

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

APV NORTH AMERICA, INC., a Delaware Corporation,)

Plaintiff,)

v.)

TRANS INDUSTRIAL DEVELOPMENT CORP. and PEEPLES INDUSTRIES, INC.,)

Defendants.)

TRANS INDUSTRIAL DEVELOPMENT CORP. and PEEPLES INDUSTRIES, INC.,)

Counter-Plaintiff,)

v.)

APV NORTH AMERICA, INC., a Delaware Corporation,)

Counter-Defendant.)

No. 05 C 2396

Hon. Joan B. Gottschall

ORDER

This is a diversity action (removed from state court) in which the plaintiff APV North America, Inc. ("APV") alleges that the defendant Trans Industrial Development Corp. ("TIDC") breached its loan agreements, and that TIDC's parent holding company Peoples Industries, Inc. ("Peoples") breached its guaranty obligations for TIDC's loan from APV. Before the court is defendants renewed motion to transfer venue to the Middle District of Georgia, Macon Division pursuant to 28 U.S.C. § 1406(a) or § 1404(a). The previous motion was denied without prejudice pending the filing of a counterclaim against APV. Since the denial, defendants answered the complaint with a

list of affirmative defenses and filed a counterclaim. For the reasons set forth below, defendants' motion to transfer venue is granted.

I. BACKGROUND

APV is a Delaware corporation primarily engaged in manufacturing food and beverage equipment. APV's principal place of business is Illinois. Defendants TIDC and Peeples are Georgia corporations with their principal places of business in Georgia. Peeples is the parent company of TIDC, and TIDC "is engaged in the manufacturing and merchandising industry." (Compl. ¶2.) In addition to the loan arrangement, APV and TIDC contracted for APV to design and build a large scale mechanical dewatering machine known as the phlodri system. TIDC apparently planned to integrate this machine into a larger system it would sell to third parties.

In its last order denying transfer, the court recited the facts relevant to APV's breach of contract claims. Defendants' answer and counterclaim allege several facts as reasons for their non-payment. TIDC and Peeples allege APV delivered the machinery to Georgia and that during the first quarter of 2001 the commercial scale demonstration of the product in front of TIDC's potential customers failed due to the phlodri system's deficient design, construction, and installation. In 2003, TIDC alleges that it entered into an agreement with APV to modify the machinery and for APV to oversee its demonstration in front of a new customer. An APV technician traveled to Eatonton, Georgia to service the machinery. TIDC contends that this technician caused the machine to suffer another failure during this new round of testing.

Defendants' counterclaim raises three claims: (1) a breach of contract by APV for failing to supply a machine as specified in the contract; (2) a breach of implied warranty of fitness for a particular purpose; and (3) promissory estoppel. TIDC and Peebles claim they suffered damages, including lost profit, when the testing failures caused them to lose their customers.

II. DISCUSSION

On January 3, 2006, this court denied the motion for transfer based on the facts as alleged in the complaint. In response to the renewed motion, plaintiffs argue that "very little has changed" to warrant a transfer now. (Pl.'s Resp. 1.) Conversely, defendants argue that the circumstances raised in their affirmative defenses and counterclaim establish that it would clearly be more convenient to try this case in Georgia.

A decision to transfer an action is committed to the district court's sound discretion. *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986). Courts apply a three factor analysis when faced with a motion to transfer venue. Under this analysis, a case may be transferred if the defendant can demonstrate that: "(1) venue is proper in the transferor district; (2) venue and jurisdiction are proper in the transferee district; and (3) the transfer will serve the convenience of the parties, the convenience of the witnesses, and the interests of justice." *Vandeveld v. Christoph*, 877 F. Supp. 1160, 1167 (N.D. Ill. 1995). These factors are not rigid, but rather "are best viewed as placeholders for a broad set of considerations, the contours of which turn upon the facts of each case." *Coffey*, 796 F.2d at 220.

In evaluating the convenience and fairness of a proposed transfer, the court considers relevant private and public interests. The private interests include factors such

as plaintiff's initial choice of forum, the situs of material events, ease of access to sources of proof, the availability of compulsory process for the attendance of unwilling witnesses, and the convenience of the parties themselves. *Georgouses v. NaTec Resources, Inc.*, 963 F. Supp. 728, 730 (N.D. Ill. 1997). The moving party must show that venue in the Middle District of Georgia is clearly more convenient than in Illinois. *See Heller Financial Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989) (citing *Coffey*, 796 F.2d at 219-20).

APV does not dispute that venue would be proper in both Illinois and Georgia. The only question before the court is whether upon consideration of private and public interest factors, Georgia is clearly the more convenient venue for this case. For the reasons set forth below, the court finds little reason to assign weight to the plaintiff's initial forum choice or the availability of compulsory process for the attendance of unwilling witnesses. Public interest factors do not heavily favor one venue over the other. The private interest factors of (1) the situs of material events; and (2) ease of access to sources of proof, are sufficient to establish that the Middle District of Georgia is clearly the more convenient forum.

Plaintiff's Chosen Forum

This factor bears little weight on the court's decision. Courts ordinarily consider the plaintiff's chosen forum in a motion for transfer. However, "[t]he weight given to plaintiff's choice of forum is lessened if the chosen forum has relatively weak connection with the operative facts giving rise to the claim." *Von Holdt v. Husky Injection Molding Systems, Ltd.*, 887 F. Supp. 185, 188 (N.D. Ill. 1995). The facts of the case are

not especially connected with the state of Illinois and the plaintiff concedes "that this issue only somewhat favors keeping the case here." (Pl.'s Resp. 7.)

Compulsory process for unwilling witnesses

Both plaintiff and defendants argue the importance of litigating the case where it will be convenient for their witnesses. "The convenience of the plaintiff's non-party witnesses is often viewed as the most important factor in the transfer analysis." *Anchor Wall Systems, Inc. v. R & D Concrete Products, Inc.*, 55 F. Supp. 2d 871 (N.D. Ill. 1999). In the previous order denying transfer, the court found that APV's witnesses were "more important to this case and this factor slightly favors APV." (Order.) Again, that analysis implicated only the breach of contract claims in the original complaint. As the pleadings now stand, the court must also consider defendants' affirmative defenses and counterclaims.

APV states that it intends to call two non-party witnesses. Neither resides in Illinois and each would be outside the subpoena power of this court even if the case remains here.

For their part, defendants state that they intend to call twelve non-party witnesses who reside in Georgia. Each of these witnesses could be subpoenaed for trial if the case were transferred to Georgia. Several of these third party witnesses were allegedly present at the commercial testing of the phlodri machinery in Georgia. One assisted the APV technician who serviced the machine in Georgia during the second phase of testing. Also on defendant's non-party witness list are employees of companies that were allegedly prepared to purchase equipment systems from TIDC had the testing they witnessed been successful. Finally, defendants identify an engineer whom TIDC called

to attempt to repair the machinery when other efforts failed. Despite APV's contention that the best indicator of whether the machine met the contract terms would be data readouts gathered during the testing, the non-party witnesses identified by defendants might be in a position to support defendants' affirmative defenses and counterclaims.

The court is mindful of the temptation for litigants to prepare lists of "unwilling" witnesses for purposes of arguing venue. However, at the very least, transfer to Georgia clearly will not affect the availability of compulsory process as to the plaintiff's non-party witnesses. It also appears that most of its other witnesses will have to travel from other states no matter where the case is tried. Of the six witnesses APV will call to support APV's counterclaim, one resides in Iowa, one in North Carolina and three in New York. (Pl.'s Resp. 12-13.). Therefore, this factor is at least neutral regarding defendants' position.

Situs of material events

In previously denying transfer, this court stated that after the filing of a counterclaim, "it is possible that the situs of many material events could turn out to be in Georgia." (Order.) As the pleadings now stand, the court finds that this is indeed the case. Both parties agree that the delivery, installation, and alleged failure of the machinery in question occurred in Georgia. TIDC alleges in its counterclaim that maintenance services provided by an APV employee in Georgia were deficient and caused TIDC to suffer damages when the machinery failed to perform to its expectation. APV acknowledges that it sent an employee to Georgia to service the machinery; however it argues that what transpired there supports its position:

APV admits it sent Leonard McCall to Eaton, Georgia and that TIDC wanted the technicians which had worked on the phlodri system several years before. APV denies that McCall was unqualified and states that any difficulties encountered were caused by TIDC and Peoples because among other things, TIDC failed to establish the proper voltage, TIDC had not run the system, and TIDC had not properly taken care of the system. (Pl.'s Resp. to Def.'s Countercl. 8.)

The actions taken by representatives of both parties while they were in Georgia lie at the heart of TIDC's counterclaim. In contrast, the actions relevant to the alleged contract breaches asserted by APV against defendants are linked to Illinois by virtue of the fact that some of the negotiations over the business arrangement took place in Illinois, while the balance took place between Illinois and Georgia. As the Court previously noted, "the nonpayment of funds has occurred (or not occurred) from a Georgia party to an Illinois party." (Order.) This factor heavily favors transfer to Georgia.¹

Ease of access to sources of proof

In the previous order, the court did not discuss the location of the machinery. At that time, the case stood as a simple action for money due and owing under a contract, and the current location of the provided product did not appear to be highly relevant to deciding venue. However, now that the defendants assert as an affirmative defense that the machinery in question does not conform to the terms of the contract, its current location warrants more attention. Defendants have provided the court with an affidavit that the machinery that is the subject of this suit is stored in Georgia and is approximately "7 feet wide, 15 to 20 feet long, and 6 feet high" and "must be shipped on a flat bed truck." (Peterson Aff. 3.) Despite the plaintiff's contention that its current state will not be probative of whether it met the conditions of the contract at time of delivery, it is

¹ The court notes that neither party has argued the place of manufacture of the machinery as a basis for venue.

