

defense of lack of jurisdiction over the person, be made either in a responsive pleading or in a motion made before pleading if further pleading is permitted. Fed. R. Civ. P. 12(b); *Pilgrim Badge & Label Corp. v. Barrios*, 857 F.2d 1, 3 (1st Cir. 1988). "A defense of lack of jurisdiction over the person . . . is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading." Fed. R. Civ. P. 12(h)(1); *Pilgrim Badge & Label Corp.*, 857 F.2d at 3; *see also* 5 C. Wright & A. Miller, *Federal Practice and Procedure* ' 1351 at 564 (1969). Here Behny answered the plaintiff's complaint without raising the defense of lack of jurisdiction over the person and he did not raise this defense in a motion made before he filed his responsive pleading.

Behny argues that he preserved this defense in a series of letters written to opposing counsel, several discovery responses, and various filings with the court, *see* Memorandum of Defendants Towery Publishing, Inc. and Roland G. Behny in Support of Motion to Dismiss at 2, including his answer which states: "This Court is without jurisdiction to decide this matter," *see* Answer to Complaint (Thirteenth Defense). As already indicated, a lack-of-personal-jurisdiction defense can be preserved only if it is asserted in the responsive pleading or made by motion in accordance with Rule 12. Behny's general objection to the jurisdiction of the court contained in his answer is insufficient to preserve the defense of lack of jurisdiction over the person. "A defendant who files a responsive pleading, but who does not object to the *personal* jurisdiction of the court, has, in effect, consented to the court's jurisdiction." *Pilgrim Badge & Label Corp.*, 857 F.2d at 3 (emphasis added). Behny's objection to this court's jurisdiction can be read, at most, as an objection to its subject matter jurisdiction. I therefore conclude that defendant Behny has waived the defense of lack of jurisdiction over the person.

B. Transfer and *Forum Non Conveniens*

Both defendants argue that this proceeding should be transferred to the United States District Court for the Western District of Tennessee pursuant to 28 U.S.C. ' 1404(a).¹ They assert that the so-called forum selection clause in the employment contract between defendant Towery Publishing and the plaintiff should control this court's determination and that the interest of justice and convenience of the parties and witnesses weigh in favor of transferring this case to Tennessee.² The plaintiff contends that the forum selection clause is unenforceable and that the convenience of the parties is best served by proceeding in this court.

¹ This section reads:

Change of venue

(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.

28 U.S.C. ' 1404(a).

² The forum selection clause states in relevant part:

The parties acknowledge that a substantial portion of negotiations, anticipated performance, and execution of this Agreement occurred or shall occur in Shelby County, Tennessee, and that, therefore, without limiting the jurisdiction and venue of any other federal or state courts, each of the parties irrevocably and unconditionally (a) agrees that any suit, action, or legal proceeding arising our [sic] of or relating to this Agreement may be brought in the courts of record of the State of Tennessee in Shelby County or the federal district court serving Shelby County, Tennessee; (b) consents to the jurisdiction of each such court in any suit, action, or proceeding; (c) waives any objection which it may have to the laying of venue of any such suit, action, or proceeding in any of [sic] such court.

& 13 of Employment and Confidentiality Agreement (Exh. I to Memorandum of Defendants Towery Publishing, Inc. and Roland G. Behny in Support of Motion to Dismiss).

To transfer a case from one district to another the moving party bears the burden of showing (1) that venue is proper in the transferor district; (2) . . . that the transferee court is in a district where it might have been brought[]; and (3) that the transfer is for the convenience of the parties and witnesses in the interest of justice." *Heller Financial, Inc. v. Shop-A-Lot, Inc.*, 680 F. Supp. 292, 295 (N.D. Ill. 1988) (citations and quotations omitted); *see also Rosenfeld v. S.F.C. Corp.*, 702 F.2d 282 (1st Cir. 1983); 28 U.S.C. ' 1404(a). In diversity cases venue is determined pursuant to 28 U.S.C. ' 1391(a) which states:

A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

Id. It is undisputed that the plaintiff resides in Maine and that venue is proper in this district. The defendants, however, have failed to satisfy parts two and three of the three-part transferability test.

The second part of the test requires that the transferor district be a district where the cause might have been brought. 28 U.S.C. ' 1404(a). To satisfy this requirement the defendants must show that either (1) all the defendants reside in the Western District of Tennessee or (2) the claim arose in that district. 28 U.S.C. ' 1391(a). The defendants admit that defendant Behny does not reside in the Western District of Tennessee, *see* Complaint & 3; Answer to Complaint & 3, and thus this action could not have been brought there based on the residence of all the defendants.

In addition, the defendants have failed to establish that these claims arose in Tennessee. While some of the events involved in this lawsuit took place in several states, the actions which make up the basis of the plaintiff's claim occurred in Maine. At the time of the initial contact between the parties the plaintiff lived in Maine. Affidavit of Robert Towery && 6-10 (Exh. G to Memorandum of Defendants Towery Publishing, Inc. and Roland G. Behny in Support of Motion to Dismiss).

Subsequently, Towery Publishing, Inc. and the plaintiff held an introductory meeting in Memphis, Tennessee. *Id.* & 13. Other employment negotiations and the employment contract were completed via telephone or telefacsimile between the plaintiff's office in Portland and Towery Publishing's office in Memphis. *Id.* at && 15-17. Furthermore, the acts which constitute the core of the plaintiff's claims, the telephone communication and letter confirming the plaintiff's dismissal, were sent to the plaintiff's office in Portland, *see* Affidavit of Roland G. Behny && 8, 10 (Exh. H to Memorandum of Defendants Towery Publishing, Inc. and Roland G. Behny in Support of Motion to Dismiss), and any injury the plaintiff suffered was suffered in Maine. Here the plaintiff's only connections to Tennessee are the introductory meeting in Memphis and some relatively few telephone and telefacsimile communications which either originated or terminated there. "[A] few peripheral contacts do not mean that the claim 'arose' in [Tennessee]." *Rosenfeld*, 702 F.2d at 284. I therefore conclude that the defendants have failed to sustain their burden of showing that the plaintiff's claims arose in the Western District of Tennessee.

Even assuming, *arguendo*, that the claim did arise in Tennessee, I conclude for the following reasons that transfer to another forum would be inappropriate. The defendants argue that maintaining this action in Maine would needlessly burden this court and themselves. They assert that this court would be required to apply Tennessee law to the contract dispute,³ that Maine is an inconvenient forum for the witnesses, and that most evidence is located in Tennessee. I am unpersuaded, however, by the defendants' arguments. This court must "weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" *Stewart Organization, Inc., v. Ricoh*

³ *See* & 14 of Employment and Confidentiality Agreement (Exh. I to Memorandum of Defendants Towery Publishing, Inc. and Roland G. Behny in Support of Motion to Dismiss).

Corp., 487 U.S. 22, 30 (1988). While the breach of contract claim may be governed by Tennessee law, the tort claims clearly arose in Maine and will be governed by Maine law. In any event, the need to apply the substantive law of Tennessee in this diversity action does not constitute a sufficient burden on the court that will, without more, justify a transfer. In addition, the parties and witnesses in this action are located in Maine, Tennessee and California and the defendants have not shown that Tennessee is any more convenient to these parties than is Maine. Finally, the defendants have not shown that the records in this case are voluminous or otherwise burdensome to produce at discovery or trial in Maine. I therefore conclude that it is not "[f]or the convenience of parties and witnesses, in the interest of justice," 28 U.S.C. § 1404(a), to transfer this case to the Western District of Tennessee.

The defendant contends that the court should give controlling weight to the forum selection clause contained in the Employment and Confidentiality Agreement signed by the parties. I note at the outset that the so-called forum selection clause does not purport to restrict venue to certain state and federal courts in Tennessee. Rather, it reflects the agreement of the parties that any suit deriving from their employment agreement *may* be brought in those courts or in any other federal or state courts having jurisdiction and venue. Thus, I do not view the clause as a limitation on venue or even as an indicator of the parties' agreed venue preference. Even if it could be so read, federal law nevertheless governs the parties' venue dispute. *Stewart Organization, Inc.*, 487 U.S. at 27-28, 32. Thus, a forum selection clause can only be given effect if it is consistent with the provisions of § 1404(a). Furthermore, a forum selection clause "should receive neither dispositive consideration . . . nor no consideration . . . , but rather the consideration for which Congress provided in § 1404(a)." *Id.* at 31. I conclude that, even giving due consideration to a restrictive reading of the clause as a true forum selection clause, its enforcement would not be in the interest of justice or for the convenience of the parties and witnesses, and is therefore inconsistent with the provisions of § 1404(a).

Finally, the defendants argue that this case should be dismissed pursuant to the doctrine of *forum non conveniens*. The analysis undertaken for a ' 1404(a) transfer is similar to the common-law doctrine of *forum non conveniens*. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 n.20 (1985). "[T]he central focus of the *forum non conveniens* inquiry is convenience . . . [;] dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981), *reh'g denied*, 455 U.S. 928 (1982). As noted above, the defendants have not shown that the plaintiff's choice of forum imposes a heavy burden on them or the court. Furthermore, as previously noted, there are specific reasons supporting the plaintiff's choice of forum.

C. Conclusion

For the foregoing reasons I recommend that:

1. Defendant Behny's motion to dismiss for lack of jurisdiction over the person be **DENIED**;
2. The defendants' motion to transfer this action to the United States District Court for the Western District of Tennessee be **DENIED**; and
3. The defendants' motion to dismiss pursuant to the doctrine of *forum non conveniens* be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo

review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 2nd day of May, 1990.

*David M. Cohen
United States Magistrate*