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Waivers, Sua Sponte Analyses, and the Interests of Justice: The Southern District Examines Pathways to Venue Transfer

As aggressive defense counsel, one of our first considerations when reviewing a complaint is, "Can we move to dismiss?" In an ideal scenario, the plaintiff has failed to state a claim, and a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) will dispose of the case entirely or at least force the plaintiff to do some heavy lifting to amend the complaint. If claim dismissal is not an option, an alternative strategy is to move the case to a more favorable court: enter the motion to dismiss for improper venue under Rule 12(b)(3) and its lesser-known but potentially equally valuable sibling, the motion to transfer venue under 42 U.S.C. 1404(a). A recent case before the Southern District of New York analyzes the applicability of these twin venue-shifting provisions and demonstrates how useful a motion under Section 1404(a) can be under the right circumstances.

The Case: *Lehrer v. J&M Monitoring, Inc.*

In *Lehrer v. J&M Monitoring, Inc.*, Index No. 20-cv-6956 (S.D.N.Y. July 1, 2022), the plaintiff filed suit against the defendants for breach of contract and related claims stemming from alleged violations of an equity share agreement. The defendants chose to file an answer rather than move to dismiss. Nine months later, perhaps realizing they had missed out on a potential dismissal of the case, the defendants filed a motion to dismiss under Rule 12(b)(3) for improper venue and simultaneously moved to amend their answer to preserve a venue objection.

In determining whether the defendants' motion was timely, Judge Kenneth Karas clarified that as venue is a "waivable" defense, the defendants waived their right to file a 12(b)(3) motion when they instead chose to answer the complaint at the case's outset. The Court then considered whether the defendants' simultaneous motion to amend resurrected their venue objection. Judge Karas concluded that this argument was similarly unavailing as a motion to amend will only save a waivable defense where the amendment is made "as a matter of course" under Rule 15(a). As the defendants filed their motion to amend almost a year after the complaint was filed and many months after they answered, the Court denied the defendants' motion under 12(b)(3) as waived and the motion to amend as moot.

The Court, however, did not end its venue analysis with Rule 12(b)(3). It turned to whether venue should be transferred in the interest of justice under 28 U.S.C. 1404, a transfer that is not "waivable" like Rule 12(b)(3) and that the Court is permitted to raise *sua sponte* in the Second Circuit. To determine whether a transfer was appropriate, Judge Karas analyzed each of the plaintiff's claims under 28 U.S.C. 1391(b)(2) to "determine whether a substantial part of the acts or omissions occurred in the district where the suit was filed."

After determining that the plaintiff had not proffered evidence showing *any* part of the contract was performed in New York, and as the complaint "contain[ed] no allegations that [the] [d]efendants' actions occurred in New York," the Court concluded that venue was properly transferred to the Eastern District of Kentucky, the home state of both defendants.

Takeaway

The federal courts provide multiple mechanisms to transfer venue to the defendant's home state. Defense counsel should not overlook 28 U.S.C. 1404(a), which is non-waivable and offers a flexible interest of justice standard that can prove helpful under the right circumstances.