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

M. DIANE KOKEN, Plaintiff,	:	CIVIL ACTION
v.	:	
LEXINGTON INSURANCE COMPANY, Defendant.	:	NO. 04-2539

MEMORANDUM OPINION

Davis, J. November 2nd, 2004

This case arises out of an insurance dispute between plaintiff M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania ("Commissioner"), in her official capacity as Liquidator of Reliance Insurance Company ("Reliance"), and defendant Lexington Insurance Company ("Lexington"). Jurisdiction is appropriate pursuant to 28 U.S.C. § 1332. Presently before the Court are Defendant's Motion for Transfer Pursuant to 28 U.S.C. § 1404(a) (Doc. No. 15), filed on September 24, 2004; Plaintiff's Opposition to Defendant's Motion to Transfer Pursuant to 28 U.S.C. § 1404(a) (Doc. No. 16), filed on October 8, 2004; and Defendant's Reply in Support of its Motion for Transfer Pursuant to 28 U.S.C. § 1404(a) (Doc. No. 18), filed on October 29, 2004.

I. Factual and Procedural History

Defendant is a property and casualty insurance company incorporated in Delaware with a principal place of business in Boston, Massachusetts. (Compl. at ¶2). In February 2001, the

defendant issued a one-year commercial insurance policy to Reliance, an insurance company organized under the laws of Pennsylvania with a principal base of business in Philadelphia, Pennsylvania. (Id. at ¶¶1, 8). The policy insured several of Reliance's facilities, including buildings in New York City. (See Policy, attached as Exhibit C to Pl. Opp'n to Def. Mot. to Transfer Venue). The policy contained a forum selection clause, whereby the defendant agree to "submit to the jurisdiction of any court of competent jurisdiction within the United States and [to] comply with all requirements necessary to give such court jurisdiction . . . ." (See id., at page 24). A February 1, 2001 endorsement to the policy, which formed part of the policy, further provided that the defendant shall have the right to "seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United states." (See February 1, 2001 Endorsement to Policy concerning Standard Property Conditions, page 1, attached as Exhibit C to Pl. Opp'n to Def. Mot. to Transfer Venue).

After the terrorist attacks on September 11, 2001, civil authorities restricted access to many buildings in Manhattan in an effort to restore order. (Compl. at ¶13). Reliance was ordered to close two of its lower Manhattan offices for three and one-half days. (Id.). Reliance subsequently submitted a claim to the defendant, alleging that the interruption of operations caused Reliance to incur expenses of $448,000. (Id. at ¶¶14, 17). On July 1, 2003, the defendant denied the claim on the ground that Reliance suffered no ascertainable losses. (Id. at ¶18). Subsequent letters were also sent to Reliance explaining the defendant's decision to deny the claim. (Id. at ¶¶19-20).

On October 3, 2001, the Commonwealth Court of Pennsylvania declared Reliance insolvent and ordered Reliance into liquidation. (Id. at ¶5). The Court also appointed the

Insurance Commissioner of the Commonwealth of Pennsylvania (the "Commissioner") to serve as Reliance's liquidator. (Id.). The Commissioner's general duty under Pennsylvania law, 40 Pa. Cons. Stat. Ann. §§ 221.20, 221.23, is to gather the company's assets, convert them into cash, and distribute the cash to claimants of the company. (Id. at ¶6). This duty includes prosecuting and instituting claims in the name of Reliance. (Id.).

On May 11, 2004, the Commissioner filed an action in the Commonwealth Court of Pennsylvania against the defendant, seeking insurance coverage for alleged losses arising out of the interruption of business following September 11, 2001. (Doc. No. 1). On June 10, 2004, the defendant removed the lawsuit to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1441 on the ground of diversity jurisdiction. (Doc. No. 1). Defendant then filed a motion to transfer venue to the Southern District of New York pursuant to 28 U.S.C. § 1404(a). (Doc. No. 15). On October 8, 2004, the plaintiff filed a brief in opposition to defendant's request to transfer venue (Doc. No. 16), and, on October 29, 2004, the defendant filed a reply brief in support of its request (Doc. No. 18).

II. Discussion

Defendant requests transfer of venue to the Southern District of New York pursuant to 28 U.S.C. § 1404(a). (Def. Mot. to Transfer Venue, at 1). This Court denies the defendant's request.

A. Transfer of venue under 28 U.S.C. § 1404(a) is inappropriate.

Neither party disputes that venue is proper in the Eastern District of Pennsylvania. As such, the Court must consider whether to transfer this case to the Southern District of New York

pursuant to section 1404(a). Section 1404(a) provides the tool for transferring a case to an appropriate district, even when venue is proper in the forum court. Section 1404(a) reads:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1404(a).

The determination of whether to transfer venue pursuant to section 1404(a) is governed by federal law. See 15 Wright, Miller, & Cooper, Federal Practice and Procedure § 3803, at 11-12 (2d ed. 1986); see also Jumara v. State Farm Ins. Co., 55 F.3d 873, 877-878 (3d Cir. 1995) (federal law applies because questions of venue are procedural, rather than substantive). Despite the defendant's reliance on case-law from the Second Circuit, this Court is required to apply the Third Circuit's analytical framework for determining whether transfer is appropriate pursuant to section 1404(a).

The Third Circuit places the burden of proving that transfer is appropriate on the party moving for transfer. In re United States, 273 F.3d 380, 388 (3d. Cir. 2001). This requires more than a showing "that the fora are equally appropriate." George Young Co. v. Bury Bros., Inc., 2004 WL 1173129, at *8 (E.D. Pa. April 2, 2004). The Third Circuit has identified a non-exhaustive list of public[1] and private[2] interest factors to determine whether the moving party has

[1]The public interest factors help interpret the "interest of justice" language of section 1404(a). These public interest factors include: enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; 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 diversity cases. Jumara, 55 F.3d at 879-80.

[2]The private interest factors help interpret the "convenience" language of section 1404(a). These private interest factors include: whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of

met its burden. See e.g., Jumara, 55 F.3d at 879-880. Within this framework, a plaintiff's choice of a proper forum demands "paramount consideration." Shutte v. AMCO Steel Corp., 431 F.2d 22, 24 (3d Cir. 1970); see also Jumara, 55 F.3d at 879 (plaintiff's choice of venue "should not be lightly disturbed"). Furthermore, although not dispositive, a forum selection clause is treated as "a manifestation of the parties' preferences as to a convenient forum" and must be given substantial consideration. Jumara, 55 F.3d at 880.

1. The forum selection clause is not dispositive of whether transfer is appropriate.

Plaintiff argues that the presence of the forum selection clause precludes transfer under section 1404(a). (Pl. Opp'n to Def. Mot. to Transfer Venue, at 4-5). This argument is incorrect as a matter of law. While the presence of a forum selection clause precludes transfer under section 1406(a), the Supreme Court has declared that a forum selection clause is not dispositive of the appropriateness of transfer under section 1404(a). See Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31 (1988) (forum selection clause not dispositive, although it is entitled to "substantial consideration"). Furthermore, even if a forum selection clause could be dispositive of whether to transfer venue pursuant to section 1404(a), the policy expressly permits either party to seek a transfer of venue to another court. (See February 1, 2001 Endorsement to Policy concerning Standard Property Conditions).

This Court also acknowledges that, in this particular case, the forum selection clause is entitled to less deference within the section 1404(a) calculus because it does not mandate venue

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witnesses--but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum). Jumara, 55 F.3d at 879.

in a particular forum. (See Policy). Nor does it express the parties' preference to litigate in a particular forum. (Id.). Instead, it is a permissive forum selection clause that merely waives the defendant's right to argue that venue is inappropriate in "any court of competent jurisdiction within the United States . . . ." (Id.); see De Lage Landen Fin. Serv. v. Cardservice Int'l., 2000 WL 1593978, at *2 n.3 (E.D. Pa. Oct. 25, 2000) (noting that courts accord more weight to exclusive forum selection provisions). Consequently, the presence of the forum selection clause in the policy neither precludes the defendant from seeking a transfer pursuant to 1404(a) nor commands significant deference in the section 1404(a) analysis.

2. Defendant has failed to meet the requisite standard pursuant to 28 U.S.C. § 1404(a).

Defendant argues that transfer is appropriate under section 1404(a) because the Southern District of New York is the locus of operative facts, because the key witnesses in the case are located in New York, because New York law will apply, and because New York courts have a significant policy interest in adjudicating cases related to the collapse of the World Trade Center. (Def. Mot. Transfer Venue, at 4-10). Defendant's arguments fail to overcome the presumption in favor of the plaintiff's choice of forum.

a. Private Interest Factors

Defendant identifies two private interest factors that allegedly favor transfer: the convenience of witnesses; and the origination of the claim in New York. (Def. Mot. to Transfer Venue, at 5-7).

First, the defendant argues that the Eastern District of Pennsylvania is inconvenient for potential witnesses because three witnesses--two Reliance employees identified in plaintiff's

Rule 26 disclosures and the adjuster of the insurance claim–reside in New York and would have to travel to Philadelphia to testify in this litigation. (Def. Mot. to Transfer Venue, at 6-7). Defendant's argument is unpersuasive. Defendant provides no documentation, such as affidavits from the witnesses, supporting this claim of inconvenience. Nor does the defendant suggest that the witnesses would be unavailable to testify if the case remains in the Eastern District of Pennsylvania. See Jumara, 55 F.3d at 879 (looking to convenience of witnesses, but only to extent that "witnesses may actually be unavailable for trial in one of the fora"). Furthermore, whether the plaintiff's witnesses may experience inconvenience is a matter of consideration for the plaintiff, rather than for the defendant.[3] Finally, even if the defendant presented affidavits from such witnesses, the close proximity of the two fora and the accessability of this Court from New York render transfer inappropriate based on this factor. See Jumara, 55 F.3d at 881 (noting that some courts have refused to consider transfer to forum that is located a short distance from original forum and finding that close proximity of two fora does not render one forum "significantly more convenient than the other"); see also Hatfield, Inc. v. Robocom Systems Int'l., 1999 WL 46563, at *2 (E.D. Pa. Jan 15, 1999) (denying motion to transfer to Eastern District of New York in part because "the distance between the two venues is not great and transportation is readily available"). Thus, the convenience of witnesses does not militate in favor of transfer.

[3] This Court presumes that the convenience of potential witnesses informed plaintiff's decision to file the case in the Eastern District of Pennsylvania. Indeed, according to plaintiff, one of the witnesses identified in the Rule 26 disclosure spends the majority of his time in Philadelphia. (Pl. Opp'n. Def. Mot. Transfer Venue, at 7). Plaintiff also notes that it is in the process of relocating most of its operations to Philadelphia, thereby making the Eastern District of Pennsylvania both a convenient forum for witnesses who may testify on behalf of plaintiff at trial and a potential situs of documentary evidence in this litigation. (Id. at 7).

Defendant also argues that transfer is appropriate because the claim arose in the Southern District of New York, rather than in the Eastern District of Pennsylvania. (Def. Mot. to Transfer Venue, at 5-6). Defendant is correct in pointing out that the claim stems from alleged business interruption losses incurred by Reliance due to the closure of Reliance's New York facilities. Moreover, the policy was negotiated in New York and was issued out of New York to Reliance's New York offices. (Id. at 6). This factor thus points in favor of transfer and weakens the deference that must be allotted to the plaintiff's choice of forum. See De Lage Landen Fin. Serv, Inc., 2000 WL 1593978, at *2 (deference given to plaintiff's choice of forum is reduced when "none of key events or omissions underlying the claim occurred in the forum selected"). However, this factor, standing alone, does not command dispositive weight. Id. at *3 (refusing to grant transfer of venue to Central District of California even though the pertinent events and omissions occurred in California).

Defendant does not address any of the additional private interest factors, such as the relative physical and financial condition of the parties, the situs of the documentary evidence, and the relative convenience of the parties. Defendant also fails to counter the plaintiff's argument that the Eastern District of Pennsylvania would be more convenient for the plaintiff because Reliance maintains its principal place of business in Philadelphia and because the Commissioner is bringing the lawsuit on behalf of Reliance. (Pl. Opp'n to Def. Mot. to Transfer Venue, at 7). Defendant's failure to address these issues constitutes an implicit recognition that the close proximity of the two fora weighs substantially against transferring venue from the selected forum based upon principles of convenience. See, e.g., Morris Black & Sons v. Zitone Construction and Supply Co., 2004 WL 2223310, at *3 (E.D. Pa. Oct. 1, 2004) (refusing to transfer venue to

Southern District of New York because relatively short distance between two fora weighs "heavily" against the transfer of the litigation).

b. Public Interest Factors

Defendant identifies two public factors that allegedly work in favor of transferring venue: the applicability of New York law; and the interest of the Southern District of New York in deciding disputes arising from the terrorist attacks of September 11, 2001. (Def. Mot. to Transfer Venue, at 7-10). Neither of these factors supports the defendant's request.

According to the Third Circuit, the applicability of a particular state law is not per se relevant to a section 1404(a) analysis. Instead, the appropriate factor is the "familiarity of the trial judge with the applicable state law." See Jumara, 55 F.3d at 879. Thus, assuming *arguendo* that New York law applies, there is nothing to indicate that this Court would have difficulty in determining and applying New York contract law to this case. See, e.g., E'Cal Corp. v. Office Max, Inc., 2001 WL 1167534, at * 4-5 (E.D. Pa. Sept. 7, 2001) (familiarity of trial judge with Ohio law does not trigger transfer of venue to Northern District of Ohio because defendant failed to demonstrate that transferor court would have difficulty applying Ohio law). Nor has the defendant suggested that the principles of New York contract law that allegedly govern this litigation are particularly complex or novel. See De Lage Landen Fin. Serv., Inc., 2000 WL 1593978, at *2 (refusing to transfer venue in part because "federal judges routinely apply the law of various jurisdictions and basic contract law principles do not vary widely among the states"); see also Wright, Miller, & Copper, Federal Practice and Procedure § 3854, at 266-267 (2d ed. 1986) (familiarity with state law not "given great weight, particularly when the applicable state law appears clear").

Defendant also notes that New York courts have a significant policy interest in adjudicating cases involving the collapse of the World Trade Center on September 11, 2004. (Def. Mot. to Transfer Venue, at 11). While New York courts certainly have such an interest, this policy consideration is not implicated by the facts of this litigation. The case involves an insurance dispute between two corporations, neither of which are residents of New York. No property damage or physical injury is alleged to have occurred in New York. In fact, the only injury is financial, and was allegedly inflicted on a Pennsylvania domiciled insurer. Furthermore, to the extent that a federal court sitting in the Southern District of New York has an interest in resolving insurance disputes stemming from the interruption of business operations within New York City as a result of September 11, 2001, the interest of Pennsylvania courts in deciding a contract dispute involving a Pennsylvania insurer with its principal place of business in Pennsylvania is equally as strong. See Remick v. Manfredy, 138 F.Supp.2d 652, 655 (E.D. Pa. 2001) (finding that federal court in Eastern District of Pennsylvania has interest in resolving claims for non-payment of bills owed to citizens); see also Pro Spice, Inc. v. Omni Trade Group, Inc., 173 F.Supp.2d 336, 342 (E.D. Pa. 2001) (finding that Texas court's interest in deciding contract dispute between New Jersey and Texas companies is slightly greater than that of Pennsylvania court, even though contract is connected with Pennsylvania in a variety of ways). This Court's interest in resolving this litigation is further enhanced by the fact that Pennsylvania's Commissioner, pursuant to her duties under Pennsylvania law, is litigating this claim on behalf of a Pennsylvania corporation that was declared insolvent by the Commonwealth Court of Pennsylvania.

Defendant does not address the rest of the public interest factors. As with the private interest factors, this omission implicitly recognizes that the close proximity of the two fora renders the remaining public interest factors unhelpful in establishing the appropriateness of transferring venue. See Jumara, 55 F.3d at 882; see also Morris Black & Sons, 2004 WL 2223310, at *3 (noting that "none of the public interest factors strongly weigh in favor of transfer" to the Southern District of New York because of close proximity of two venues).

c. Conclusion

Defendant has identified one private interest factor–where the claim arose--that points in favor of transferring venue to the Southern District of New York. However, this factor, standing alone, does not meet the defendant's burden of proving that this case would be "better off transferred to another district." In re United States, 273 F.3d at 388 (internal quotations omitted). It certainly does not override the deference that this Court must give to the plaintiff's choice of forum, pursuant to a valid forum selection clause. At best, the defendant has demonstrated that the two fora are equally appropriate. See, e.g., George Young Co., 2004 WL 1173129, at *8 (no transfer when defendant "merely shows that the fora are equally appropriate"). Consequently, this Court denies the defendant's motion to transfer venue to the Southern District of New York. An appropriate order follows.

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

M. DIANE KOKEN,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
LEXINGTON INSURANCE COMPANY,	:	NO. 04-2539
Defendant.	:	

ORDER

AND NOW, this 2nd day of November 2004, upon consideration of Defendant's Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) (Doc. No. 15), filed on September 24, 2004, Plaintiff's Opposition to Defendant's Motion to Transfer Venue (Doc. No. 16), filed on October 8, 2004, and Defendant's Reply in Support of its Motion to Transfer Venue (Doc. No. 18), filed on October 29, 2004, it is hereby ORDERED that Defendant's Motion is DENIED.

BY THE COURT:

s/LEGROME D. DAVIS
Legrome D. Davis, J.