

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

CoStar Realty Information and
CoStar Group Inc.,

Case No. PJM 06CV0655

Plaintiffs

v

Atkinson Hunt and
Resource Realty of Southern New Jersey

Defendants.

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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL
JURISDICTION, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, AND/OR MOTION
TO TRANSFER VENUE**

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STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE

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Plaintiffs CoStar Realty Information and Costar Group, Inc. (hereinafter "Costar") allege that Defendant Resource Realty and Personal Property Evaluations, Inc. (improperly plead as Resource Realty of Southern New Jersey, and hereinafter "Resource Realty") has breached a license agreement (Count I) and committed common law fraud (Count II). However, the initial claim fails as a matter of law, due to the lack of any enforceable contract, which not only makes the claim facially defective but would also prevent CoStar from exercising personal jurisdiction over Resource Realty. Next, CoStar's second claim must fail insofar as it is derived from the first. Additionally, this Court must dismiss Count II (Fraud), because its extraordinary vagueness falls short of the heightened pleading standard of Rule 9 of the Federal Rules of Civil Procedure.

Alternatively, this Court should provide a transfer of venue, because the factual circumstances reveal that none of the Defendants in this matter reside in Maryland, the Defendants are not subject to personal jurisdiction in Maryland, and a substantial portion of the events giving rise to this action did not occur in Maryland. Further, it should be noted that this case has little relevant connection with the District of Maryland. Although, Costar is incorporated in Maryland, virtually all of the relevant witnesses are located in New Jersey where both Defendants are located, or New York where it is believed that Plaintiff's local representative is located. Accordingly, it will be just as easy for Costar to try this case in New Jersey as in Maryland. Additionally, venue is proper in the District of New Jersey, because of Resource Realty's residence in that district, Resource Realty's physical facilities and records are in New Jersey and that is where the purported contracts were negotiated. Further, New Jersey is more centrally located to Plaintiff's local representative's office in New York. In short, the trial of this case would be easier and less expensive in the District of New Jersey, yet the interests of justice will be equally well served. Therefore, Resource Realty respectfully request that if this Court is not prepared to Dismiss the Complaint, then it requests that this Court transfer venue of this case to the District of New Jersey.

STATEMENT OF FACTS

On March 23, 2006, CoStar, a Maryland corporation with offices for its local account executives in New Jersey and New York, filed and served its Complaint on Resource Realty, a New Jersey corporation with its principal place of business in Moorestown, New Jersey. See Complaint, at 2; Certification of John Hofsaess (hereinafter “Hofsaess Cert.”), attached as Exhibit A, ¶ 2. Although, as indicated in Plaintiff’s Complaint it is stated that CoStar’s computer databases are located in Maryland, the information contained on those servers is readily transportable as indicated by the fact that Plaintiff purports to be in the business of licensing that same information. See Complaint, at 3. Further, as Defendants are located in New Jersey, upon information and belief, Plaintiff’s records and local account executives who took part in soliciting the proposed agreement related to the current transaction are located in New York and/or New Jersey. Hofsaess Cert., ¶ 2. Additionally, for purposes of evaluating the venue for this matter, it should be noted that Co-Defendant Atkinson Hunt is a business with a principal place of business located in Pennsauken, New Jersey. Certification of James R. Davis (hereinafter “Davis Cert.”), attached as Exhibit B, ¶ 2. The only allegations within CoStar’s Complaint against Resource Realty are contained in Counts I (Breach of Contract) and II (Fraud). See Complaint, at 9-11.

In particular, it should also be noted that CoStar premises personal jurisdiction over Resource Realty in this matter based solely on the “written contract” that is believed to be the proposed Licensing Agreement. See Complaint, at 2 (insofar as any tortious acts are alleged, it should be noted that the remainder of the Complaint only alleges that Resource Realty engaged in acts of fraud that are derivative from the purported Contract).

Plaintiff alleges breach of contract based on a purported License Agreement between Resource Realty and CoStar, which CoStar alleges was violated by Resource Realty sharing its

passwords to CoStar's database with an unauthorized user. See Complaint, at 9. However, at the time the purported contract was entered into, in the presence of CoStar's local account executive Mark Dougherty, the allegedly unauthorized user was included by CoStar as a specifically designated authorized user in the Authorized User section of the License Agreement. Davis Cert., ¶ 3. The user that CoStar fails to recognize as authorized is Co-Defendant David Atkinson, who was an independent contractor working on a joint venture with Resource Realty until during fall 2004. Davis Cert., at 2 & 9; Complaint, at 10-11. Resource Realty asserts that to the extent that CoStar fails to recognize one of its five authorized users, CoStar and Resource Realty failed to have a valid agreement, because the parties did not have a meeting of the minds as to a material term of the proposed License Agreement. Davis Cert., at 6.

Further, apparently derived from its failure to recognize David Atkinson as an additional authorized user, CoStar alleges that Resource Realty engaged in fraud by making "inaccurate and misleading statements to CoStar in order to conceal Atkinson Hunt's involvement". See Complaint, at 10. However, Plaintiff CoStar fails to provide any additional details as to the specific basis for its allegations of fraud by Resource Realty.

ARGUMENT

I. COSTAR FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT, BECAUSE THE MINDS OF THE PARTIES WERE NOT IN AGREEMENT AS TO THE TERMS OF A CONTRACT AND NO UNILATERAL MODIFICATIONS OF AN AGREEMENT ARE ALLOWED

Pursuant to Fed. R. Civ. P. 12(b)(6), a claim may be dismissed for the failure to state a claim upon which relief can be granted. In order to prevail on such a motion, the moving party must show that "it appears certain that the plaintiff cannot prove any set of facts in support of his

claim entitling him to relief.” The Court should dismiss CoStar's breach of contract claim because it fails to state a claim under both Maryland and New Jersey law. A claimant can not prevail on a contract claim in the absence of mutual assent to the same contract terms. Creel v. Lilly, 354 Md. 77, 101, 729 A.2d 385, 398 (1999) (citing Klein v. Weiss, 284 Md. 36, 63, 395 A.2d 126, 141 (1978)). “One of the essential elements for formation of a contract is a manifestation of agreement or mutual assent by the parties to the terms thereof; in other words, to establish a contract the minds of the parties must be in agreement as to its terms.”); Chernick v. Chernick, 327 Md. 470, 478-79, 610 A.2d 770, 774 (1992)(stating “In order to form a contract, both parties must have the power to enter into an agreement and must consent to the agreement being made”). Further, Chernick recognized that parties do not have the ability to independently modify an agreement. Id.

In the present case, Plaintiffs’ breach of contract claim must fail, because the contract as executed by Resource Realty listed David Atkinson as an authorized user. In light of the proposed Licensing Agreement’s requirement that authorized users be listed on the Authorized Site and Users List, any unilateral subsequent amendment to the Licensing Agreement by Plaintiffs would render the proposed contract invalid, because the minds of the parties would not be in agreement as to its terms to a material term. Further, to the extent that Plaintiff asserts that the contract was not independently modified, then there can be no breach of the contract because the allegations of the Complaint related to Resource Realty only assert that Resource Realty improperly shared its passwords with an unauthorized user, namely David Atkinson. On the basis of the foregoing, Count I of Plaintiff’s Complaint as to Resource Realty must be dismissed for the failure to state a claim.

II. THIS COURT LACKS PERSONAL JURISDICTION TO ADJUDICATE THIS MATTER PURSUANT TO RULE 12(b)(2), BECAUSE COSTAR HAS ONLY ASSERTEED THAT PERSONAL JURISDICTION EXISTS AS TO RESOURCE REALTY BASED ON THE PURPORTED CONTRACT THAT LACKED MUTUAL ASSENT AND A DERIVATIVE FRAUD CLAIM

Rule 12(b)(2) provides that a Complaint may be dismissed for lack of jurisdiction over the person. Additionally, it should be noted that “[w]hen a court’s power to exercise personal jurisdiction over a nonresident defendant is challenged by a motion under Rule 12(b)(2), the jurisdictional question is to be resolved by the judge, with the burden on the plaintiff ultimately to prove grounds for jurisdiction by a preponderance of the evidence.” Screen v. Equifax Information Sys., LLC, 303 F.Supp.2d 685, 688 (D.Md. 2004); Carefirst of Maryland, Inc. v. Carefirst Preganacy Centers, Inc., 334 F.3d 390, 396 (4th Cir. 2003). However, the court may resolve such a dispute after the performance of an evidentiary hearing, when sufficient factual disputes are present. Id. As Maryland allows for long arm jurisdiction to the extent of the limits of the Due Process Clause and Fourteenth Amendment, Maryland courts should focus on whether a defendant “purposefully established ‘minimum contacts’ with Maryland such that maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” Id. In particular, “a defendant’s contacts with Maryland must be extensive, continuous and systematic before the defendant can be held to be subject to specific jurisdiction in a Maryland court.” Virtuality. LLC v. Bata, Ltd., 138 F.Supp.2d 677, 683 (D.Md. 2001).

In the present case, Defendant Resource Realty has not established any minimum contacts with Maryland. The License Agreement that was to be entered into, was signed and negotiated in New Jersey, and all acts performed by Defendant Resource Realty would have occurred in New Jersey. Still, based on a forum selection clause within a contract without mutual assent, Plaintiffs attempts to haul Defendant Resource Realty into court in Maryland.

Respectfully, Defendant Resource Realty reminds this Court that it is Plaintiff's burden to establish that jurisdiction is proper within Maryland by competent evidence, and they have not carried that burden. In particular, due to their own actions Plaintiffs can not establish the existence of a valid contractual agreement, or for that matter an agreement that was not obtained by overreaching conduct that involved amendments to the purported Licensing Agreement after the document was executed by Defendant Resource Realty. On that basis, this Court must dismiss CoStar's Complaint for lack of personal jurisdiction.

III. COSTAR FAILS TO STATE A CLAIM FOR FRAUD, BECAUSE THE ELEMENTS OF SUCH A CLAIM AND THE REQUIREMENTS OF FED. R. CIV. P. 9(b) HAVE NOT BEEN MET

CoStar's allegations of fraud merit dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for several reasons. First, CoStar's pleading fails to satisfy the requirements of Federal Rule of Civil Procedure 9(b) and must be dismissed, because CoStar's Complaint is devoid of specific factual allegations that might give rise to a "fraud" claim against Resource Realty. Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). To satisfy this heightened pleading standard, the Fourth Circuit has recognized that the plaintiff must specify "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." Harrison v. Westinghouse Savannah River Co., 173 F.3d 776, 783-84 (4th Cir. 1999). Importantly, the only conclusory allegations permitted are "defendant's knowledge at to the true facts and of defendant's intent to deceive." Id. In other words, Rule 9(b) requires a party alleging fraud to identify the claim's "who, what, where, when, and how." United States ex reI. Costner v. United States, 317 F.3d 883,888 (8th

Cir. 2003), cert. denied, 540 U.S. 875 (2003).

Additionally, it should be noted that four reasons have been cited for this upfront clarity,

First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of.... Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.

Harrison, 173 F.3d at 784. As such, it has been stated that;

In case of fraud, “plaintiffs carry an unquestionably heavy burden of proof. The existence of actual fraud is not deducible from facts and circumstances which would be equally consistent with honest intentions. In sum, a presumption always exists in favor of innocence and honesty in a given transaction and the burden is upon one who alleges fraud to prove it by clear and distinct evidence.”

Banca Cremi, S.A. v. Alex, Brown & Sons, Inc., 132 F.3d 1017, 1036 (4th Cir. 1997)(quoting in part, White v. Nat’l Steel Corp., 938 F.2d 474, 490 (4th Cir. 1991)). Further, in order to meet the requirements of proving the elements, a person claiming fraud must establish:

1) that the defendant made a false representation to the plaintiff, 2) that its falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth, 3) that the misrepresentation was made for the purpose of defrauding the plaintiff, 4) that the plaintiff relied on the misrepresentation and had the right to rely on it, and 5) that the plaintiff suffered compensable injury resulting from the misrepresentation.

Mathis v. Hargrove, 166 Md. App. 286, 314, 888 A.2d 377, 393 (2005)(citing Ellerin v. Fairfax Savings, F.S.B., 337 Md. 216, 238-39, 652 A.2d. 1117 (1995)).

However, in the present case, Costar levies only one set of factual allegations at Resource Realty; namely, that “in the fall of 2004 and early 2005, Resource Realty made inaccurate and misleading statements to CoStar in order to conceal Atkinson Hunt’s involvement and the other breaches at issue.” Complaint, at 10. Such a statement is deficient in several respects, namely that the individuals asserted to have participated in the allegations and the statements themselves have not been specifically identified as required by Rule 9(b). Rather, the factual assertions as to

fraud by Resource Realty are so vague that they essentially prevent Resource Realty from defending the same. Essentially, the required pleading of the "who said it and who received it" is entirely missing from CoStar's Complaint, despite the clear requirements of Rule 9(b). CoStar's generalized allegations, do not meet the requirements of Rule 9(b).

The inadequacies of Plaintiffs' Complaint begin, but they do not end, with CoStar's failure to identify the individuals and statements that are asserted to constitute a fraud. Instead, the allegations of the Complaint also fail to allege that Resource Realty made any false statement, and only assert that the purported statements were "inaccurate and misleading". Second, there is no allegation that the falsity of the alleged statements was known to Resource Realty, even if any statement that may have been made by Resource Realty is ultimately found to be false. Of particular importance is the fact that the subject matter underlying Plaintiffs' claim that false statements were made is not only in dispute, but Plaintiffs know that the individual identified as an unauthorized user was actually at least initially contained on the proposed License Agreement at the time that it was signed by Defendant Resource Realty. Even if true, Plaintiff has failed to identify how any such statement would have been made with the purpose to defraud them, in that Mr. Atkinson was listed as an authorized user. Further, to the extent that Plaintiff continues to dispute the same, it should be recognized that Plaintiff charged Defendant Resource Realty for 5 authorized users, despite unbeknownst to Resource Realty that Plaintiff reduced the number of authorized users to 4. This essentially means that it would have been impossible for Plaintiff to suffer any harm, because they had already been paid for the authorized number of users. Finally, Costar only vaguely asserts that whatever statements may have been made by Resource Realty were relied upon, but CoStar does not allege how it received or relied

upon any such "inaccurate or misleading statements" to its detriment. As such, CoStar cannot support a fraud claim by alleging that Resource Realty made misrepresentations.

IV. RESOUCCE REALTY'S MOTION TO TRANSFER SHOULD BE GRANTED, PURSUANT TO 28 U.S.C. 1404(a) FOR THE CONVENIENCE OF THE PARTIES, ACCESS TO PROOF AND SUBSTANTIAL CONTACTS WITH THE FORUM

Motions to transfer venue under 28 U.S.C. § 1404(a), require that courts apply a two part test. First, the Court must determine whether this action "might have been brought" in the district to which transfer is requested, which requires that personal jurisdiction and venue are proper in the transferee court. Second, the Court must determine in its discretion whether the action should be transferred "[f]or the convenience of the parties and witnesses, in the interests of justice. 28 U.S.C. § 1404(a); Mitchell v. Gundlach, 136 F.Supp. 169 (D.Md. 1955). The facts of this case easily satisfy both of these criteria.

28 U.S.C. § 1391(a)(1) provides that venue is proper in a judicial district where any defendant resides, if all defendants reside in the same state. Further, pursuant to 28 U.S.C. § 1391(a)(2) venue is proper, within a State when a substantial part of the events related to the claim occurred within that State.

As such, in the present case venue is proper in the District of New Jersey, because CoStar could have filed this case in New Jersey pursuant to 28 U.S.C. § 1391(a)(1) and (2). In particular, in relation to Section 1391(a)(1), the only two defendants in this matter are both New Jersey entities. Further, pursuant to Section 1391(a)(2), Resource Realty negotiated and signed the proposed License Agreement within New Jersey. Resource Realty accessed CoStar's computer databases from New Jersey. Finally, it should be noted that Plaintiffs came to New Jersey in order to perform their business.

Additionally, in anticipation that Plaintiffs will likely cite to the existence of a forum selection clause in opposing this Motion, it should be noted that the Supreme Court has held that 28 U.S.C. § 1404(a) still controls the issue of whether a case should be transferred to another judicial district in accordance with a forum selection clause in a contract between the parties. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28-29 (1988). Previously, in M/S Breman v. Zapata Off-Shore Co., it was held that there was a presumption in favor of forum selection clauses, except when a party can show that it would be “unreasonable under the circumstances” to enforce the clause. 407 U.S. 1, 10 (1972). However, since Stewart, district courts must review Section 1404(a) motions to transfer “according to an ‘individualized, case-by-case consideration of convenience and fairness.’” 487 U.S. at 29 (quoting in part, Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)). In such an analysis, while still a factor, a forum selection clause is only one of a number of factors that are balanced. Id. Further, when an agreement is tainted by fraud or overreaching, such an agreement will not be honored even when a mandatory forum-selection clause is present. Davis Media Group, Inc. v. Best Western Int’l, Inc., 302 F.Supp.2d 464, 469 (D.Md. 2004).

Typically, Maryland Courts examine the following factors to determine whether a Motion to Transfer Venue should be granted,

- 1) the plaintiff's choice of forum;
- 2) relative ease of access to sources of proof;
- 3) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing and unwilling witnesses;
- 4) possibility of a view of the premises, if appropriate;
- 5) enforceability of a judgment, if one is obtained;
- 6) relative advantage and obstacles to a fair trial;
- 7) other practical problems that make a trial easy, expeditious, and inexpensive;
- 8) administrative difficulties of court congestion;
- 9) local interest in having localized controversies settled at home;
- 10) appropriateness in having a trial of a diversity case in a forum that is at home with the state law that must govern the action; and
- 11) avoidance of unnecessary problems with conflicts of laws.

Choice Hotels Int'l, Inc. v. Madison Three, Inc., 23 F.Supp.2d 617, 622 n.4 (D.Md 1998). In terms of the first factor, “[g]enerally, a plaintiff’s choice of forum is given considerable weight unless none of the conduct complained of occurred in the forum and the forum has no connection with the matter in controversy.” Cole-Tuve, Inc. v. American Machine Tools Corp., 342 F. Supp.2d 362, 370 (D.Md 2004).

Based on the foregoing factors, transfer of venue to the District of New Jersey will serve the convenience of the parties, witnesses and the interests of justice. In particular, the Plaintiff’s choice of forum should only be given minimum weight as none of the “conduct complained of” actually occurred in Maryland. Rather, the contracts, negotiations, and downloading of information all occurred in New Jersey. Additionally, due to the fact that Plaintiff has local offices to serve New Jersey it is even believed that the written records related to Resource Realty’s account are contained in New York or New Jersey. Essentially, the only connection the suit has with Maryland is that Plaintiff’s is headquartered there, and Plaintiff’s counsel is located in Maryland. Similarly, the existence of a forum selection clause within the Licensing Agreement in the present case, is of little consequence because the agreement should be disregarded due to the over reaching conduct of Plaintiffs. For substantially the same reasons as just described, easier access to proofs may be obtained in New Jersey. Additionally, while Plaintiff’s Complaint cites to the existence of substantial property in dispute located in Maryland, it should be explicitly stated that there is no possibility of needing to view premises located in Maryland, but rather the only “property” applicable to this matter located in Maryland is Plaintiff’s servers which it is believed contribute nothing to the dispute of this matter. Additionally, even if information needed to be obtained from the same it should be noted that the information contained on the servers is readily obtainable from outside Maryland, as Plaintiff

primary business is comprised of supplying the same information. It is doubtful, Plaintiff would object to the relative ease of being able to obtain a judgment against either of the Defendants in this matter in their home state of New Jersey. In terms of the relative advantages and obstacles to a fair trial, it is believed that both states would present a fair forum and that administrative difficulties of court congestion are similar in both States, which means that such factors would not weigh in favor of either party. However, other practical issues that make a trial easy, expeditious, and inexpensive weigh in favor of hearing the issue in New Jersey as it is believed that all of the fact witnesses for this matter are located within that State. While CoStar will surely assert that it is a local business, it should be recognized that there is little if any local interest in having this matter heard in Maryland as it is not a controversy related to Maryland, but rather deals primarily with CoStar's contacts with New Jersey. Similarly, due to the disputed nature of the purported contract, in light of CoStar's choice to unilaterally amend the agreement before it was executed, the factor of the having a diversity trial handled in a forum that is "at home with the state law" should not be applied because it is unclear what State's law should apply. Similarly, the avoidance of unnecessary problems with conflicts of laws is a factor that also can not be properly addressed at this time.

As the foregoing review of the pertinent factors evidence, this Court should find that the factors weigh strongly in favor of transferring this matter to the District of New Jersey. Resource Realty therefore respectfully requests that its Motion to Transfer to the District of New Jersey be granted.

CONCLUSION

For the foregoing reasons, Resource Realty respectfully requests that its Motions to Dismiss be granted or in the alternative that this matter be transferred to the District of New Jersey.

Dated May 1, 2006

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