

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

IDLEWILD CREEK LIMITED)
PARTNERSHIP,)
)
Plaintiff)
)
v.)
)
TRAVELERS PROPERTY CASUALTY,)
)
Defendant)

Docket No. 00-200-P-C

MEMORANDUM DECISION ON MOTION FOR TRANSFER OF VENUE

The defendant, Travelers Property Indemnity,¹ moves to transfer this action to the Southern District of New York, Division of White Plains, pursuant to 28 U.S.C. § 1404(a). I grant the motion.

I. Applicable Legal Standard

The statute invoked by the defendant provides, in relevant part:

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.

28 U.S.C. § 1404(a). The plaintiff does not dispute the defendant’s assertion that this action might have been brought in the Southern District of New York, Division of White Plains. Motion at 7.

A transfer pursuant to section 1404(a) lies within the discretion of the court. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). The factors to be considered in the exercise of this

¹ The defendant asserts that the plaintiff will amend the pleadings to replace it with Travelers Indemnity Company of Illinois, Defendant’s Motion for Transfer of Venue, etc. (“Motion”) (Docket No. 10) at 1 n.1, but no such amendment has yet been offered by the plaintiff.

discretion include the convenience of the parties and witnesses, the order in which jurisdiction was obtained by the district court, the availability of documents, and the possibilities of consolidation. *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 11 (1st Cir. 1987). The fact that a prompt trial may be available in one of the districts at issue but not in the other is relevant to the statutory criteria. *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 925 F. Supp. 36, 39 (D. Me. 1996). The defendant bears “a substantial burden” of demonstrating the need for a change of forum. *Demont & Assoc. v. Berry*, 77 F.Supp.2d 171, 173 (D. Me. 1999). The evidence submitted by the defendant “must weigh heavily in favor of transfer” when this district is the plaintiff’s “home forum.” *Id.*

II. Factual Background

The plaintiff, a Maine limited partnership, First Amended Complaint (Docket No. 3) ¶ 1, alleges that it is a named insured under a policy of insurance issued by the defendant, *id.* ¶ 5,² and that it has sustained damage at a residential complex for the elderly located in Cornwall, New York which is currently under construction for which the defendant has refused to make a timely coverage determination and has wrongfully denied coverage under the policy, *id.* ¶¶ 6, 9-14. It alleges breach of contract and bad faith claims-settlement practices in violation of Maine law. *Id.* ¶¶ 17-28.

The plaintiff provides residential management services to the tenants of the Cornwall complex through a Maine company with offices in Massachusetts. Falk Aff. ¶ 3. The complex was designed by an architectural firm based in Warren, Pennsylvania and built by a general contracting firm from Buffalo, New York. *Id.* ¶ 5; Affidavit of Karen Frink Wolf (Docket No. 11) ¶ 20. The particular damage at issue is apparently connected with the elevated decks on the buildings in the complex. Falk

² In the affidavit it submits in support of its opposition to the motion to transfer, the plaintiff represents that the named insured is actually Landmark America, a “Maine entity” providing “management functions” to the plaintiff by contract. Affidavit of Gunnar Falk in Support of Plaintiff’s Opposition to Motion to Transfer Venue (“Falk Aff.”) (Docket No. 15) ¶¶ 3-4. The parties do not appear to attach any significance to this discrepancy and accordingly I will not consider it in connection with this motion.

Aff. ¶ 6. The plaintiff “is under some pressure to repair the decks, by the officials of the Town of Cornwall, the building’s residents, and officials of the State of New York.” *Id.*

III. Analysis

The defendant contends that transfer is appropriate because the Southern District of New York is more convenient for witnesses and closer to “immobile sources of proof,” will allow live testimony at trial by witnesses who are not within the subpoena power of this court, and will be able to exert personal jurisdiction over potential third-party defendants. Motion at 10-11. Neither party mentions the availability of documents, nor is there apparently any action between the parties currently pending in the Southern District of New York, making irrelevant two additional factors listed in *Cianbro*: the order in which jurisdiction was obtained and the possibility of consolidation. Accordingly, I will consider only the convenience of the parties and potential witnesses.

The plaintiff is a Maine limited partnership, making this district its “home forum.” However, the inference can easily and clearly be drawn that the plaintiff was formed to own the property at issue, which is located within the Southern District of New York. While the plaintiff states that the insurance policy at issue was obtained from an agent in New Hampshire and that it covers other properties in addition to the Cornwall complex, “including thirty-four properties in Maine,” Falk Aff. ¶ 4, it does not suggest how these facts would make it more convenient for it or any particular witnesses to try this action in Maine. Indeed, both facts appear to be irrelevant to the allegations included in the first amended complaint. The plaintiff instead offers these facts to support its argument that this court cannot be considered to be inconvenient for the defendant, which is licensed to do business in Maine. Plaintiff’s Memorandum in Opposition to Motion to Transfer Venue (“Plaintiff’s Opposition”) (Docket No. 14) at 2-3, 8. The same argument can be made with respect to the plaintiff:

it cannot be considered inconvenient for the plaintiff to be required to litigate in the district in which it chose to build the residential complex that is its only business.

In support of its motion, the defendant has provided a list of potential witnesses, their expected testimony and their locations.³ Motion at 4-6. Of the witnesses listed, two are employees of the defendant and two are consultants to the defendant. Such witnesses must be deemed to be within the defendant's control for purposes of a section 1404(a) analysis; they may be physically located outside the 100-mile limit for service of subpoenas imposed by Fed. R. Civ. P. 45(b)(2), but the fact that they are not within the range of this court's subpoena power is irrelevant when they are within the defendant's control. *See Ashmore*, 925 F. Supp. at 38. The same is true of the plaintiff's consultants and the property manager of the complex listed by the defendant; the plaintiff, having brought this action in Maine, can reasonably be expected to produce these witnesses for live trial testimony in Maine.⁴ Of course, the convenience of those employees of the plaintiff's management contractor who reside near the complex in order to provide services there would be better served by trial in the Southern District of New York rather than trial in Maine.

The remaining witnesses on the defendants list are the residents of the complex, employees of the Town of Cornwall who have dealt with the alleged problem, the contractor and the architect. The

³ As the plaintiff correctly points out, the location of the property itself is of little importance as an evidentiary concern. Repairs to the property will be underway, if not completed, by the time of trial in either forum, necessitating the use of photographs and other means to demonstrate the alleged damage. Falk Aff. ¶¶ 6-7. Title to the property is not at issue, nor is any interest in the property. *See* 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3822 at 204 (2d ed. 1986) (discussing "local action doctrine").

⁴ The plaintiff's assertion that it will arrange to have these witnesses and its expert witnesses "travel to Maine for live testimony *if necessary*" and that it will "make them available for videotaped deposition at mutually convenient locations," Plaintiff's Opposition at 8 (emphasis added), is a less than complete statement of recognition of its responsibility in this regard.

plaintiff describes the tenants as having “marginal utility to this action;” contends that only two employees of the town, the building inspector and the fire code enforcement official, “are obvious candidates for substantive testimony,” and that their testimony can be presented through video deposition; and that the contractor and architect are not within 100 miles of the White Plains courthouse, making the difference they would have to travel to White Plains as opposed to Portland, Maine “too slight to create any true inconvenience,” and, in any event, counsel for the plaintiff is “willing to travel the greater distance to the federal district in which they can be compelled to give deposition testimony.” Plaintiff’s Opposition at 6-7. The plaintiff does not identify any witnesses resident in Maine who are likely to testify.

The plaintiff’s response is entirely too facile. While the defendant may have overemphasized the need for testimony from the tenants of the complex, it is not unreasonable to assume that some such testimony may indeed be presented. The testimony of the town officials, however many may be called, appears to be critical given the nature of the claims presented. While it is of course possible to present such testimony by videotaped deposition, presenting the testimony directly before a jury serves the interests of justice by allowing the jurors to hear the testimony directly from those individuals, in a form more likely to hold their attention. With respect to the contractor, the defendant correctly points out that Rule 45 does allow its testimony to be compelled by the federal district court in White Plains because it resides or regularly transacts business in the same state. Fed. R. Civ. P. 45(c)(3)(A)(ii). With respect to the architect, the defendant suggests that its employees or agents who inspect or approve the contractor’s work on the Cornwall complex — which the amended complaint alleges remains unfinished — may be compelled to testify under the same subsection of the rule. The latter contention is not supported by any matter of evidentiary quality in the record before this court and accordingly must be discounted, as is the case with the defendant’s assertion that unidentified

subcontractors, not included on its list of potential witnesses, may be compelled to testify in White Plains but not in Maine. Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion for Transfer of Venue ("Defendant's Reply") (Docket No. 16) at 2-3, 4-5.

In any event, the expressed willingness of the plaintiff's attorney to travel to obtain deposition testimony from witnesses in New York and Pennsylvania known to the plaintiff to be likely to be called to testify in an action that the plaintiff chose to bring in Maine is irrelevant. To such witnesses, the difference between traveling to White Plains, New York and Portland, Maine in order to testify — by the plaintiff's own estimate, a difference of 144 miles and 187 miles, respectively, Plaintiff's Opposition at 7 — may well be significant. These differences are certainly greater than the distance between Boston and Portland involved in the cases cited by the plaintiff in which this court found the additional travel distance for witnesses to be insufficient to justify transfer. *E.g., Ashmore*, 925 F. Supp. at 40; *Parsons v. United States*, 1999 WL 33117194 (D. Me. Aug. 11, 1999), at *3. These witnesses also appear critical to the matters at issue, and their convenience would be better served by having the Southern District of New York function as the forum for this action.

The parties have suggested two other considerations to which I cannot give great weight. The defendant suggests that the Southern District of New York would have personal jurisdiction over the contractor, the architect and "any currently undiscovered but potentially liable subcontractors" should it elect to assert claims against them, while this court would not. Motion at 10-11. The parties dispute whether the contracts between the plaintiff and the contractor and architect require arbitration, which if required would foreclose any possibility of their inclusion in this action as third-party defendants, Plaintiff's Opposition at 4, Defendant's Reply at 2 n.2. In the absence of any assertion by the defendant that it is likely to bring such claims, or any identification of any subcontractors that might be liable, this court cannot consider this contention. The reference to the possibility of consolidation in

Cianbro has been interpreted by this court in the past to refer to existing court actions. It cannot be stretched for purposes of a section 1404(a) transfer analysis to include claims against unidentified third parties that a defendant might choose to bring in the future. Any defendant seeking transfer might be able to speculate about the availability of such evanescent future claims, to little practical effect. Consideration of such factors must be limited at most to third-party claims against identified parties that the defendant represents it is likely to assert.

The plaintiff contends that it selected this forum due to “the relative speed of its docket, as compare to the Southern District of New York.” Plaintiff’s Opposition at 3. The only support the plaintiff offers for this contention is an unspecific citation to “Guide to the Southern District of New York Civil Justice Expense and Delay Reduction Plan.” *Id.* n.1. The plaintiff did not supply a copy of that document, which is not readily available in Maine, with its memorandum. While it may be likely that, as a general proposition, final resolution of an action can be obtained in this forum before it can be obtained in the Southern District of New York, the plaintiff has provided this court with no accessible evidence concerning the length of time likely to be necessary to resolve this action in the Southern District of New York so that the relative periods of time involved can be compared in order to address the *Cianbro* factor of convenience to the parties. It is the comparison of the amounts of time likely to be involved, given the nature of the claims raised, rather than the bare supposition that more time would be involved in another forum, that should be considered with respect to the issue of convenience for purposes of section 1404(a). This factor would not outweigh the importance to this action of the testimony of critical witnesses whose presence cannot be compelled in Maine in any event.

IV. Conclusion

For the foregoing reasons, the defendant's motion is **GRANTED**. This action is transferred to the United States District Court for the Southern District of New York, White Plains Division.

Dated this 16th day of November, 2000.

David M. Cohen
United States Magistrate Judge