.N.Y. Sept. 27, 2013) ("If the plaintiff cannot establish that the chosen venue is correct, '[t]he district court ... shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.' " (quoting 28 U.S.C. § 1406)); *Azrelyant v. B. Manischewitz Co.,* No. 98–CV–2502, 2000 WL 264345, at *3 (E.D.N.Y. Jan.13, 2000) ("Where a suit is filed in federal court in a district in which venue is improper, and a timely and sufficient objection to the defect is raised, a change of venue may be made under 28 U.S.C. § 1406(a)...."). "Courts enjoy considerable discretion in deciding whether to transfer a case [under § 1406] in the interest of justice." *White v. Rock,* No. 10–CV–5163, 2013 WL 527804, at *5 (E.D.N.Y. Feb. 4, 2013) (quoting *Daniel v. American Board of Emergency Medicine,* 428 F.3d 408, 435 (2d Cir.2005)).

***4** Plaintiff alleges that "[v]enue is proper in this District under 28 USC § 1391(b)." (Am.Compl.¶ 10.) This statute provides, in pertinent part, that an action may be brought in:

> (1) a judicial district in which any Defendant resides, if all Defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any Defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b).

i. Venue is not Proper Pursuant to Section 1391(b)(1)

In this case, not all Defendants "reside" in New York, the state in which the Eastern District of New York is located, as required by § 1391(b)(1), therefore venue in the Eastern District of New York is not properly based on the residence of Defendants. *See* 28 U.S.C. § 1391(b)(1) (providing that a civil action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located"). According to Plaintiff, Aurora Bank has a "principal place for doing business located at 1271 Avenue of the Americas, New York N.Y. 10019," and McCurdy & Candler's principal address is 3525 Piedmont Road, Atlanta, Georgia, with a registered agent at the same address. (Am.Compl.¶¶ 13–16.) Thus, while Plaintiff may have alleged that at least one Defendant—Aurora Bank —"resides" in New York, the state in which the Eastern District of New York is located, Plaintiff cannot establish that *all* Defendants are residents of New York state.

For purposes of determining proper venue, a business entity such as a corporation "shall be deemed to reside, if a Defendant, in any judicial district in which such Defendant is subject to the court's personal jurisdiction

with respect to the civil action in question." 28 U.S.C. § 1391(c)(2); *see also 5381 Partners LLC v. Shareasale.com, Inc.,* No. 12–CV–4263, 2013 WL 5328324, at * 12 (E.D.N.Y. Sept.23, 2013) ("under Section 1391(c)(2), a defendant that is a corporation 'shall be deemed to reside ... in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question.' " (quoting § 1391(c)(2))); *Indus. Quick Search, Inc. v. Miller, Rosado & Algois, LLP,* No. 09–CV–1340, 2013 WL 4048324, at *2 (E.D.N.Y. Aug. 9, 2013) (noting that "the venue question [under § 1391(c)(2)] turns on whether the [district court] has personal jurisdiction over this corporate defendant." (quoting § 1391(c) (2))).

Personal jurisdiction, in turn, is determined by "a two-step inquiry." *Licci ex rel.. Licci v. Lebanese Canadian Bank, SAL,* 732 F.3d 161, 169 (2d Cir.2013), *reh'g denied,* No. 10–CV1306, 2013 W L 5700963 (2d Cir. Oct. 18, 2013) (citing *Best Van Lines, Inc. v. Walker,* 490 F.3d 239, 242 (2d Cir.2007) and *Int' l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). First, the Court "look[s] to the law of the forum state" [5] to determine whether there is personal jurisdiction. *Id.* If there is personal jurisdiction under state law, the Court still must consider whether the exercise of personal jurisdiction over the out-of-state Defendant "comports with due process protections established under the United States Constitution." *Id.*

1. The Court Does Not Have Personal Jurisdiction.

***5** Under New York state l aw, a court has jurisdiction over a non-domiciliary corporation that commits a tortious act outside New York State but causes harm to someone in the state, if that corporation "(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (i i) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." N.Y. C.P.L.R. § 302(a)(3); *Chloe v. Queen Bee of Beverly Hills, LLC,* 616 F.3d 158, 164 (2d Cir.2010). Here, McCurdy & Candler is alleged to have committed a tortious act outside of New York State in its actions with respect to the property, and is a non-domiciliary entity, as "a Georgia corporation," (Am.Compl.¶ 13), whose "principal address is located' in Atlanta, Georgia, (*Id.* ¶ 14). Therefore, McCurdy & Candler is subject to personal jurisdiction in New York if it either "regularly does or solicits business" in New York, or "should reasonably expect the act to have consequences in the state." N.Y. C.P.L.R. § 302(a)(3)(i)-(i i); *see also Levans v. Delta Airlines, Inc.,* No. 12–CV–00773, 2013 WL 6841984, at *5 (E.D.N.Y. Dec. 23, 2013) ("Pursuant to § 302(a)(3), a court may exercise personal jurisdiction over a non-domiciliary who ... 'commits a tortious act without the state causing injury to person or property within the state ... if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce' " (citing § 302(a)(3))); *Richtone Design Grp., LLC v. Live Art, Inc.,* No. 12–CV–7652, 2013 WL 5904975, at *5 (S.D.N.Y. Nov. 4, 2013) (same). Plaintiff has not alleged that McCurdy & Candler "regularly does or solicits business" in New York, and McCurdy & Candler states that it is a "Georgia limited liability company which only advertises itself as a provider of legal services" throughout Georgia and Tennessee. (McCurdy Mem. ¶ 47.) Plaintiff also does not allege that McCurdy & Candler should reasonably expect its actions with respect to the property to have had consequences in the state of New York. McCurdy & Candler's allegedly unlawful actions were (1) facilitating the "questionable assignment" of a security interest in the property from MERS to Aurora Loan, and entering the assignment into Georgia's land records, (Am.Compl.¶¶ 102–03), and (2) its debt collection and attempted foreclosure activities with respect to the property, (*id.* ¶¶ 90–97).

McCurdy & Candler's role in the assignment of security interest by MERS to Aurora Loan Services had no connection to the Eastern District of New York. The assignment was prepared by an individual from Aurora Loan Services located in Scottsbluff, Nebraska, stamped with MERS's Delaware corporate seal, filed and recorded in Fulton County, Georgia, and annotated with an instruction to return to McCurdy & Candler in Atlanta, Georgia. (A m. Compl. Ex. D.) Plaintiff acknowledges that the assignment was filed with the state of Georgia. (Am.Compl.¶ 103.) Nothing connected with the MERS assignment to Aurora implicates the Eastern District of New York—not the location of any of the people or the entry of the assignment into the land records itself. Similarly, all of McCurdy & Candler's activities with

respect to the debt collection and attempted foreclosure, including all of McCurdy & Candler's communications with Plaintiff, were sent to the property in Atlanta, Georgia. (*See* Am. Compl. Ex. 100 (letter dated January 13, 2011); Ex. 200 (letter dated October 12, 2011); McCurdy Mot. Ex. B (letter dated April 12, 2012)). Likewise, Plaintiff's communications with McCurdy & Candler were sent either to Nebraska or Atlanta. (*See* Am. Compl. Ex. 400 ("Revocation of Power of Attorney") at 4; Ex. 500 ("Final Notice to Remove Property from Alleged Non Judicial Foreclosure Sale") at 2–3; Ex. 725 ("Qualified Written Request") at 6.) Therefore, Plaintiff has not alleged any action by McCurdy & Candler that could have led McCurdy & Candler to "reasonably expect" that its actions would have consequences in the state of New York. Because McCurdy & Candler is not domiciled in New York, does not regularly conduct or solicit business in New York, and should not have reasonably expected its actions with respect to the property in Atlanta to have consequences in New York, personal jurisdiction cannot be established over McCurdy & Candler under N.Y. C.P.L.R. § 302(a)(3). [6]

2. McCurdy & Candler Does Not "Reside" in New York

***6** Because McCurdy & Candler is not subject to the personal jurisdiction of a court in any judicial district in New York, it does not "reside" in New York for venue purposes. *See* 28 U.S.C. § 1391(c)(2) (corporations are deemed to reside, for purposes of venue, "i n any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question"); *cf. Indus. Quick Search, Inc.,* 2013 WL 4048324, at * 4 (finding that corporate defendant was subject to personal jurisdiction in the Southern District of New York, and therefore that venue was proper in that district); *5381 Partners LLC,* 2013 WL 5328324, at * 12 (finding that venue was proper in the Northern District of Illinois with respect to corporate defendant under § 1391(c)(2), as it was undisputed that defendant's principal place of business was in that district). As a result, Plaintiff has not satisfied the precondition to § 1391(b) (1)—that "al l defendants are residents of the State in which the district is located"—making venue improper under § 1391(b)(1).

ii. Venue is Not Proper Pursuant to Section 1391(b)(2)

Venue in the Eastern District of New York is not proper under § 1391(b)(2), because "a substantial part of the events or omissions giving rise to the claim" did not occur in the Eastern District of New York, nor is "a substantial part of [the] property that is the subject of the action ... situated" in the Eastern District of New York. 28 U.S.C. § 1391(b)(2). To determine whether venue is proper under § 1391(b)(2), courts apply a two-part test: "First, a court should identify the nature of the claims and the acts or omissions that the plaintiff alleges give rise to those claims. Second, the court should determine whether a substantial part of those acts or omissions occurred in the district where suit was filed, that is, whether 'significant events or omissions material to those claims ... have occurred in the district in question.' " *Deufrains v. Karcauskas,* No. 12–CV–2576, 2013 WL 4806955, at *13 (E.D.N.Y. Sept.9, 2013) (citing *Daniel,* 428 F.3d at 432); *see also Delgado v. Villanueva,* No. 12–CV–3113, 2013 WL 3009649, at *2 (S.D.N.Y. June 18, 2013) (same).

Plaintiff alleges violations of several state and federal laws in connection with the making, transfer, and management of the mortgage loan made on the property which is his retirement home in Atlanta, Georgia. (*See generally* A m. Compl.) Plaintiff does not allege that any acts or omissions relevant to his claims occurred in the Eastern District of New York; instead, Plaintiff alleges that venue is proper based in part on the fact that "the homeowner *now* lives in New York." (Am. Compl. ¶ 9 (emphasis added).) However, none of the alleged events or omissions, as pleaded by Plaintiff, took place in the Eastern District of New York. Plaintiff entered into a mortgage agreement with Bayrock to finance the purchase of the property in Atlanta, Georgia, and agreed to send his monthly payments to Alpharetta, Georgia. (Am. Compl. Ex. A at 1–2.) As part of this mortgage agreement, Plaintiff assigned a security interest in the property to MERS, acting as the nominee for Bayrock and its successors, which assignment was recorded in Fulton County, Georgia. (Security Deed at 1, 3.) M ERS assigned the security interest to Aurora Loan, which assignment took place in Fulton County, Georgia, (Am.Compl.Ex.D), and the communications from McCurdy & Candler to Plaintiff were mailed from McCurdy & Candler in Georgia to Plaintiff at the address of the property in Atlanta, Georgia. One communication from a non-party, law firm McGinnis, Tessitore, W utscher, L L P, originated in Chicago, Illinois. (A m. Compl. Ex. 600.)

***7** Because *no* events, let alone any "substantial" events, took place in the Eastern District of New York, venue cannot be established based on a substantial occurrence pursuant to § 1391(b) (2). [7] The fact that Plaintiff now lives in the Eastern District of New York, without more, is not a sufficient basis to establish venue pursuant to § 1391(b) (2). [8] The fact that this action arises out of a mortgage on a property located in Atlanta, Georgia, outside the Eastern District of New York, further indicates that venue is not proper in this District. *See Adams v. U.S. Bank, NA,* No. 12–CV–4640, 2013 W L 5437060, at *5 (E.D.N.Y. Sept. 27, 2013) (dismissing challenges to foreclosure and eviction proceedings and noting "that claims regarding [dismissed plaintiffs'] property should generally be filed in the jurisdiction where the property is located and the claim arose." (citing 28 U.S.C. § 1391(b))).

iii. Venue is Not Proper Pursuant to Section 1391(b)(3)

Venue in the Eastern District of New York is not proper under § 1391(b)(3), because there is another district in which this action "may otherwise be brought." Section 1391(b)(3) provides that venue is proper in "any judicial district in which any Defendant is subject to the court's personal jurisdiction with respect to such action"—but only *"if there is no district in which an action may otherwise be brought* as provided in this section" (emphasis added); *see Daniel,* 428 F.3d at 434 ("the phrase 'if there is no district in which the action may otherwise be brought' indicates that venue may be based on that subsection only if venue cannot be established in another district pursuant to any other venue provision."). Here, under § 1391(b)(2), venue would be proper in the Northern District of Georgia, where a substantial part of the acts or omissions that give rise to Plaintiff's claims took place, and where the property that is the subject of the mortgage is located. Therefore, 1391(b)(3) is not applicable, because, contrary to its requirements, there is another district "in which [the] action may otherwise be brought." 28U.S.C. § 1391(b)(3); *see also Daniel,* 428 F.3d at 435 (finding that, because plaintiffs could have brought a claim in the Western District of Michigan under § 1391(b)(2), where "a substantial part" of the alleged events giving rise to the claim took place, "they cannot rely on § 1391(b)(3) to support venue in the Western District of New York."); *Safety Software Ltd. v. Rivo Software, Inc.,* No. 11–CV–7433, 2012 WL 1267889, at *5 (S.D.N.Y. Apr.11, 2012) (declining to apply § 1391(b)(3) where the action could be brought in another district, noting that "[b]y the plain language of the statute, however, [§ 1391(b)(3)] applies only if there is no other district in which the action may be brought").

iv. Transfer is Proper Under Section 1406

In sum, because venue in the Eastern District of New York is not proper under any of the provisions of § 1391(b), and McCurdy & Candler has timely objected to venue, pursuant to 28 U.S.C. § 1406, the Court must either dismiss the claims against McCurdy & Candler or transfer them to a district where venue is proper. *See Gonzalez,* 651 F.3d at 324. In light of the fact that dismissal would require *pro se* Plaintiff to incur additional filing costs, and re-filing the Amended Complaint in the appropriate district would delay the proceeding, the Court transfers the claims against McCurdy & Candler to the Northern District of Georgia. *See Fredriksson v. Sikorsky Aircraft Corp., Inc.,* No. 07–CV–0214, 2008 WL 752469, at *4 (E.D.N.Y. Mar.19, 2008) (transferring a case pursuant to § 1406 and observing that "Congress, by the enactment of § 1406(a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by ... 'timeconsuming and justice-defeating technicalities.' ") (quoting *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 466, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962)); *Int'l Flavors & Fragrances Inc. v. Van Eeghen Int'l B.V.,* No. 06–CV–490, 2006 WL 1876671, at * 8 (S.D.N.Y. July 6, 2006) ("Dismissal is a harsh remedy that is best avoided when another avenue is open."). [9] Although dismissal rather than transfer under is encouraged when a case is a "sure loser," *Gonzalez,* 651 F.3d at 324, or "clearly doomed," *Daniel,* 428 F.3d at 436, the Court cannot conclude that there is no merit to any of Plaintiff's claims. *See Zaltz v. JDATE,* No. 12–CV–3475, 2013 WL 3369073, at * 12 n. 8 (E.D.N.Y. July 8, 2013) (transferring under § 1404(a) "even if plaintiff's claims might be difficult to sustain, it does not appear that they are 'clearly doomed' "). In particular, in light of relevant Eleventh Circuit case law, Plaintiff may have stated a claim against McCurdy & Candler for violations of the Fair Debt Collection Practices A ct. [10]

c. Claims against the Aurora Defendants

***8** The Court also transfers Plaintiff's claims against the Aurora Defendants pursuant to 28 U.S.C. § 1404(a) in the interest of justice and for the convenience of the parties. Because the Aurora Defendants waived their objection

to venue, transfer of the claims against them under § 1406 is not proper. *See Azrelyant,* 2000 WL 264345, at * 3 ("If a party's objection to venue, however, is not timely and sufficient, or if the party has waived the right to object to venue, transfer under 1406(a) is improper and unwarranted."); *Orb Factory, Ltd. v. Design Sci. Toys, Ltd.,* 6 F.Supp.2d 203, 207 (S.D.N.Y.1998) ("Once objections to venue are waived, any defect in venue is cured, and the benefits of a § 1406(a) transfer for lack of venue are no longer available."). However, where, as here, the conduct of the Aurora Defendants is "central to the issues raised" by Plaintiff against McCurdy & Candler, in the interest of justice and for the convenience of the parties, rather than sever the claims and hear only the claims against the Aurora Defendants, the Court transfers the entire proceeding against all Defendants to the Northern District of Georgia. *See* 28 U.S.C. § 1404(a) ("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 or to any district or division to which all parties have consented."); *Cottman Transmission Sys., Inc. v. Martino,* 36 F.3d 291, 296 (3d Cir.1994) (stating that when one of two co-Defendants objects to improper venue and the other waives objection, if the co-Defendant who has waived the objection "is central to the issues raised by the plaintiff against those subject to transfer, ... the proper procedure in this case [is] to transfer the case in its entirety...."); *Indymac Mortgage Holdings, Inc. v. Reyad,* 167 F.Supp.2d 222, 239 (D.Conn.2001) ("[w]hen the conduct of a co-Defendant as to whom venue is proper is central to the issues raised by the plaintiff against those subject to transfer, the grant of a severance would not ordinarily be consistent with the sound exercise of discretion." (quoting *Cottman,* 36 F.3d at 296)); *accord Montoya v. Fin. Fed. Credit, Inc.,* 872 F.Supp.2d 1251, 1283 (D.N.M.2012); *Barnes Grp., Inc. v. Midwest Motor Supply Co., Inc.,* No. 07–CV–1164, 2008 WL 509193, at *3–4 (S.D.Ohio Feb. 22, 2008); *see also Brossart v. Lynx Bus. Intelligence Consulting, Inc.,* No. 08–CV–0609, 2008 WL 2561592, at *2 (D.Ariz. June 25, 2008) ("[I]f we transfer an action against a particular defendant for improper venue, we may exercise our discretion to transfer the rest of the action to any district where it might have been brought for 'the convenience of the parties and witnesses' pursuant to 28 U.S.C. § 1404(a)." (citing 17 *Moore's Federal Practice* § 111.35[2] (3d ed.2006))); WRIGHT & MILLER, 14D FED. PRAC. & PROC. JURIS. § 3827 (3d ed. 2005) ("If venue is proper for some Defendants but improper for others, the district court has wide discretion. It may transfer the entire case to another forum that would be proper for all the Defendants as many courts have done. Alternatively, it may retain the case as to those Defendants who have been properly sued there and either transfer the severed portion of the case for those Defendants for whom venue is improper or dismiss the action as to those Defendants." (citing cases)); *cf. Paul v. Shinseki,* No. 09–CV–1591, 2010 WL 3927077, at *6 (E.D.N.Y. Sept. 29, 2010) ("Where, as here, a district court finds venue improper with respect to a given claim, it may as a matter of discretion transfer rather than dismiss the improperly venued claim where transfer is in the interest of justice.").

***9** The claims against the Aurora Defendants may be properly transferred pursuant to 28 U.S.C. § 1404(a). The purpose of Section 1404(a) "is to prevent waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Adams,* 2013 WL 5437060, at *5 (citing *Blechman v. Ideal Health, Inc.,* 668 F.Supp.2d 399, 403 (E.D.N.Y.2009) and *Van Dusen v. Barrack,* 376 U.S. 612, 616, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964)). As discussed above, this action could have been brought in the Northern District of Georgia pursuant to § 1391(b), as the "events or omissions" giving rise to Plaintiff's claims took place in that district, and the property is located there.

Under § 1404(a), a court determines whether a transfer is warranted "for the convenience of the parties and witnesses, in the interest of justice," by analyzing various factors including: "(1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, and (7) the relative means of the parties." *Id.* at *6 (citing *N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.,* 599 F.3d 102, 112 (2d Cir.2010) and *Phillips v. Reed Grp., Ltd.,* No. 07–CV–3417, 2013 WL 3340293, at *5 (S.D.N.Y. July 1, 2013)). "[S]ubstantial weight is accorded a plaintiff's choice of forum." *Dornoch Ltd. ex rel. Underwriting Members ofLloyd's Syndicate 1209 v. PBM Holdings, Inc.,* 666 F.Supp.2d 366, 372 (S.D.N.Y.2009) (citation omitted). However, "when the transactions or facts giving rise to the action have no material relation or significant connection

to plaintiff's chosen forum, then the plaintiff's choice is not accorded the same 'great weight' and in fact is given reduced significance." *Donde v. Romano,* No. 09–CV–04407, 2010 WL 3173321, at *7 (E.D.N.Y. Aug.10, 2010) (internal quotation marks omitted) (quoting *Romano v. Banc of Am. Insurances Servs.,* 528 F.Supp.2d 127, 130 (E.D.N.Y.2007) and *Hernandez v. Graebel Van Lines, Inc.,* 761 F.Supp. 983, 990 (E.D.N.Y.1991))).

Here, the first and the seventh factors weigh in favor of Plaintiff, who currently resides in the Eastern District of New York and who, as an individual plaintiff proceeding *pro se,* likely is of less means than the incorporated Defendants. However, all of the remaining factors weigh strongly in favor of litigating the claims against the Aurora Defendants in the Northern District of Georgia. The claims against the Aurora Defendants are essentially disputes over Plaintiff's mortgage on the property which is located in Atlanta, Georgia. Any witnesses to the signing of the mortgage and the challenged assignments are more likely to be located in the Northern District of Georgia, as are Georgia state land records and other relevant documents. *See Crutchfield v. Country Wide Home Loans,* No. 02–CV–9092, 2003 WL 102879, at * 1–2 (S.D.N.Y. Jan.10, 2003) (finding that venue was more appropriate in Oklahoma district where property that was the subject of a challenged mortgage was located, because "a critical element of the events at issue relates to the mortgage financing of the Property ... and the material witnesses and documents regarding that aspect of the underlying transaction are in Oklahoma"). More importantly, any of the witnesses who currently reside in Georgia are outside this Court's subpoena power, raising the costs and complicating the logistics of any discovery that may be needed to resolve the claims against the Aurora Defendants. *See* Fed.R.Civ.P. 45(b)(2) (providing that "a subpoena may be served at any place: (A) within the district of the issuing court; (B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection"); *Crutchfield,* 2003 WL 102879 at *2 ("The location of such witnesses and documents within the Court's subpoena power is an essential consideration in determining the appropriateness and convenience of plaintiff's choice of forum." (citing *AyalaBranch v. Tad Telecom, Inc.,* 197 F.Supp.2d 13, 15 (S.D.N.Y.2002) and *Summit v. U.S. Dynamics Corp.,* No. 97–CV–9224, 2000 WL 502862, at *2 (S.D.N.Y. Apr.27, 2000))); *Deufrains,* 2013 WL 4806955, at * 16 ("The most compelling factors to the Court in its finding that transfer is in the interest of justice ... relate to the convenience of witnesses and the access to judicial process to compel unwilling witnesses to testify.").

***10** In addition to the fact that most of the witnesses likely live in Georgia and would not be subject to the Court's subpoena power, the claims against both sets of Defendants share many common facts. Severing and addressing the claims against the Aurora Defendants in the Eastern District of New York while permitting the claims against McCurdy & Candler to proceed in the Northern District of Georgia will effectively result in duplicate litigation of Plaintiff's claims, taxing judicial resources and burdening Plaintiff as well as Defendants. McCurdy & Candler is a "foreclosure specialty" law firm retained by at least one of the Aurora Defendants to foreclose on the property after Plaintiff defaulted on his mortgage. (Am. Compl. ¶¶ 13, 25; Exs. 100, 200.) Plaintiff's Amended Complaint alleges that, subsequent to the collapse of loan modification talks between Plaintiff and Aurora Loan, "Defendant McCurdy made three attempts to foreclose by non-judicial sale on behalf of Aurora Loan Services, LLC," (Am.Compl.¶¶ 22–25), and "Plaintiff's Revocation notices were sent to Aurora [Loan] and to McCurdy as a legal notification to refrain them from their continued action under their scheme to misrepresent their relationship with the Plaintiff." (Am.Compl.¶ 36.) Plaintiff also alleges that McCurdy & Candler "knew or should have known" that "MERS is an unlawful fiduciary and nominee for Bayrock as a matter of law," and that McCurdy's "action to participate and encourage Aurora to proceed is unconscionable." (*Id.* ¶¶ 37–38.) Finally, Plaintiff notes that the third attempt at foreclosure by McCurdy & Candler occurred after Aurora Bank had signed a Consent Order with the Office of Thrift Supervision. (*Id.* ¶ 42.)

While the claims against McCurdy & Candler could be separated to focus solely on its role in attempting to foreclose on Plaintiff's property, another court could not address the claims against McCurdy & Candler without significantly duplicating the litigation before this Court involving the Aurora Defendants. *See Brossart,* 2008 WL 2561592, at *3 (transferring entire action from Arizona to California where venue was improper as to one of two defendants, and "a substantial part of the events giving rise to all of plaintiff's claims occurred in" California rather than in Arizona, because both defendants were subject to personal jurisdiction of a California court, "a

majority of witnesses and evidence" were in California, and a "district judge in California will have greater familiarity with California law"). Because the conduct of the Aurora Defendants is central to the issues raised by the Plaintiff in the claims against McCurdy & Candler, which are subject to transfer, the Court finds that severance of the claims and transfer of only the claims against McCurdy & Candler is not "consistent with the sound exercise of discretion." *See Indymac,* 167 F.Supp.2d at 239.

III. Conclusion

For the foregoing reasons, the Court grants McCurdy & Candler's motion to transfer venue as to the claims against McCurdy & Candler pursuant to 28 U.S.C. § 1406 and, in the interest of justice, transfers the claims against the Aurora Defendants pursuant to 28 U.S.C. § 1404(a). The Aurora Defendants' motion to dismiss is dismissed with leave to refile in the Northern District of Georgia. The entire action shall be transferred to the Northern District of Georgia.

***11** SO ORDERED:

All Citations

Not Reported in F.Supp.3d, 2014 WL 201502

Footnotes

1 Bayrock Mortgage Corporation was dissolved by the Georgia Secretary of State in August 2011. (Am.Compl.Ex. C.)

2 Plaintiff alleges that Aurora Loan was involved with servicing his loan as early as 2009 or 2010, prior to the assignment of the security interest. (Am.Compl.¶¶ 22, 58.)

3 McCurdy & Candler states that Aurora Loan assigned the security interest in the property to Aurora Bank on September 14, 2011, (McCurdy Mem. ¶ 3), but has not provided any supporting documentation. McCurdy & Candler attaches to its moving papers only the assignment made by MERS to Aurora Loan. (*See* McCurdy Mem. Ex. A.)

4 The Aurora Defendants did not raise a venue challenge in their pre-answer motion to dismiss (Docket Entry No. 37), and therefore waive their objection to venue. Although McCurdy & Candler argues that venue is not proper as to the Aurora Defendants, (McCurdy Mem. ¶ 46 n. 9), "venue is a personal privilege that is waivable at will," *Gross v. British Broad. Corp.,* 386 F.3d 224, 234 (2d Cir.2004) (citing *Concession Consultants, Inc. v. Mirisch,* 355 F.2d 369, 371 (2d Cir.1966)). Consequently, a party may raise objections to venue only as to itself, and not as to another party. *See Brossart v. Lynx Bus. Intelligence Consulting, Inc.,* No. 08–CV–0609, 2008 WL 2561592, at *2 (D.Ariz. June 25, 2008) ("The defense of improper venue is generally personal, such that one defendant may not obtain dismissal or transfer because venue is improper as to a codefendant, unless that codefendant is an indispensable party." (citing *Anrig v. Ringsby United,* 603 F.2d 1319, 1324 (9th Cir.1979))); *Dean v. Anderson,* No. 01–CV2599, 2002 WL 1067454, at * 1 (D.Kan. May 2, 2002) ("[A] defendant 'may not challenge venue on the ground that it is improper as to a codefendant.' " (citing *Pratt v. Rowland,* 769 F.Supp. 1128, 1132 (N.D.Cal.1991)); *Pratt,* 769 F.Supp. at 1132 ("Improper venue is a defense personal to the party to whom it applies. Thus one defendant may not challenge venue on the ground that it is improper as to a co-defendant." (citing *Camp v. Gress,* 250 U.S. 308, 314, 39 S.Ct. 478, 63 L.Ed. 997 (1919)).

5 "Forum state" refers to the state in which a lawsuit is filed.

6 Even if Plaintiff could establish that McCurdy & Candler is subject to personal jurisdiction in New York under New York law, the assertion of personal jurisdiction over McCurdy & Candler in the Eastern District of New York would not comport with the constitutional requirements of due process. A defendant in a civil lawsuit is entitled to "due process of law" under the Fifth and the Fourteenth Amendments of the Constitution, which means that such a defendant can only be subject to the personal jurisdiction of a court when it has "certain minimum contacts [with the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Licci,* 732 F.3d at 169 (quoting *Int'l Shoe,* 326 U.S. at 316). Plaintiff does not allege that McCurdy & Candler has conducted any business in New York, nor that it has *any* contacts with New York, let alone the "minimum contacts" that are required for personal jurisdiction. All of the events alleged in the Amended Complaint took place in Georgia, and McCurdy & Candler's mailing address and place of incorporation is in Georgia. Without more evidence of contacts with New York, due process prohibits the exercise of personal jurisdiction over McCurdy & Candler.

7 Plaintiff's allegation that he is the victim of an "anticipatory breach" of the Consent Order between Aurora Bank and the federal government—assuming it could be a valid basis for a claim—references only Aurora Bank's place of incorporation in Delaware. (A m. Compl. ¶ 68.) The Consent Order expressly states "Nothing in this Stipulation or the Order, express

or implied, shall give to any person or entity, other than the parties hereto, and their successors hereunder, any benefit or any legal or equitable right, remedy or claim under this Stipulation or the Order ." (Am. Compl. Ex. 850 ¶ 12.) Plaintiff also acknowledges that "[t]here is no defined right to sue granted to private individual [sic] under the Consent Order for violations or breach of agreement." (Am.Compl.¶ 11.)

8 Although Plaintiff does not allege that he was based in New York when he entered into the mortgage agreement that gives rise to his claims, he does include some communications to Defendants which originated in New York, (*see, e.g.,* Revocation of Power of Attorney at 1, Qualified Written Request at 5–6), attempting to rescind his mortgage and otherwise make legal demands on Defendants. Because these letters were sent subsequent to the events that give rise to Plaintiff's claims, they do not comprise a sufficient basis for establishing venue under § 1391(b)(2), in light of the otherwise overwhelming connections to Atlanta and Fulton County, Georgia.

9 The Court transfers the claims as to McCurdy & Candler, notwithstanding McCurdy & Candler's argument that the Court lacks personal jurisdiction over it. *See Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 466, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962) ("The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not."); *see also Deufrains v. Karcauskas,* No. 12–CV–2576, 2013 WL 4806955, at * 14 (E.D.N.Y. Sept.9, 2013) ("A district court has the authority [under § 1406] to transfer a case to another district, even if the transferring court does not have personal jurisdiction over the Defendant." (citing *Goldlawr,* 369 U.S. at 466, and *SongByrd, Inc. v. Estate of Grossman,* 206 F.3d 172, 179 n. 9 (2d Cir.2000)); *Brown v. City of New York,* No. 10–CV–5229, 2013 WL 3245214, at *8 (E.D.N.Y. June 26, 2013) (28 U.S.C. § 1406(a) "permits a court to transfer claims to another venue even if the transferring court lacks personal jurisdiction over the Defendants" (citing *Goldlawr,* 369 U.S. at 466–67)).

10 For example, Plaintiff alleges a claim against both McCurdy & Candler and the Aurora Defendants under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. seq.,* (Am.Compl.¶¶ 5, 91, 111.E), which McCurdy & Candler argues must be dismissed because foreclosing on a mortgage is not debt collection for purposes of the FDCPA. (*See* McCurdy Mem. ¶ 20 (citing, *inter alia, Warren v. Countrywide Home Loans, Inc.,* 342 F. App'x 458, 460 (11 th Cir.2009); *Beadle v. Haughey,* No. 04–CV–272, 2005 W L 300060, at * 3 (D.N.H. Feb. 9, 2005).) The October 12, 2011 and April 10, 2012 letters sent by McCurdy & Candler to Plaintiff specifically state: "Notice pursuant to the Fair Debt Collection Practices Act 15 USC 1692 Initial Communications Letter," "This law firm is acting as a debt collector and attempting to collect a debt," and, "As of the date of this letter, you owe $138,847.65." (Am.Compl.Exs.100, 200.) The Eleventh Circuit has held that a letter featuring identical language sent by law firms in Georgia, attempting to collect a debt on behalf of mortgage loan holders were attempts to collect a debt under the FDCPA. *See Bourff v. Rubin Lublin, LLC,* 674 F.3d 1238, 1240–41 (11th Cir.2012) ("The FDCPA applies to the notice here in question because the notice was an attempt at debt collection. The notice stated that Rubin Lublin had been retained to 'collect the loan,' stated in bold capital letters that it was 'an attempt to collect a debt,' and advised Bourff to contact Rubin Lublin to 'find out the total current amount needed to either bring your loan current or to pay off your loan in full.' "). In addition, to the extent that Plaintiff alleges that McCurdy & Candler engaged in abusive debt collection practices by naming a false creditor in its attempt to collect a debt, such a claim is cognizable under the FDCPA. *See id.* at 1241; *Shoup v. McCurdy & Candler, LLC,* 465 F. App'x 882, 885 (11th Cir.2012) (holding that plaintiff stated a claim under the FDCPA by alleging that letter from law firm attempting to collect a debt on a mortgage loan falsely represented the name of the plaintiff's creditor). In light of the Eleventh Circuit's case law on these precise issues, and the factual similarity between the allegations in *Shoup* and Plaintiff's allegations here, the Court is not prepared to dismiss Plaintiff's Complaint as failing to state a claim or find that Plaintiff's case is a "sure loser." *See Gonzalez v. Hasty,* 651 F.3d 318, 324 (2d Cir.2011).

End of Document

EXHIBIT C

2009 WL 1158842
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas,
Houston Division.

Edward PICKETT (a/k/a Chris Alan a/k/a CA Entertainment, Inc., a/k/a Pink Monkey, Plaintiff,
v.
CITY OF HOUSTON, and Bart Truxillo, Defendants.

Civil Action No. H–08–2734.
|
April 29, 2009.

West KeySummary

1 **Federal Civil Procedure**
Process, Defects In

A plaintiff's civil rights complaint filed a against a city without a proper summons that was not served upon the city's designated agents, was dismissed for insufficient process and insufficient service of process. The plaintiff waited nearly eight months after the action was filed to effect lawful service on the city and offered no cause for his failures. Furthermore, the city did not waive its process and service defenses because they were raised as a defense in the first document it filed in response to the plaintiff's claim, its second motion to dismiss the action and at the plaintiff's motion for a temporary restraining order. Fed.Rules Civ.Proc.Rule 4(m), 28 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM AND ORDER

EWING WERLEIN, JR., District Judge.

***1** Pending is Defendant City of Houston's Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Rule 12(b)(4) and 12(b)(5) (Document No. 18).[1] After carefully considering the motion, response, and the applicable law, the Court concludes that the motion should be granted.

I. *Background*

Plaintiff Edward Pickett ("Pickett") filed this civil rights action against Defendant City of Houston (the "City") seeking declaratory and injunctive relief, as well as damages. Document No. 1. Pickett also applied for a temporary restraining order to (1) enjoin the City from issuing any "frivolous" tickets to him or any patrons attending his night club—the Pink Monkey; and (2) enjoin the City and the Pink Monkey's landlord from evicting the Pink Monkey from its premises. Documents Nos. 1, 2. The Court held a hearing, attended by counsel for all parties the day after the Complaint and motion for TRO were filed, and denied the motion for TRO. Documents Nos. 5, 6.

When the City had not been served with summons and a copy of the Complaint within four and one-half months after the case was filed, the City moved to dismiss (Document No. 7), asserting, *inter alia,* that Pickett had (1) failed to serve one of the City's designated agents for service of process, and (2) failed to obtain a proper summons. Document No. 7 at 3–4. Nearly a month later, on February 19, 2009, Pickett filed his Second Amended Complaint averring that the City "[h]as been served with process by serving the City Secretary." Document No. 16 at 5. Plaintiff then filed a process server's "Affidavit of Service," which averred that the City was served via delivery to the City Secretary on February 18, 2009. Attached to the affidavit was a copy of the process server's return of service, and what was purported to be a copy of the summons. This putative "summons," however, did not bear the seal or signature of the Clerk of Court,

and was not issued by the Court. The City then filed its second motion to dismiss, renewing its arguments regarding insufficiency of process and service of process. Document No. 18. [2]

II. *Discussion*

The City contends that Pickett's one attempt to serve process was untimely and defective because it did not comply with the rules governing service. Federal Rule of Civil Procedure 4(m) provides for dismissal of an action against a defendant who has not been properly served within 120 days after the filing of the complaint. FED. R. CIV. P. 4(m). If the plaintiff shows "good cause," the court must extend the time for service. *Id.* To establish "good cause," the plaintiff must " 'demonstrate at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually do not suffice.' " *Lindsey v. U.S. R.R. Ret.,* 101 F.3d 444, 446 (5th Cir.1996) (quoting *Peters v. United States,* 9 F.3d 344, 345 (5th Cir.1993)). Plaintiff, as the serving party, bears the burden of proving the validity of service or good cause for failure timely to serve. *See Sys. Signs Supplies v. U.S. Dep't of Justice,* 903 F.2d 1011, 1013 (5th Cir.1990); *Familia De Boom v. Arosa Mercantil, S.A.,* 629 F.2d 1134, 1139 (5th Cir.1980).

Insufficient Process

***2** Rule 4(a)(1) prescribes the requirements for a summons. FED. R. CIV. P. 4(a)(1). These requirements "are phrased in plainly mandatory language." *Wells v. Ali,* 304 F. App'x 292, 295 (5th Cir.2008). As part of these requirements, plaintiffs must ensure that the summons (1) is signed by the clerk of court, (2) bears the court's seal, and (3) provides the name and address of the plaintiff's attorney (assuming plaintiff has counsel). FED. R. CIV . P. 4(a)(1)(C), (F), (G). The putative summons contained in Pickett's service on the City Secretary failed to satisfy these requirements. For this reason alone Pickett's claims are subject to dismissal for insufficiency of process. *See Wells,* 304 F. App'x at 295 (affirming dismissal because the summons issued to a particular defendant was defective because, among other reasons, it was not signed or sealed by the clerk of court); *see also McGuire v. Sigma Coatings, Inc.,* 48 F.3d 902, 907–08 (5th Cir.1995) (vacating sanctions order against the defendant for lack of personal jurisdiction when defendant had not been served with any document that conformed with the requirements for formal process); *Ayres v. Jacobs & Crumplar, P.A.,* 99 F.3d 565, 568–70 (3d Cir.1996) (holding that a summons not issued and signed by the clerk and affixed with the seal of the court fails to confer personal jurisdiction over a defendant even if properly served). The Court's electronic filing system confirms that no summons was issued by the Clerk of Court in this case.

Insufficient Service of Process

The process server's "Affidavit of Service" reflects that Pickett made no ostensible attempt to serve one of the City's designated agents under Rule 4(j) until February 18, 2009, more than five months after the Original Complaint was filed. Document Nos. 17, 19. [3] Pickett makes no effort to explain or to claim good cause for his failure timely to serve the City under Rule 4(j). Instead, Pickett makes two meritless arguments regarding waiver: (1) the City waived service because Pickett's counsel faxed a waiver form to the City's attorneys; and (2) the City waived service by appearing at the TRO hearing on September 10, 2008.

First, the request for waiver procedure cannot be utilized against defendants who are governmental entities. FED. R. CIV. P. 4, advisory committee's notes of 1993 (providing that the waiver of service procedure is available only against "defendants subject to service under [Rule 4](e), (f) or (h)" but not state or local governments subject to service under Rule 4(j)); *see also* HONORABLE DAVID HITTNER ET AL., RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 5:92 (West 2008) (same).

Second, the City did not waive its process and service defenses by appearing at the TRO hearing. On the day that Plaintiff filed this suit and requested a TRO, the Court directed Plaintiff's counsel to notify defense counsel that a hearing was set on the TRO motion for the next morning at 9:00 a.m. When that hearing convened, the City's counsel appeared, stated that the City had not been served with summons and a copy of the Complaint, and spoke only to protect the City's immediate interests on Plaintiff's motion for a TRO. The City's mere attendance at the TRO hearing does not constitute waiver. *Ayres,* 99 F.3d at 568 (attending scheduling conferences and participating in discovery was not a waiver of process

and service defenses when the defendant moved to dismiss based on those grounds in its answer); *Johnson v. Masselli,* No. 2:07 CV 214 PPS, 2008 WL 111057, at *3 (N.D.Ind. Jan.4, 2008) (holding that the defendants had not waived a venue challenge under Rule 12(h) "merely [by] defend[ing] themselves against the TRO .... Quite simply, Defendants only did what was necessary to protect their immediate interests. This does not constitute a waiver.").

***3** Moreover, in the first document it filed, *viz.,* its original Motion to Dismiss, the City reurged its objection to having not been lawfully served. A defense of insufficient process or service of process, like the defenses of lack of personal jurisdiction and improper venue, may be waived if not timely raised in accordance with Rule 12(h), which requires such defenses to be raised in the first responsive pleading or the first Rule 12(b) motion. FED. R. CIV. P. 12(h)(1); *see also* 1 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 4.81[1] (3d. ed.2000). Here, the City did assert its defenses in the first document it filed, and again in its second Motion to Dismiss. In sum, the City did not waive these defenses.

Conclusion

The Court recognizes that it may enlarge the time for service even in the absence of good cause, *see Thompson v. Brown,* 91 F.3d 20, 21 (5th Cir.1996), but the Court declines to do so here. Plaintiff has not made even a minimal showing to warrant such leniency in this case. Notwithstanding that Plaintiff's failures to obtain lawful service on the City were brought to Pickett's attention at the TRO hearing and in both of the City's motions, Pickett has wholly failed to cure the defects, has offered no good cause for his failures, and has shown no diligence even at this late date—nearly eight months after the case was filed—to effect lawful service on the City. The City is therefore entitled to dismissal on the grounds of both insufficient process and insufficient service of process.

III. *Order*

It is therefore ORDERED that

Defendant City of Houston's Motion to Dismiss (Document No. 18) is GRANTED.

The Clerk will enter this Order and provide a correct copy to all parties.

All Citations

Not Reported in F.Supp.2d, 2009 WL 1158842

Footnotes

1 The City of Houston first filed a Motion to Dismiss the Complaint and Amended Complaint pursuant to Rule 12(b)(1), (3), (4), and (5) (Document No. 7). That motion contains identical arguments concerning defects in process and service. Because the Second Amended Complaint is the live pleading, the Court rules on the Motion to Dismiss the Second Amended Complaint (Document No. 18).

2 Generally speaking, a motion under Rule 12(b)(4) for "insufficiency of process" concerns defects in the summons, while a Rule 12(b)(5) motion for "insufficiency of service of process" challenges the mode of delivery or lack of delivery of the summons and complaint. *Gartin v. Par Pharm. Cos.,* 289 F. App'x 688, 692 n. 3 (5th Cir.2008) (citing 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1353 (3d ed.2008)).

3 Rule 4(j) provides that state governmental organizations must be served by either "(A) delivering a copy of the summons and of the complaint to [their] chief executive officer; or (B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such defendant." FED. R. CIV. P. 4(j)(2). Under Texas law, "[i]n a suit against an incorporated city, town, or village, citation may be served on the mayor, clerk, secretary, or treasurer." TEX. CIV. PRAC. REM.CODE § 17.024 (Vernon 2008). Here, Pickett had the process server deliver the Complaint and putative "summons" to the City Secretary.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BASF CORPORATION, Plaintiff, v. SNF HOLDING COMPANY, ET AL., Defendants.	Civil Action No. 4:14-cv-02733

[PROPOSED] ORDER DISMISSING OR, IN THE ALTERNATIVE, TRANSFERRING VENUE OF THIS CASE TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

THIS MATTER having come before the Court on the Motion of Defendants Flopam Inc. and Chemtall Incorporated for Reconsideration of Court's Order entered October 6, 2017 (Dkt. 261); and it appearing venue in this case is improper under 28 U.S.C. § 1400(b) because at least Defendants Flopam Inc. and Chemtall Incorporated are not subject to suit in this district on the claims stated in the Plaintiff's complaint; and it further appearing that all Defendants consent to a transfer of this case to the Southern District of Georgia; and for good cause otherwise appearing, it is hereby:

ORDERED, pursuant to 28 U.S.C. § 1406(a), that this case is DISMISSED WITHOUT PREJUDICE unless Plaintiff, within five (5) days of the date of this Order, files written consent to a transfer of venue of this case to the Southern District of Georgia, in which event the Court will issue an Order transferring venue pursuant to 28 U.S.C. § 1404(a).

SIGNED at Houston, Texas, this _____ day of _____, 2017.

HON. VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BASF CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CASE NO. 4:14-CV-2733**
	§	
SNF HOLDING COMPANY, et. al.,	§	
	§	
Defendants.	§	

ORDER

Pending before the Court is Defendants Flopam Inc. ("Flopam") and Chemtall Incorporated ("Chemtall")'s Motion for Reconsideration of the Order Denying their Motion to Dismiss. **(Instrument No. 282).**

Throughout this litigation, Defendants Flopam and Chemtall have repeatedly objected to venue in the Southern District of Texas while seeking to transfer the case to the Southern District of Georgia. *See* (Instruments No. 37; No. 54; No. 98; No. 114; No. 165). The Supreme Court's recent decision in *TC Heartland, LLC v. Kraft Foods Group Brands, LLC* breathed new life into that effort. *See* 137 S. Ct. 1514, 1515 (2017). In the Order denying Defendants' most recent motion to dismiss dated October 5, 2017, this Court determined that Defendants waived their venue objection by raising it under 28 U.S.C. § 1404(a) instead of 28 U.S.C. § 1400(b). (Instrument No. 261 at 2). Since that ruling, however, the Court of Appeals for the Federal Circuit held that *TC Heartland* was an intervening change in law that made "the waiver rule of Rule 12(g)(2) and h(1)(A) inapplicable." *In re Micron Tech., Inc.*, 875 F.3d 1091, 1094 (Fed.

Cir. 2017). In light of that precedent, it is clear that venue is no longer proper in the Southern District of Texas.

Pursuant to 28 U.S.C. § 1406(a), "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Rather than dismissing this action and forcing Plaintiff to re-file this three-year-long litigation on the eve of trial, it is in the interest of justice to transfer this case to the Southern District of Georgia, where Defendants have consented to venue and jurisdiction. *See* (Instrument No. 282).

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendants' Motion for Reconsideration is **GRANTED**. **(Instrument No. 282). IT IS FURTHER ORDERED** that this case is transferred to the United States District Court for the Southern District of Georgia.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 19th day of December, 2017.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE