

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CTC COMMUNICATIONS CORP.,)
)
 Plaintiff)
)
 v.)
)
 BELL ATLANTIC CORPORATION,)
)
 Defendant)

Civil No. 97-395-P-H

MEMORANDUM DECISION ON DEFENDANT’S MOTION TO TRANSFER OR STAY

The defendant, Bell Atlantic Corporation, moves pursuant to 28 U.S.C. § 1404(a) to transfer this action to the United States District Court for the Southern District of New York, where an action between the parties, filed by the defendant approximately two weeks after this action was filed and arising out of the same dispute, is currently pending. In the alternative, Bell asks this court to stay this action pending resolution of its application in the New York action for an order compelling arbitration of this dispute. However, that application has been denied by Judge Wood in the New York case, Order dated February 2, 1998, *Bell Atlantic Corporation v. CTC Communications Corp. et al*, Docket No. 98 Civ. 0048 (KMW) (copy attached to Reply Brief of Defendant Bell Atlantic Corporation (Docket No. 9)), at 3, and the motion for stay therefore appears moot. Oral argument was held before me on February 18, 1998. I deny the motion to transfer.

Section 1404(a) of Title 28 of the United States Code provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any

other district or division where it might have been brought.” Factors to be considered by the court to which a motion for transfer is brought 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 burden is on the party seeking transfer to show that transfer is warranted. *Blinzler v. Marriott Int’l, Inc.*, 857 F. Supp. 1, 3 (D. R. I. 1994).

In considering the convenience of the parties, transfer of this action to the Southern District of New York would serve the convenience of Bell, but leave CTC inconvenienced by the venue change. The general rule in the First Circuit has long been that “the federal district court which first obtains jurisdiction of the issues and the parties should proceed to adjudication.” *Small v. Wageman*, 291 F.2d 734, 736 (1st Cir. 1961). This court will not disturb a plaintiff’s choice of venue in the absence of evidence that predominates in favor of transfer, even when the plaintiff is not a resident of the chosen forum. *Scott v. Jones*, 1997 WL 702935 (D. Me. Oct. 29, 1997) at *7 & n. 16. While New York would be more convenient for seven of the eleven witnesses listed by Bell,¹ it would not be more convenient for any of the four witnesses listed by CTC, all of whom are from Boston or Maine. Transfer “is inappropriate if the effect is merely to shift inconvenience from one party to the other.” *Buckley v. McGraw-Hill, Inc.*, 762 F. Supp. 430, 439 (D.N.H. 1991); *see also Van Dusen*

¹ Bell refers to several other potential witnesses whom it does not identify. In order for the court to consider such witnesses in its application of section 1404(a), the party seeking transfer must “clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover.” *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2d Cir. 1978). *See also McEvily v. Sunbean-Oster Co.*, 878 F. Supp. 337, 347 (D.R.I. 1994) (party opposing transfer must state with particularity why particular witness weighs in favor of retaining jurisdiction). I do not consider any witnesses other than those whom Bell specifically identifies and for whom it describes their expected testimony.

v. Barrack, 376 U.S. 612, 645-46 (1964) (“Section 1404(a) provides for transfer to a more convenient forum, not a forum likely to prove equally convenient or inconvenient.”); *Milgrim Thomajan & Lee P.C. v. Nycal Corp.*, 775 F. Supp. 117, 122 (S.D.N.Y. 1991). It is also significant that all of the witnesses listed by Bell are its employees, or employees of one of its subsidiaries. “A defendant’s motion to transfer under section 1404(a) may be denied when the witnesses are employees of the defendant and their presence can be obtained by the party.” *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 925 F. Supp. 36, 38 (D. Me. 1996).

Jurisdiction was obtained by this court before the action was filed in New York. Bell argues that this factor should be disregarded because CTC obtained this advantage by deceit. Bell bases this argument on the assertions that CTC solicited a settlement offer, “suggest[ed] to Bell Atlantic that it would not have a response until January 5, 1998 . . . and then surreptitiously fil[ed] a complaint on December 23, 1997.” Motion and Incorporated Memorandum in Support of Motion to Transfer or Stay (Docket No. 3) at 6. These assertions are supported by the affidavit of Micki Chen, counsel for a Bell subsidiary, who states in conclusory fashion that Bell “had been led to believe that because of vacations, Bell Atlantic would not be receiving a response” to its settlement proposals “until at least January 5, 1998.” Affidavit of Micki M. Chen (“Chen Aff.”) (Docket No. 4) ¶¶ 1, 13. The settlement proposals were delivered some time after November 21, 1997. *Id.* ¶¶ 12-13. Chen also reports that Bell was advised of the filing of the complaint in this action on December 26, 1997. *Id.* ¶ 12. CTC responds that it rejected settlement on or about December 16 or 19, 1997, Affidavit of Leonard R. Glass, Exh. D. to Plaintiff’s Objection to Motion to Transfer or Stay (“Plaintiff’s Objection”) (Docket No. 7), ¶ 6, a point that is disputed by Bell, Declaration [by Jack H. White, Jr.] in Support of Motion, Exh. 4 to Chen Aff., ¶ 15 (CTC’s counsel continued to

discuss settlement proposals through December 22, 1997).

In any event, the case law upon which Bell relies to support its argument on this point, *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983), and *Amerada Petroleum Corp. v. Marshall*, 381 F.2d 661 (5th Cir. 1967), in addition to being from a circuit other than the First Circuit and therefore not binding here, deals with actions clearly filed in anticipation of lawsuits being brought in other forums by the opposing parties. Unlike the situation in *Mission*, 706 F.2d at 601, 602 (plaintiff caused defendant to delay filing suit; defendant had prepared pleadings and planned to file them on two occasions), Bell provides this court with no indication that it would have filed suit itself but for CTC's alleged misrepresentations or that it had prepared to file suit in New York, delaying only because it reasonably believed that CTC was still engaged in good faith settlement negotiations or because CTC had asked it to delay filing suit. In *Amerada*, the plaintiff had been informed that the defendant would bring suit against it if it did not appear voluntarily in other litigation; three weeks later, the plaintiff filed suit. 381 F.2d at 662. The Fifth Circuit found that this action was "in anticipation of" the action subsequently filed in another forum by the defendant. *Id.* at 663. Bell has not provided this court with a similar factual background. Indeed, the record before the court on this motion would support a finding that either party should have anticipated that the other would file suit in late December 1997.

Bell does not address the availability of documents or the possibility of consolidation as considerations supporting its motion.²

CTC devotes the majority of its argument against transfer to the assertions that it chose to

² Bell does argue that it is more appropriate for a court located in New York to resolve questions of New York law, but choice of law is not a consideration relevant to a venue analysis. *Ashmore*, 925 F. Supp. at 39.

file this action in the District of Maine because its docket is not congested and trial will be prompt and that Bell's superior financial strength makes it more able to bear the cost of litigation in Maine than is CTC able to bear the cost of litigation in New York City. These are both valid points for consideration by the court under the "interest of justice" language of section 1404(a). *Ashmore*, 925 F. Supp. at 39-40. This court has a fast-moving docket and would be able to effect an earlier resolution of the matter than would the overburdened court in the Southern District of New York. A prompt trial is relevant to both the convenience of parties and the interest of justice. *Id.*; *see also Congress Financial Corp. v. John Morrell & Co.*, 761 F. Supp. 16, 17 (S.D.N.Y. 1991). The relative financial strength of the parties to absorb the costs of litigation is a consideration in the transfer of venue analysis. *Ashmore*, 925 F. Supp. at 39. Bell cannot seriously contend that CTC, a corporation with annual income of less than \$30 million, Affidavit of Robert Fabbriatore, Exh. B. to Plaintiff's Objection, ¶ 25 (\$14 million is "nearly one half of CTC's annual revenue"), is in a financial position similar to its own.

While the transfer sought in *Ashmore* was from Maine to Massachusetts, a lesser distance than that involved here, the additional distance does not increase the inconvenience to Bell to a degree that distinguishes this case from *Ashmore*. Bell has not shown that the District of Maine is more inconvenient for it than the Southern District of New York would be for CTC. *See Manufacturers Hanover Trust Co. v. Palmer Corp.*, 798 F. Supp. 161, 164 (S.D.N.Y. 1992).

For the foregoing reasons, Bell's motion for transfer is **DENIED**.

Dated this 18th day of February, 1998.

David M. Cohen
United States Magistrate Judge