LEXSEE 2004 U.S. DIST. LEXIS 22491

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. THE ROSE FUND, LLC, THE ROSE FUND, INC., THE HOLDINGS, INC., MICHAEL ALEXANDER, PAUL EDWARD NELSON, and WILLIAM WRIGHT, Defendants. and ROSE COLLECTIONS, INC., PACIFIC VIDEO NETWORK, INC., RESORT MANAGEMENT, CO., INC., WEB INVENTIONS, INC., WHO BANGING, INC., and YAE, INC., Relief Defendants.

No. C 03-04593 WHA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2004 U.S. Dist. LEXIS 22491

January 9, 2004, Decided

SUBSEQUENT HISTORY: Subsequent appeal at *SEC v. Rose Fund LLC, 2005 U.S. App. LEXIS 24914 (9th Cir. Cal., Nov. 16, 2005)*

DISPOSITION: Defendant Michael Alexander's motion to transfer denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff SEC brought an action against defendant investment fund which sought to transfer venue from the United States District Court for the Northern District of California to a district court sitting in the Southern District of California, where the fund had its office and the owner lived. The fund argued that transfer was appropriate for the convenience of the parties and witnesses pursuant to *28 U.S.C.S. 1404(a)*. The SEC opposed the motion.

OVERVIEW: The issue was whether the case should be transferred to the Southern District of California. The district court held that the fund had not met his burden of showing that the balance of factors warranted a change of venue. Rather, the balance of factors favored resolution of the case in the northern district. The SEC contended that the fund violated the registration and anti-fraud provisions of the securities laws, among other things. The fund, to further its scheme, advertised the fraudulent investment opportunity in local newspapers that successfully enticed residents in the northern district to invest in the fund. The fund allegedly sold unregistered securities to a number of residents of the northern district. Investors located there purchased approximately one-million dollars worth of units in the fund. The SEC was well within its discretion to bring its action in the northern district. Any benefit derived from transferring the case to Los Angeles versus keeping it in the northern district would have been de minimis. Accordingly, where the owoner of the fund merely attempted to shift the inconvenience of litigating the case from himself to the SEC, transfer was not warranted.

OUTCOME: The motion to transfer venue was denied.

LexisNexis(R) Headnotes

Civil Procedure > Venue > Federal Venue Transfers > Convenience Transfers
Civil Procedure > Venue > Motions to Transfer > General Overview
Civil Procedure > Judicial Officers > Judges > Discretion

[HN1] Under *28 U.S.C.S. § 1404(a)*, a district court has discretion to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness. A motion to transfer venue under *§ 1404(a)* requires the court to weigh various factors in its determination whether transfer is

appropriate in a particular case.

Civil Procedure > Venue > Federal Venue Transfers > General Overview
Evidence > Procedural Considerations > Burdens of Proof > General Overview
[HN2] Courts in the Northern District of California have considered the following factors relevant when deciding a transfer motion: (1) plaintiff's choice of forum; (2) convenience of the parties; (3) convenience of the witnesses; (4) ease of access to the evidence; (5) familiarity of each forum with the applicable law; (6) feasibility of consolidation of other claims; (7) any local interest in the controversy; and (8) the relative court congestion and time of trial in each forum. The moving party has the burden.

Civil Procedure > Venue > Federal Venue Transfers > Convenience Transfers
Civil Procedure > Venue > Forum Non Conveniens
Civil Procedure > Venue > Motions to Transfer > Choice of Forum
[HN3] The general rule is that a plaintiff's choice of forum is afforded substantial weight. Accordingly, a defendant seeking transfer of venue under *28 U.S.C.S. § 1404(a)* must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum.

Civil Procedure > Venue > Special Venue
Securities Law > Additional Offerings & the Securities Exchange Act of 1934 > Jurisdiction & Scope > Federal Jurisdiction
Securities Law > Regulation of Securities Markets > General Overview
[HN4] The general rule that a plaintiff's choice of forum is afforded substantial weight applies even more so where Congress has enacted a special venue provision for actions under the federal securities laws. Under *15 U.S.C.S. § 78aa*, the SEC may bring suit to enforce liability under the Securities and Exchange Act of 1934 in the district wherein any act or transaction constituting the violation occurred. The act contemplated by the statute need not be crucial, nor must the fraudulent scheme be hatched in the forum district, so long as the act is of material importance to the consummation of the scheme. The purpose of this special venue provision is to grant potential plaintiffs liberal choice in their selection of forum.

Civil Procedure > Venue > Multiparty Litigation
Securities Law > Regulation of Securities Markets > General Overview
[HN5] The SEC is entitled to just as much deference in its choice of forum as any other litigant.

COUNSEL: [*1] For Securities And Exchange Commission, Plaintiff: Christopher Charles Cooke, Cooke Kobrick & Wu LLP, San Francisco, CA; Helane L. Morrison, San Francisco, CA; James A. Howell, Securities and Exchange Commission, San Francisco, CA; Xavier Carlos Vasquez, Securities And Exchange Commission, San Francisco, CA.

For Michael Alexander, Defendant: Fred G. Meis, Meis & Alexander, San Francisco, CA.

For Paul Nelson, Defendant: Pro se, Bothell, WA.

For William Wright, Defendant: Pro se, Manhattan Beach, CA.

For Web Inventions, Inc., Defendant: Pro se, Bothell, WA.

For Thomas F Lennon, Defendant: Loraine L. Pedowitz, Allen Matkins Leck Gamble & Mallory LLP, San Diego, CA; David Osias, Allen Matkins Leck Gamble & Mallory LLP, San Diego, CA.

JUDGES: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM ALSUP

OPINION

ORDER DENYING MOTION TO TRANSFER VENUE

INTRODUCTION

In this civil-enforcement action brought under the federal securities laws, defendant Michael Alexander seeks to transfer venue from this Court to a district court sitting in the Southern District of California. He contends that transfer is appropriate for the convenience of the parties and witnesses **[*2]** and in the interest of justice pursuant to *28 U.S.C. 1404(a)*. The Securities and Exchange Commission opposes the motion. This order **DENIES** the motion to transfer.

STATEMENT

From October 2002 through September 2003, defendants Michael Alexander, Paul Nelson and William Wright allegedly ran a scheme that promised investors extraordinary profits through a high-risk, high-return mortgage-lending business known as the Rose Fund, LLC. To this end, defendants advertised and sold unregistered securities to members of the general public in the form of unit interests in the Rose Fund, LLC. By August 2003, 78 California residents (of approximately 125 total investors nationwide) had invested over three-million dollars in Rose Fund, LLC securities. Over one-million dollars of this amount came from investors in the Northern District of California.

The SEC filed this action on October 10, 2003, and sought a temporary restraining order prohibiting further violations of the securities laws and other relief, including an asset freeze. This Court entered the temporary restraining order and set a preliminary injunction hearing. All of the parties thereafter signed **[*3]** a stipulation and filed a proposed order for a preliminary injunction and the appointment of a receiver for the entity defendants. The Court signed the order October 29, 2003. With his consent, a judgment of permanent injunction was then entered against defendant Wright. Defendants Alexander and Nelson both answered the complaint.

ANALYSIS

The question presented by the present motion is whether the case should be transferred to the Southern District of California. [HN1] Under *28 U.S.C. 1404(a)*, the district court has discretion "to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.'" *Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 29, 101 L. Ed. 2d 22, 108 S. Ct. 2239 (1988)* (citation omitted). A motion to transfer venue under *Section 1404(a)* requires the court to weigh various factors in its determination whether transfer is appropriate in a particular case. *Ibid.*

[HN2] Courts in this district have considered the following factors relevant when deciding a transfer motion: (1) plaintiff's choice of forum; (2) convenience of the parties; (3) convenience of the witnesses; (4) ease of access to the evidence; **[*4]** (5) familiarity of each forum with the applicable law; (6) feasibility of consolidation of other claims; (7) any local interest in the controversy; and (8) the relative court congestion and time of trial in each forum. *See Williams v. Bowman, 157 F. Supp. 2d 1103, 1105-06 (N.D. Cal. 2001)* (Walker, J.). The moving party has the burden.

This order holds that Alexander has not met his burden of showing that the balance of factors warrants a change of venue. Rather, the balance of factors favors resolution of the case in this district.

PLAINTIFF'S CHOICE OF FORUM

[HN3] The general rule is that a plaintiff's choice of forum is afforded substantial weight. Accordingly, a defendant seeking transfer of venue under *Section 1404(a)* must make a strong showing of inconvenience to warrant upsetting the plaintiff' s choice of forum. *Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986)*.

[HN4] The general rule applies even more so here where Congress has enacted a special venue provision for actions under the federal securities laws. Under *15 U.S.C. 78aa*, the SEC may bring suit to enforce liability under the *Securities and Exchange Act of 1934* **[*5]** in the district "wherein any act or transaction constituting the violation occurred." As the Ninth Circuit observed in *Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1316-17 (9th Cir. 1985)*, the "act contemplated by the statute need not be crucial, nor must the fraudulent scheme be hatched in the forum district," so long as the act is "of material importance to the consummation of the scheme." The purpose of this special venue provision is to "grant potential plaintiffs liberal choice in their selection of forum." *Ibid.*

Here, the SEC contends that defendants violated the registration and anti-fraud provisions of the securities laws, among other things. Defendants, to further their scheme, advertised the fraudulent investment opportunity in local newspapers like the San Francisco Chronicle, the Oakland Tribune, the Contra Costa Times, the San Jose Mercury News, and the San Mateo Daily. The advertisements were successful and enticed residents here to invest in the Rose Fund, LLC. Defendants allegedly sold unregistered securities to a number of residents of this district. Investors located here purchased approximately one-million **[*6]** dollars worth of units in the limited liability company. This order holds that the SEC was thus well within its discretion to bring its action in this district.

Alexander maintains that the SEC's choice of forum should receive little deference. He states that the SEC "is based in Washington D.C. with regional offices across the United States, including Los Angeles" (Br. 6-7). The argument goes that the SEC, as a federal agency, has vast resources and would rarely, if ever, be seriously inconvenienced by being compelled to litigate in a district purportedly more convenient to defendants. [HN5] The SEC, however, is entitled to just as much deference in its choice of forum as any other litigant. *See In re: National Presto Industries Inc., 347 F.3d 662, 664-65 (7th Cir. 2003)*. The SEC does not have personnel or facilities in every federal district. It has eleven regional and district offices, two of them located in California. One is located in this district, the other in the Central District of California. Not until his reply brief (which was filed one-week late and without leave of the Court) did Alexander propose moving the case to the Central District. He repeated this **[*7]** possible alternative at the hearing of this matter. This order finds, however, that any benefit derived from transferring the case to Los Angeles versus keeping it here would be *de minimis.* Accordingly, where Alexander merely attempts to shift the inconvenience of litigating this case from himself to the SEC, transfer is not warranted.

CONVENIENCE OF THE PARTIES

This forum is obviously convenient for the SEC, as one of its California offices is located here in the Northern District. Neither does this district raise issues of inconvenience for defendants' receiver, Thomas F. Lennon. Although based in Southern California, as a professional receiver and bankruptcy trustee, Lennon agreed to this assignment understanding that some travel to San Francisco might be required (Lennon Decl. P 3). His counsel, Allen Matkins Leck Gamble & Mallory, has a San Francisco office in addition to its offices in San Diego and Los Angeles. Lennon's attorney-client agreement further provides that any travel time to San Francisco for court appearances will not be charged to the receivership (*id.* P 4).

Alexander, however, resides in San Diego County. He also claims to be seriously ill and **[*8]** under doctor's supervision with advice not to travel (Miller Decl. Exhs. 1, 2). Alexander suffers from sudden cardiac death syndrome that requires him to carry a portable defibrillator, and other health conditions. The burden of traveling to and from San Francisco to attend hearings and the trial of this matter would be a tremendous burden on him and unnecessarily place his life at risk (Br. 7). The SEC submits that Alexander's claim of ill health should be viewed with a slanted eye in light of evidence (including photographs) that show he has made regular trips to bank offices and a race track in Del Mar over the past several months without substantial difficulty.

Moreover, Alexander has apparently advised the SEC that he will refuse to testify in this case and will instead assert his privilege against self-incrimination under the *Fifth Amendment*. If this is the case, the "tremendous burden" of traveling for deposition or trial is reduced. That is not to say that Alexander is not entitled to be present at trial. He has every right to be -- ultimately, the choice will be his. In any event, this factor alone does not tip the scales in favor of transfer.

CONVENIENCE OF THE WITNESSES

[*9] To demonstrate an inconvenience to witnesses, the moving party must identify relevant witnesses, state their location and describe their testimony and its relevance. Alexander identifies one witness he intends to call in his defense. Lyman Warnock, who purportedly resides in San Diego and served as a mortgage broker for the Rose Fund entities, allegedly suffers from a serious medical condition that confines him to a wheelchair and prevents him from traveling to the Northern District (Miller Decl. Exh. 4). Alexander, however, fails to explain what Warnock would testify to if called as a witness at trial.

With similar ambiguity, Alexander states that the "majority of witnesses identified by the SEC reside in Southern California" and that "the Southern District will also be a more convenient venue for depositions of witnesses" (Br. 7-8). Alexander appears to rely on a list of Rose Fund, LLC investors to support his contention. Even if he did intend to call each investor as a witness, the location of the investors does not favor transfer. Of the 78 California investors, 36 have addresses in the Northern District and the remainder are distributed among the Central District and Eastern **[*10]** District (Vasquez Decl. U 5). This district is therefore a convenient forum for at least some of the investors whereas transfer of the case to the Southern District would inconvenience nearly all of the investor witnesses on the list. Alexander has not met his burden on this factor.

EASE OF ACCESS TO EVIDENCE

Alexander argues that the Southern District is a more favorable forum because defendants' principal places of business are all located in San Diego County. According to Alexander, all parties will have better access to defendants' records if the case is transferred. It appears, however, that very little evidence ever existed at defendants' business office. The court-appointed receiver visited the office of the Rose Fund entities in San Diego. He found a space six-by-ten feet in size furnished with an easy chair, a desk chair, and a two-drawer filing cabinet (Lennon Decl. P 6). There were no employees in the office. The only documents he located were about two inches of miscellaneous papers, blank forms, the office lease, blank checks, and accumulated mail (*id.* 6-7). Those documents are now in the receiver's possession. The SEC as well has copies of relevant documents **[*11]** in its San Francisco office, since all defendants produced documents prior to the commencement of this action. All of these records are subject to discovery as part of the SEC's initial disclosures in this case. As such, the location of business records and other documentary evidence does not favor transfer.

FAMILIARITY OF EACH FORUM WITH THE APPLICABLE LAW

This case concerns the application of federal securities law. Neither party suggests that a judge in the Southern District will be more familiar with this area of law to warrant transfer. As such, this factor is neutral and does not weigh one way or the other on the issue of venue.

FEASIBILITY OF CONSOLIDATION OF OTHER CLAIMS

At this stage, no other claims have been brought against defendants. This factor is also neutral and does not affect the instant determination of venue.

ANY LOCAL INTEREST IN THE CONTROVERSY

The individuals who invested their money with defendants are located throughout the United States and the State of California. Alexander claims that this factor tips the scales in favor of transfer to the Southern District "because the transactions originated from San Diego and were finalized in **[*12]** San Diego by San Diego individuals and businesses" (Br. 9). Defendants' alleged fraud, however, was aimed at investors everywhere. At least 36 people residing in this district invested on the basis of defendants' fraudulent offering of securities, which represents nearly half of the allegedly defrauded California investors. Of course, the courts of the Southern District have a substantial interest in policing the conduct of businesses that operate within their jurisdiction. Where the harm from that conduct, however, is felt further away from home, the courts where the victims are located have at least an equal interest in the controversy. Although a close call, this factor does not weigh in favor of transfer.

RELATIVE COURT CONGESTION AND TIME OF TRIAL IN EACH FORUM

Neither party disputes that both district courts have busy dockets. Alexander contends that new judges were recently appointed in the Southern District to handle its ever-increasing caseload. Even if Alexander's statement (for which he submits no support) is true, this order finds that both courts are capable of managing the instant case and that this factor does not favor a change of venue.

CONCLUSION

[*13] Considering all the factors, this order concludes that Alexander has not met his burden of showing that a change of venue is warranted under *Section 1404(a)*. The motion to transfer, therefore, is **DENIED.**

IT IS SO ORDERED.

Dated: January 9, 2004.

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE