

United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RICKY B. PERRITT, Individually;	§	
THE CUPCAKERY, LLC, a Texas Limited	§	
Liability Company; BUSTER BAKING, LLC,	§	
a Texas Limited Liability Company; and THE	§	
WOODLANDS BAKING, LLC, a Texas	§	
Limited Liability Company,	§	
	§	
v.	§	Case No. 4:11-CV-23
	§	Judge Schneider/Judge Mazzant
PAMELA F. JENKINS, Individually; and	§	
THE CUPCAKERY, LLC, a Nevada Limited	§	
Liability Company.	§	

REPORT AND RECOMMENDATION **OF UNITED STATES MAGISTRATE JUDGE**

Pending before the Court is Defendants Pamela F. Jenkins and The Cupcakery, LLC, a Nevada Limited Liability Company's Motion to Transfer Venue to the District of Nevada, Las Vegas Division (Dkt. #24). Having considered the relevant pleadings, the Court is of the opinion that Defendant's motion should be denied.

I. BACKGROUND

This case concerns alleged violations of a Settlement Agreement arising out of *Perritt v. Jenkins*, Case No. 4:09-CV-406, a case previously pending in this Court. In August of 2009, Mr. Perritt ("Perritt") filed a complaint in this Court against Ms. Jenkins ("Jenkins") concerning ownership and operation of The Cupcakery, LLC, a Nevada Limited Liability Company ("Nevada Cupcakery"), The Cupcakery, LLC, a Texas Limited Liability Company ("Texas Cupcakery"), and Buster Baking, LLC, a Texas Limited Liability Company ("BLLC"). In October of 2009, the parties signed a Settlement Agreement and the case was dismissed.

On January 14, 2011, Plaintiffs filed the present action arguing Defendants are in violation

of the Settlement Agreement. Generally, Plaintiffs complain of “threats to harm the name, mark, website and intellectual property of The Cupcakery™” and “refus[al] to pay her share of the expenses of protecting same.” Complaint (Dkt. #1) at 13. Plaintiffs assert causes of action for injunctive relief, declaratory judgment, breach of the duty of loyalty, breach of fiduciary duty, and breach of contract. *Id.* Defendants assert counterclaims for breach of contract, tortious interference, and tortious interference with prospective relations. *See* Amended Answer (Dkt. #27).

On February 24, 2011, Defendants filed Defendants Pamela F. Jenkins and The Cupcakery, LLC, a Nevada Limited Liability Company’s Motion to Transfer Venue to the District of Nevada, Las Vegas Division (Dkt. #24). On May 27, 2011, Plaintiffs filed a Response (Dkt. #73). On June 17, 2011, Defendants filed a Reply (Dkt. #82). On June 27, 2011, Plaintiffs filed a surreply (Dkt. #87)

II. STANDARD

A district court may transfer any civil case “for the convenience of parties and witnesses, in the interest of justice...to another other district or division where it might have been brought.” 28 U.S.C. § 1404(a). The party seeking transfer of venue must show good cause for the transfer. *In re Volkswagen of America, Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc) (“Volkswagen II”); *In re TS Tech USA Corp*, 551 F.3d 1315, 1320 (Fed. Cir. 2008). The moving party must show that transfer is “clearly more convenient.” *Volkswagen II*, 545 F.3d at 315. Otherwise, a plaintiff’s choice of venue must be respected because that choice places the burden on the defendant to demonstrate why venue should be transferred. *Volkswagen II*, 545 F.3d at 315 n. 10.

When deciding whether to transfer venue, the Court balances the private interests of the litigants and the public’s interest in the fair and efficient administration of justice. *Volkswagen II*,

545 F.3d at 315; *TS Tech*, 551 at 1319. The private interest factors include (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. *Volkswagen II*, 545 F.3d at 315. The public interest factors include (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law. *Id.* These factors are not exhaustive or exclusive, and no single factor is dispositive. *Id.*

In addressing whether transfer is appropriate in this case, the Court must look to two recent appellate decisions. *Volkswagen II* involved a products liability claim in connection with an automobile accident in Dallas, Texas. *Id.* at 307. On rehearing en banc, the Fifth Circuit granted a writ of mandamus requiring the Eastern District of Texas to transfer the case to the Northern District of Texas. *Id.* The Fifth Circuit found that the trial court erred by giving inordinate weight to the plaintiff's choice of venue and by not giving appropriate weight to other factors. *Id.* at 318.

Volkswagen II clarified the application of a number of the venue transfer factors. The Fifth Circuit held that despite technological advances that made the physical location of documents less significant, the location of sources of proof remains a meaningful factor in the transfer analysis. *Id.* at 316. The Court also clarified that when the proposed transferee venue enjoys absolute subpoena power over witnesses, and the original forum does not, that factor weighs in favor of transfer. *Id.* With regard to the third private interest factor, the Court instructed that “when the distance between an existing venue for trial of a matter and a proposed venue...is more than 100 miles, the factor of

inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.” *Id.* at 317. Finally, the Fifth Circuit stated that where all the relevant events occurred in the transferee district and the only connection to the original district was that products of the same type were sold there, the transferee district’s localized interest in seeing the case decided there significantly favors transfer. *Id.*

In *TS Tech*, The Federal Circuit, relying on *Volkswagen II*, granted a writ of mandamus requiring the Eastern District of Texas to transfer a patent case to the Southern District of Ohio. *TS Tech*, 551 F.3d at 1322-23. The Federal Circuit found that the trial court erred by (1) giving too much weight to the plaintiff’s choice of forum; (2) failing to recognize the cost of attendance of witnesses; (3) failing to recognize the ease of access to sources of proof; and (4) disregarding Fifth Circuit precedent in analyzing the public interest in having localized interests decided at home. *Id.*

In *TS Tech*, the Federal Circuit found that the mere sale of allegedly infringing products in the original forum did not give that venue a “substantial interest” in having the case decided locally. *Id.* at 1321. The Federal Circuit noted that because the sale of infringing products in the forum “could apply virtually to any judicial district or division in the United States,” to rely on that as a basis to find that the district had a localized interest in the controversy “stretches logic.” *Id.*

III. ANALYSIS

The first question the Court must address when ruling on a motion to transfer venue under 28 U.S.C. § 1404(a) is whether the suit could have been filed originally in the destination venue. *Volkswagen II*, 545 F.3d at 312. The parties do not dispute that this cause of action could have been filed in the District of Nevada, Las Vegas Division.

The Court must review a number of private and public factors with regard to convenience

on a motion to transfer venue. *Volkswagen II*, 545 F.3d at 315; *TS Tech*, 551 F.3d at 1319.

A. Private Interest Factors

(1) The Relative Ease of Access to Sources of Proof

Defendants argue this factor weighs in favor of transfer because the Nevada Cupcakery maintains its principal place of business in Las Vegas, Nevada, and any documentary evidence relating to Jenkins’s alleged failure to pay legal expenses and/or protect tradenames and trademarks, including accounting records, are located in the District of Nevada. Motion (Dkt. #24) at 5. Further, Defendants argue “the law firm handling The Cupcakery’s™ legal pursuits to protect its trademark is located in Las Vegas, Nevada” and the company that manages The Cupcakery™ website is located in Las Vegas, Nevada. *Id.* at 5-6.

Plaintiffs argue this factor weighs against transfer because Perritt manages all of the Plaintiff entities from the Eastern District of Texas and all of Plaintiffs’ documents are located in Texas. Response (Dkt. #73) at 9. Plaintiffs also argue Defendants’ counterclaims concern the publication of the terms of the Settlement Agreement that was litigated in this Court. *Id.* at 7.

The Court finds that this factor is neutral. Defendants have shown that relevant evidence resides in the District of Nevada, while Plaintiff has shown that relevant evidence is located in the Eastern District of Texas. Unlike *Volkswagen II*, here, all of the documents and physical evidence are not located in and around the destination venue. *See Volkswagen II*, 545 F.3d at 316; *TS Tech*, 551 F.3d at 1321. Unlike *Volkswagen II*, where all physical evidence was located in the transferee venue, physical evidence in this case is located in both Nevada and Texas. *See Volkswagen II*, 545 F.3d at 316. Therefore, Nevada is not a clearly more convenient forum to access sources of proof for all parties, and this factor is neutral.

(2) The Availability of Compulsory Process

Defendants assert that at least seven key non-party witnesses are located in the District of Nevada. *See* Motion (Dkt. #24) at 6-7; Reply (Dkt. #82) at 2-3. Defendants argue that because Plaintiffs' allegations center on "claims regarding 'threats' and conduct harming the website and tradename," relevant non-party witnesses will include persons working with the website hosting company for www.thecupcakery.com, the law firm handling The Cupcakery's™ trademark enforcement and application, as well as Defendants' public relations firm. Motion (Dkt. #24) at 6. Specifically, Defendants name Dawn Kalman and Laura Santo Pietro, Jenkins's former business partners, who reside in Las Vegas, Nevada. Reply (Dkt. #82) at 2. Defendants also name Lisa Schonsheck, Lauren Dubsy, and Paul Helvin, persons that maintain the website www.thecupcakery.com, who are Las Vegas, Nevada residents. *Id.* at 2-3. Further, Defendants name Laura Herlovich and Carly Valadais, members of Defendants' Las Vegas, Nevada, public relations firm. *Id.* at 3.

Plaintiffs provide an extensive list of witnesses, but it is not necessarily clear which witnesses are third-party witnesses. *See* Response (Dkt. #73) at 10-11. Further, it is not necessarily clear how the testimony of each witness will be relevant to the case. That said, the Court is able to determine that the following witnesses are third-party witnesses that reside in the Eastern District of Texas: (1) Dan Trammell of Denton County, Texas; and (2) Scott Prendergrast, who resides "in or around Plano, Texas area" *Id.* Plaintiffs also name the following third-party witnesses that do not reside in the Eastern District of Texas, but who would be inconvenienced by traveling to the District of Nevada: (1) Inki Shaver of Shreveport, Louisiana; (2) Tommy Box who resides in or around the Dallas, Texas area; and (3) Richard Geil who resides in or around the Dallas, Texas area. *Id.*

Plaintiffs also argue that Christopher Austin, of Las Vegas, Nevada, is an intellectual property lawyer jointly employed by the parties and will voluntarily travel to Texas to testify. *Id.* at 11.

Defendants argue that Plaintiffs attempt to avoid transfer by providing a list of witnesses with little to no connection to this case, or a description of the witness's knowledge so generic that it is impossible to tell what relevant information the witness will provide. Reply (Dkt. #82) at 3. Specifically, Defendants argue that Dan Trammel has been designated as having knowledge of "the Promissory Notes and related documents," when the Promissory Notes and their related Security Agreement are no longer at issue in this case. *Id.* at 4. Defendants object that Scott Prendergrast maintains the website www.thecupcakerycorp.com, not www.thecupcakery.com, which is the subject of Plaintiffs' complaint. *Id.* Defendants argue Ellen McAnear is not a relevant witness in this case as she served process on Jenkins, and there is no dispute over service of process in this case. *Id.* Defendants further argue that Tommy Box and Richard Geil are not relevant witnesses as Plaintiffs' complaint is conclusory and offers no factual allegations regarding lost business or investment opportunities. *Id.*

Defendants have named seven third-party witnesses that appear, for purposes of this motion, to be relevant to the claims and counterclaims asserted by the parties. All seven of these witnesses reside in Las Vegas, Nevada, outside the subpoena power of this Court. Also, the intellectual property attorney, jointly employed by the parties, resides in Las Vegas, Nevada. The Court also agrees with Defendants that Plaintiffs' descriptions of who the third-party witnesses are and to what their testimony relates is difficult to understand, and the relevance of their testimony is not necessarily clear. That said, it is not appropriate for the Court to make a determination on relevance, at this stage, unless a witness is clearly listed for the sole purpose of defeating transfer here. While

Ellen McAnear, the process server, appears to have no relevance to the dispute here, the other third-party witnesses identified by Plaintiff do appear to have some relevance to the subject matter of this dispute.

Therefore, as both this District and the District of Nevada appear to have subpoena power over some third-party witnesses, the Court finds this factor weighs against transfer because transfer would merely redistribute the inconvenience of lacking the ability to subpoena non-party witnesses. Based upon the foregoing, the Court finds this factor weighs against transfer.

(3) Cost of Attendance of Willing Witnesses

Defendants argue that the District of Nevada is clearly more convenient as all of Defendants' party witnesses are in Nevada. Similarly, Plaintiffs argue the Eastern District of Texas is clearly more convenient because all of Plaintiffs' party witnesses are located in this District or in Texas. In general, a transfer should not be made where the only practical effect is to shift inconvenience from the moving party to the non-moving party. *Sybase, Inc. v. Vertica Systems, Inc.*, 2008 WL 2387430 *3 (E.D. Tex. June 9, 2008) (citations omitted). In *Volkswagen II*, all witnesses lived in the transferee district, which is not the case here. In *TS Tech*, all of the witnesses resided significantly closer to the transferee forum than to the original forum, which is not the case here. Here, a transfer to the District of Nevada would inconvenience Plaintiffs' witnesses, while the Eastern District of Texas is an inconvenience to Defendants' witnesses. Therefore, as transfer would only serve to shift the inconvenience from Defendants to Plaintiffs, the Court finds this factor weighs against transfer.

(4) All Other Practical Problems

Defendants' arguments in support of this factor have been addressed above with regard to

the first three factors. *See* Motion (Dkt. #24) at 7. Similarly, Plaintiffs' arguments were also previously addressed above. *See* Response (Dkt. #73) at 13-14. Therefore, the Court finds this factor is neutral.

B. Public Interest Factors

(1) The Administrative Difficulties Flowing From Court Congestion

Defendants argue that this factor slightly favors transfer because, according to the Federal Court Management Statistics for the twelve month period ending March 31, 2010, the District of Nevada had more pending civil cases than the Eastern District of Texas (3,150 in the District of Nevada versus 2,809 in this District), but this District saw 57 cases go to trial as opposed to 18 cases going to trial in the District of Nevada. Motion (Dkt. #24) at 7. According to Defendants, because this District has more cases go to trial, the "District of Nevada, while it has more pending cases, may be less congested." *Id.*

Plaintiffs argue this factor weighs against transfer as the median time to trial in this District was 25.8 months in 2010 and 33.1 months in the District of Nevada. Response (Dkt. #73) at 14. Plaintiffs agree with Defendants regarding the number of pending cases in the two districts, but argue these statistics actually show that the District of Nevada is congested.

The Court agrees with Plaintiffs. According to the statistics provided by the parties, fewer cases were pending in the Eastern District of Texas during the 12-month time period ending March 31, 2010, and the Eastern District of Texas saw 57 cases go to trial, as opposed to 18 during the relevant time period in the District of Nevada. Therefore, the Court finds this factor weighs against transfer.

(2) The Local Interest in Having Localized Interests Decided at Home

Defendants argue this factor weighs heavily in favor of transfer because the contract at the center of this dispute was negotiated, executed, and performed by Jenkins in Las Vegas, Nevada. Motion (Dkt. #24) at 8. Further, Defendants argue two of the Plaintiffs reside outside the Eastern District of Texas. *Id.*

Plaintiffs argue this factor weighs against transfer because the contract at issue is a settlement agreement from a previous case in this Court. Response (Dkt. #73) at 14. Also, Plaintiffs argue the current case is about damages suffered by Plaintiffs in Texas by conduct that was committed, in part, in Texas. *Id.* at 15.

The Court finds this factor to be neutral. The Federal Circuit recognized in *TS Tech* that the presence of a party's office within a district should be considered in evaluating a public interest in the litigation. *TS Tech* 551 F.3d at 1321. Therefore, the District of Nevada and the Eastern District of Texas both have a public interest in the outcome of this case because Defendants and some of the Plaintiffs keep their principal places of business in those locations, identified witnesses that reside in both venues, and allege that evidence is located within both venues. Therefore, the Court finds this factor is neutral.

(3) Familiarity of the Forum With the Governing Law

Defendants argue this factor is neutral because Texas or Nevada law will govern the disposition of Plaintiffs' claims and both the District of Nevada and the Eastern District of Texas are equally suited to apply these states' laws. Motion (Dkt. #24) at 8.

Plaintiffs argue that Texas law applies and therefore this factor weighs against transfer. Response (Dkt. #73) at 15. According to Plaintiffs, the Settlement Agreement expressly incorporates

two Promissory Notes and a Security Agreement. *Id.* at 6. The Promissory Notes are payable in Denton County, Texas, within the Eastern District of Texas, and expressly provide that they “will be construed under the law of the state of Texas, without regard to choice-of-law rules of any jurisdiction.” *Id.* The Security Agreement provides, “[t]his agreement will be construed according to Texas law, without regard to choice-of-law rules in any jurisdiction.” *Id.* Plaintiffs argue that, read together, the settlement documents show the parties intended Texas law to apply. *Id.* at 7. Plaintiffs argue Defendants’ payment of the balance of the two Promissory Notes subsequent to the filing of Plaintiffs’ Amended Complaint does not alter and/or affect the fact that the settlement documents incorporate Texas law. *Id.* Further, Plaintiffs argue Defendants’ counterclaims involve Texas law, as they are premised upon the publication of the terms of the Settlement Agreement. *Id.*

Defendants contend that any allegation regarding the Promissory Notes is moot because Jenkins paid the outstanding balance on May 2, 2011. Reply (Dkt. #82) at 1-2.

Both the Eastern District of Texas and the District of Nevada are equally capable of applying the law regarding the claims and counterclaims at issue here. Neither Plaintiffs’ claims nor Defendants’ counterclaims appear overly complicated or sophisticated. Further, neither party provides any authority showing that applying Texas law versus Nevada law will affect the outcome of this case in any way. Therefore, the Court finds this factor is neutral.

(4) The Avoidance of Unnecessary Problems of Conflicts of Law

The parties present their arguments with regard to this factor in conjunction with the “familiarity of the forum with the governing law” factor. As the parties do not provide the Court with any authority stating conflict of law will be an issue in this case, the Court finds this factor is neutral.

C. Conclusion

The Court finds that Defendants have not met their burden of showing that the District of Nevada is “clearly more convenient” than the Eastern District of Texas. *See Volkswagen*, 545 F.3d at 315. After considering the private and public interest factors, the Court finds that three of the factors weigh against transfer and five of the factors are neutral. Therefore, the Court finds Defendants have failed to meet their burden and the case should remain in the Eastern District of Texas.

RECOMMENDATION

Based upon the findings discussed above, the Court **RECOMMENDS** that Defendants Pamela F. Jenkins and The Cupcakery, LLC, a Nevada Limited Liability Company’s Motion to Transfer Venue to the District of Nevada, Las Vegas Division (Dkt. #24) be **DENIED**.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 18th day of July, 2011.


AMOS L. MAZZANT
UNITED STATES MAGISTRATE JUDGE