

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HANOVER FIRE & CASUALTY : CIVIL ACTION
INSURANCE COMPANY :
 :
 :
 v. : NO. 06-2758
 :
 :
 EDWIN SIERON, et al. :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

January 9, 2007

Edwin Sieron and the Entities¹ ask me to dismiss this lawsuit against them for lack of personal jurisdiction or to stay/transfer to the Southern District of Illinois under the first-filed rule. Hanover Fire & Casualty Insurance Company argues its general agency agreement with Sieron proves personal jurisdiction, and the first-filed rule does not apply because this lawsuit differs from Sieron’s Illinois complaint. I agree this Court has personal jurisdiction over all the parties, but find transfer to the Southern District of Illinois is appropriate because both cases arise out of the same transaction or occurrence.

FACTS²

Hanover, incorporated in Pennsylvania, insured three Illinois properties which burned in late

¹The Entities include Tujay, Inc., Falcon, Ltd., OFS Ltd., GWM, Inc., Raven Securities, Inc., Golden Properties, Inc., Arrow Realty, Inc., Hawk Properties, Inc., Sieron-Fauss, Inc., and Riverfront Corp. (“Entities”).

² I accept all allegations in, and reasonable inferences from, the Complaint as true and view them in the light most favorable to Hanover. *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989).

2005. Sieron, an Illinois resident, insured these properties under his agreement with Hanover. Hanover authorized Sieron to insure only homeowner occupied properties. The insurance applications for these burned properties list Theresa Hariel, Oko and Angela Williams, and Curtis Warner as the individual homeowner occupants. These insurance applications also list Sieron and two of the Entities, Golden Properties, Inc. and Arrow Realty, Inc., as the sole lien-holders, insured, and intended beneficiaries.³

After the fires, Sieron, Arrow Realty, Inc., Golden Properties, Inc., Theresa Hariel, Curtis Warner, and Oko and Angela Williams (“Illinois Complainants”) filed insurance claims with their carrier, Hanover. Hanover denied the coverage because its investigation revealed Sieron, Arrow Realty, Inc., and Golden Properties, Inc., not the alleged occupants, actually owned the properties.⁴ Then, on May 24, 2006, the Illinois Complainants responded by suing Hanover in Illinois State Court for breach of fiduciary duty, breach of insurance contract, breach of settlement contract, promissory estoppel, specific performance, insurer misconduct, fraud, Illinois Consumer Fraud, negligence, and

³ On October 20, 2005, a fire burned Theresa Hariel’s alleged dwelling at 1750 N. 61st, Washington Park, St. Clair County, Illinois. The insurance application listed Golden Properties, Inc. as the sole lien-holder, insured, and intended beneficiary. Sieron’s Ill. Compl. ¶¶ 6-8.

On November 11, 2005, a different fire burned Oko and Angela Williams’s alleged dwelling at 5724 Caseyville Ave., Washington Park, St. Clair County, Illinois. Arrow Realty, Inc., was listed as the sole lien-holder, insured, and intended beneficiary. *Id.* ¶¶ 138-43.

Around December 5, 2005, another fire burned Curtis Warner’s alleged dwelling at 657 N. 58th, East St. Louis, St. Clair County, Illinois. The application listed Sieron as the sole lien-holder, insured, and intended beneficiary. *Id.* ¶¶ 24-29.

⁴ Curtis Warner and Theresa Hariel along with Sieron and Golden Properties, Inc. claim Hanover agreed to pay the appropriate coverage, but never complied with the agreements. Sieron’s Ill. Compl. Oko and Angela Williams and Arrow Realty, Inc. claim Hanover denied their insurance coverage nine months after the fire.

willful and wanton misconduct. Sieron's Ill. Compl.

On June 23, 2006, Hanover removed Sieron's lawsuit to the Southern District of Illinois. Three days later, Hanover filed this suit against Sieron and the Entities for fraud, breach of fiduciary duty, breach of contract, violating Racketeer Influenced and Corrupt Organizations ("RICO"),⁵ conspiracy to commit fraud, and aiding and abetting breach of fiduciary duty claims.

Hanover filed this lawsuit alleging three instances of Sieron's fraud and misrepresentation. First, Hanover's investigation revealed Sieron lied on its application. Second, Sieron breached his general agency agreement by insuring properties not homeowner occupied. The investigation also revealed Sieron and the Entities were engaged in a fraudulent insurance scheme.

In 2002, Sieron lied on his Hanover application when he denied being sued or investigated for insurance and when he denied selling insurance recently. *Id.* ¶ 49; Pl.'s Compl. Ex. B.⁶ In fact, prior to this application, Illinois Fair Access to Insurance Requirement Plan's ("FAIR Plan"), an Illinois nonprofit insurance organization, prohibited insuring properties owned or associated with

⁵18 U.S.C. § § 1961-68

⁶In the New Agent Data Sheet, Sieron answered the following questions negatively:

To your knowledge, are you now or have you ever been the subject of any investigation or proceeding by any insurance, securities, or commodities agency, jurisdiction, or organization?

Are you now or have you ever been a defendant in any litigation alleging the violation of any agreement with or provision of any insurance, securities, or commodities law, or regulation?

Pl.'s Compl. Ex. B

Sieron or the Entities. Pl.'s Resp. Br. Mot. Dismiss 4. FAIR Plan sued Sieron and the Entities when they continued to insure properties, and the presiding Court granted summary judgment against Sieron and the Entities. Pl.'s Resp. Mot. Dismiss Ex. O (showing deposition and complaint for *Illinois FAIR Plan Ass'n v. Victor McCarter, Tujay, Inc., and E.J. Sieron*, No. O3CH1736, Cir. Court of Cook Cty. - Chancery Division). Sieron failed to disclose his previous lawsuit or recent insurance experience to Hanover. Hanover, relying on Sieron's representations in the application, hired Sieron to insure "[o]nly 1 and 2 family owner occupied dwellings." Pl.'s Compl. ¶¶ 50-52. Under this agreement, Sieron insured hundreds of Illinois properties including those which burned in late 2005.

DISCUSSION

In proving personal jurisdiction, a plaintiff "need only establish a prima facie case of personal jurisdiction and the plaintiff is entitled to have its allegations taken as true and all factual disputes drawn in its favor." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir.2004) (citing *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir.2002)). Plaintiff must establish defendant could "reasonably anticipate being haled into court. . ." based on its minimum contacts with the forum, and personal jurisdiction over the defendant "comport[s] with 'fair play and substantial justice.'" *Pennzoil Products Co. v. Colelli & Associates, Inc.*, 149 F.3d 197, 201 (3d Cir. 1998) (citing *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 297 (1980); *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 476 (1985); quoting *International Shoe Company v. Washington*, 326 U.S. 310, 320 (1945)). Pennsylvania's long arm statute enacts specific personal jurisdiction when the cause of action arises from a defendant's business transactions within the

Commonwealth. 42 Pa. C.S. § 5322(a)(1). Pennsylvania co-conspirator case law requires “the performance of substantial acts within the forum in furtherance of the conspiracy ‘and of which the out-of-state co-conspirator was or should have been aware.’” *In re Arthur Treachers Franchise Litigation*, 92 F.R.D. 398, 411-13 (E.D. Pa. 1981) (citing *Metropolitan Sanitary District of Greater Chicago v. General Electric Co.*, 208 F. Supp. 943, 946 (N.D. Ill.1962))

Hanover’s suit against Sieron arises from the general agency contract between Hanover and Sieron, thus satisfying Pennsylvania’s long-arm statute for specific personal jurisdiction.

42 Pa. C.S. § 5322(a)(1). The Entities argue lack of sufficient contacts with Pennsylvania to invoke personal jurisdiction. Def’s Mot. Dismiss Ex.’s D-M. Hanover’s insurance applications listing the Entities as mortgagees, applicants, lien-holders, or intended beneficiaries coupled with Sieron’s executive officer position in the Entities makes it reasonable for all the Entities to know of the alleged conspiracy in the Pennsylvania forum. Thus, co-conspirator jurisdiction exists over the Entities. *In re Arthur Treachers Franchise Litigation*, 92 F.R.D. at 411-13 (evaluating co-conspirators’ contacts with the forum).

Alternatively, Sieron moves to stay/transfer under the first-filed rule. I must first decide whether the first-filed rule applies to this case, and if it does, whether stay or transfer is appropriate. I find the first-filed rule does apply and transfer to the Southern District of Illinois is appropriate.

The first-filed rule provides a court the option to stay/transfer actions to another jurisdiction if the “proceedings involv[e] the same parties and the same issues already before another.” *EEOC v. Univ. of Penn.*, 850 F.2d 969, 971-72 (3d Cir. 1988) (citing *Triangle Conduit & Cable Co. v.*

National Elec. Products Corp., 125 F.2d 1008, 1009 (3d Cir. 1941)); *Keating Fibre International, Inc., v. Weyerhaeuser Company, Inc.*, 416 F. Supp. 2d 1048, 1051 (E.D. Pa. 2006) (“[T]he party who first brings a controversy into a court of competent jurisdiction for adjudication should, so far as our dual system permits, be free from the vexation of subsequent litigation over the same subject matter.” (citing *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 930 (3d Cir. 1941)). Courts depart from the first-filed rule only upon showing 1) bad faith, 2) a party anticipatorily filed to avoid a less favorable forum, 3) forum shopping motivated original filing, 4) second filed case had developed further than the original, or 5) extraordinary circumstances. *Univ. of Penn.*, 850 F.2d at 972-74 (deviating from first-filed rule because Defendant University of Pennsylvania filed first seeking declaratory judgment in District of Columbia District Court to avoid adverse controlling Third Circuit precedent); *Keating Fibre International, Inc.*, 416 F. Supp. 2d at 1051 (deciding first-filed rule applied because neither bad faith nor forum shopping motivated filing of the original action). The primary purpose of the first-filed rule is to avoid duplicative litigation.

The compulsory counterclaim rule, Federal Rule of Civil Procedure 13, also promotes judicial and litigation efficiency by requiring opposing parties to plead any counterclaim arising from the same “transaction or occurrence” of the underlying claim.⁷ Courts have broadly interpreted

⁷Federal Rule of Civil Procedure 13(a) further provides:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claims and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Fed. R. Civ. Pro. 13(a).

“arising out of the same transaction or occurrence” in the interest of judicial economy. *Urban v. United States of America*, 392 F. Supp. 2d 1018, 1022-23 (N.D. Ill. 2005). When determining whether two claims arise of the same transaction or occurrence, courts should consider the totality and nature of the claims involved, the applicable law, the legal basis for recovery, and the respective factual backgrounds of the claims. *Id.* The term transaction can comprise a series of occurrences with a logical relationship and not depending so much on the immediate connection between the two claims. *Price v. United States of America*, 42 F.3d 1068, 1073 (7th Cir. 1994). Courts have applied the first-filed rule and the compulsory counterclaim rule together when appropriate. *See Keating Fibre International, Inc.*, 416 F. Supp. 2d at 1053-54 (finding claims “are more properly brought” as compulsory counterclaims in a first-filed action based on the same transactions or occurrences.)

Examining the two complaints shows both Hanover’s claim and Sieron’s Illinois claim arise out of the same transaction or occurrence. *Compare* Sieron’s Ill. Compl. (lawsuit arising from Hanover’s failure to provide the Illinois Complainants coverage after their properties burned), *with* Pl.’s Compl. (lawsuit arising from Sieron and the Entities allegedly engaging in a fraudulent scheme to insure properties not homeowner occupied). Hanover claims Sieron breached his contract and fiduciary duty because he solicited insurance policies for properties not homeowner occupied. Prior to Hanover filing suit, Sieron sued Hanover requesting coverage for the insureds’ properties. In defending against Sieron’s claim, Hanover would argue the properties are not covered because they were not homeowner occupied and Sieron and the Entities fraudulently insured these properties. Sieron also violated his general agency agreement by insuring properties not homeowner occupied. *See* Def.’s Mot. Ex. A (Hanover’s correspondence to Theresa Hariel, Curtis Warner, and Oko and

Angela Williams).⁸ Hanover could also defend against the Illinois Complaint by arguing Sieron and the Entities' allegedly engaged in a fraudulent insurance scheme insuring hundreds of properties.

Hanover argues the first-filed rule does not apply because the complaints have different parties and different issues. Pl.'s Resp. Mot. Dismiss 19-21. Specifically, Hanover contends the Illinois claim arises from the insurance policies, while the Pennsylvania claim arises from Sieron's general agency contract. Further, Hanover argues the complaints have different parties because some of the Entities are not Illinois Complainants and not all of the Illinois Complainants are defendants in this lawsuit.⁹ *Id.* Hanover baselessly argues these differences preclude application of the first-filed rule. *See id.* (lacking case law defining "subject matter," "similar issues," or "same parties"). Hanover also fails to argue any of the first-filed rule's recognized departures apply. *Univ. of Penn.*, 850 F.2d at 972-74 (listing departures as bad faith, anticipatory filing, avoiding less favorable forum, forum shopping, second filed case had developed further than the original, or extraordinary circumstances).

The compulsory counterclaim rule and the first-filed rule both advocate a broad and liberal interpretation of "transaction or occurrence." *Urban*, 392 F. Supp. 2d at 1022. Both Sieron's Illinois

⁸ Hanover informed the parties there was a "question as to whether the Loss is payable under the policy." Def.'s Mot. Dismiss Ex. A (Letters to Illinois Complainants). Additionally, Hanover voided Oko and Angela Williams's insurance policy "because of a misrepresentation made in the application submitted that materially affected the acceptance of the risk and hazard assumed." Def.'s Mot. Dismiss Ex. A (Letter to Oko and Angela Williams from Hanover Casualty Fire Insurance Dated May 31, 2006)

⁹ The Illinois Complaint lists Oko and Angela Williams, Curtis Warner, and Theresa Harriel as plaintiffs, while Hanover's Pennsylvania Complaint excludes them. Hanover lists Tujay Inc., Falcon, Inc., OFS, Ltd., GWM, Inc., Hawk Properties, Inc., Sieron-Fauss, Inc., and Riverfront Corporation as Defendants, but these corporations are excluded from the Illinois Complaint.

claim and Hanover's Pennsylvania claim arise from the disputed validity of the insurance policies Sieron processed while working for Hanover. Although Hanover argues Sieron's misrepresentation in his application prompted this lawsuit, Hanover focuses on the alleged invalid insurance policies Sieron processed. *See* Pl.'s Compl. ¶¶ 71, 83, 92, 102, 108, 117-18 (focusing on Sieron's or both Sieron's and the Entities' unauthorized insurance to properties not homeowner occupied). I find the first-filed rule applies because the term "transaction or occurrence" is liberally interpreted, Hanover's inconsistent arguments,¹⁰ and its baseless distinctions of "subject matter" "similar issues" or "same parties."

I can stay this case for the duration of the Illinois matter or transfer this case to the jurisdiction of the first-filed case because the first-filed rule applies. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). Section 1404(a) of Title 28 permits transfer "[f]or the convenience of parties and witnesses, [or] in the interest of justice." The burden is on the moving party to establish the need for a transfer. *Jumara*, 55 F.3d at 879.

Motions to transfer are not liberally granted because "the plaintiff's choice of forum is of

¹⁰While Hanover argues its Pennsylvania case arises from a general agency contract, it admitted at least in relation to its RICO claims, this case is about the disputed insurance applications in Illinois. *See* Pl.'s Resp. Mot. Dismiss 13-14. Additionally, its complaint primarily focuses on the alleged fraudulent scheme to insure properties not homeowner occupied. Regarding Hanover's argument distinguishing the two complaints' parties, Hanover makes inconsistent arguments. While arguing for personal jurisdiction, Hanover persuaded this Court to obtain personal jurisdiction over the additional entities, Tujay, Inc., Falcon, Inc., OFS, Ltd., GWM, Inc., Hawk Properties, Inc., Sieron-Fauss, Inc., and Riverfront Corporation, based on Sieron's involvement in those corporations and the alleged conspiracy. Pl.'s Resp. Mot. Dismiss 8-18. It seems then inconsistent for Hanover to ask me to deviate from the first-filed rule merely because the entities significantly involved in the underlying disputed insurance policies were not plaintiffs in the first-filed action.

paramount concern and should not be lightly disturbed.” *Shutte v. Armco Steel Corp.*, 26 F. Supp. 2d 747, 749 (3d Cir. 1970). Nevertheless, federal district courts have wide discretion to consider such motions “based on an individualized, case-by-case consideration of convenience and fairness.” *Dinterman v. Nationwide Mut. Ins. Co.*, 26 F. Supp. 2d 747, 749 (E.D. Pa. 1998). In determining whether to grant a discretionary transfer, the court must balance section 1404(a)’s private interests such as plaintiff’s choice of forum and where the claim arose, against the section’s public factors such as the judgment’s enforceability and practical considerations possibly making the trial easy, expeditious, or inexpensive.¹¹ *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879-80 (3d Cir. 1995).

In this case, the interest of justice requires me to transfer this case to Illinois. The prior related action before another jurisdiction weighs heavily in my section 1404(a) determination. *Koresko v. Nationwide Life*, 403 F. Supp. 2d 394, 404 (E.D. Pa. 2005). Other factors permitting transfer include the location of the burned properties in Illinois, the incorporation of all the Entities in Illinois, and the location of witnesses in Illinois.¹² Sieron and the Entities submitted sworn affidavits claiming litigation in Pennsylvania would be burdensome, and Hanover would not be overly burdened litigating these claims in Illinois because it is already litigating the first-filed action there. Thus, Sieron and the Entities have met this burden, and transfer is appropriate.

¹¹ Other private factors include: defendant’s preference; whether the claim arose elsewhere; convenience of the parties and witnesses; and location of evidence. Other public factors include: the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in a diversity case. *Jumara*, 55 F.3d at 879-80.

¹² Thus, the Southern District of Illinois would also have personal jurisdiction over all the Entities. *See Fed. R. Civ. Pro. 13(a)* (eliminating the jurisdiction concern to application of Rule 13(a)).

Hanover emphasizes and relies on its general agency contract's forum selection clause mandating Pennsylvania jurisdiction. While such forum clauses are given substantial weight, they are not the sole consideration. The general agency's forum selection clause has permissive language as to Hanover's choice of forum, but expressively mandates Sieron submit to Pennsylvania jurisdiction in disputes regarding the general agency contract.¹³ Sieron's Illinois Complaint involves Hanover's alleged failure to provide insurance coverage, not the general agency contract. Thus, the general agency contract does not govern, and Sieron did not expressly waive jurisdiction to file the Illinois Complaint regarding insurance coverage. Therefore, in the interest of justice, the first-filed rule requires me to transfer this case despite Hanover's forum selection clause. *See Koresko*, 403 F. Supp. 2d at 400 (despite forum selection clause, Judge Surrick followed the first-filed rule because none of the enumerated exceptions applied); *cf. Rogal v. Skilstaf, Inc.*, 446 F. Supp. 2d 334, 336-38 (E.D. Pa. 2006) (court upheld validity of forum clause and denied the motion to transfer

¹³ The forum selection clause reads as follows:

In all matters concerning the validity, interpretation, performance, effort of otherwise of this Agreement, the laws of the State of Pennsylvania shall govern and be applicable. All disputes with regard to this agreement, or any part thereof, unless we can settle such dispute amicably must be submitted to arbitration . . . In the event that we are unable to resolve our differences by arbitration, any actions or proceedings instituted by [Sieron] under this Agreement, with respect to matters arising under or growing out of this Agreement, shall be brought and tried only in the County of Montgomery, Commonwealth of Pennsylvania, and [Sieron] expressly waive[s his] right to cause such action or proceedings to be brought or tried elsewhere. Any such actions or proceedings instituted by [Hanover] may be brought and tried in courts located in the County of Montgomery, Commonwealth Pennsylvania, or if proceedings against you [Sieron] cannot be obtained therein, in courts located in any jurisdiction where such process can be obtained.

Pl.'s Resp. Mot. Dismiss Ex. A.

despite the convenience for the parties to have the matter in Pennsylvania, but the first-filed rule was not an issue).

An appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HANOVER FIRE & CASUALTY	:	CIVIL ACTION
INSURANCE COMPANY	:	
	:	
v.	:	No. 06-2758
	:	
EDWIN SIERON, et al.	:	
	:	

ORDER

And now, this 9th day of January, 2007, Defendants' Motion to Dismiss for Lack of Personal Jurisdiction or in the Alternative to Stay or Transfer (Document Number 12) is DENIED as to stay or dismissal and GRANTED as to transfer. The Clerk is directed to transfer this case to the Southern District of Illinois.

BY THE COURT:

\s\ Juan R. Sánchez
Juan R. Sánchez J.