

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

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CENTRAL DIVISION

DISTRICT OF UTAH

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TRI-SATE INSURANCE CO.
OF MINN.,

)

Case No. 2:04CV00358 DS

Plaintiff,

)

vs.

)

MEMORANDUM DECISION
AND ORDER

WESTWAY CONSTRUCTION INC., and
JOSHUA HODGES,

)

Defendants.

)

I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 41(a)(2), Defendant Westway Construction, Inc. ("Westway") moves to dismiss the Complaint for Declaratory Relief of Plaintiff Tri-State Insurance Company of Minnesota ("Tri-State"). In the alternative, Westway requests that the case be transferred to the United States District Court for the District of South Dakota pursuant to 28 U.S.C. § 1404(a).

Westway is a Washington corporation with its principal place of business in Airway Heights, Washington. Defendant Joshua Hodges ("Hodges") is a resident of Utah and an employee of Westway. Tri-State is a Minnesota corporation with its principal place of business in Iowa.

During a period from May 4, 2003 to March 31, 2004, Tri-State provided Workers Compensation insurance to Westway subject to certain conditions. On August 14, 2003, during the

course of employment, Hodges was involved in a semi-tractor trailer accident in Nevada in which he claims to have sustained physical injuries. On January 27, 2004, Hodges filed a Notice of Formal Adjudicative Proceedings and Order for Answer before the Utah Labor Commission by which he seeks Workers Compensation benefits from Westway and Tri-State.

In this action Tri-State seeks declaratory judgment that the insurance policy at issue does not provide coverage to Hodges for any injuries arising from Hodges accident because conditions regarding the Other States Insurance endorsement were not satisfied. Specifically, Tri-State contends that its policy with Westway did not provide Workers Compensation insurance to Westway in Utah.

II. DISCUSSION

A. Motion to Dismiss

Asserting that it is not subject to personal jurisdiction, Westway, pursuant to Fed. R. Civ. P. 41(a)(2), first moves the court to dismiss Tri-State's Complaint for Declaratory Relief. Rule 41(a)(2) provides in relevant part as follows: "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Rule 41(a)(2) is clear. A plaintiff may voluntarily dismiss an action under the procedures provided in Rule 41(a)(1). All other dismissals on the Plaintiff's instance are to be made by the court "upon such terms and conditions as the court deems proper." The court, in the absence of persuasive authority, fails to see the relevance of Rule 41(a)(2) to Defendant's Motion to Dismiss.

It appears to the court that Westway's Motion is more appropriately analyzed pursuant to Fed. R. Civ. P 12(b)(2) for lack of personal jurisdiction. In deciding a motion to dismiss for lack of jurisdiction the court is guided by the following general principles.

The plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988) (quoting Behagen v. Amateur Basketball Ass'n of the United States, 744 F.2d 731, 733 (10th Cir., 1984) (citations omitted), cert. denied, 471 U.S. 1010 (1985)).

In support of its position, Westway states that it has no office, inventory or real estate in Utah, and transacts no business in Utah. The only contact it admits to is that it has an employee, Hodges, who lives in Utah and drives a truck to Nevada. On the other hand, Tri-State asserts that Westway conducts business in Utah, that Hodges was hired in Ogden, Utah by the lead driver for Westway, who was stationed in Ogden, and that Hodges employment and contacts with Westway were in Ogden. It appears undisputed that Hodges work for Westway consisted of driving loads from Ogden, Utah, to Carlin, Nevada.

For purposes of the present motion, the court agrees with Tri-State that it has made a prima facie showing that the court has personal jurisdiction over Westway, which Westway has failed to rebut. Therefore, Westways motion to dismiss for lack of personal jurisdiction must be dismissed.

B. 28 U.S.C. § 1404(a) Transfer

In the alternative, Westway requests that this case be transferred to the United States District Court for the District of South Dakota pursuant 28 U.S.C. § 1404(a). “For the convenience of 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).

In evaluating a motion to transfer, the court considers the following.

“Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an ‘individualized, case-by-case consideration of convenience and fairness.’” Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29, 108 S. Ct. 2239, 2244, 101 L. Ed.2d 22 (1988)(quoting Van Dusen, 376 U.S. at 622, 84 S. Ct. at 812).

Among the factors [a district court] should consider is the plaintiff’s choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical.

Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir. 1967).

Chrysler Credit Corp. v. Country Chrysler Inc., 928 F.2d 1509, 1516 (10th Cir. 1991). As master of the complaint, deference is given to plaintiff’s forum selection. Frontier Federal Sav. & Loan Ass’n v. National Hotel Corp., 675 F. Supp. 1293, 1301 (D. Utah 1987). “The defendants’ burden is heavy, and unless the circumstances of the case weigh heavily in favor of the transfer, the

plaintiff's choice should not be disturbed." Id.

Westway simply asserts that several of its witnesses live in either South Dakota or Minnesota and that the records involving this case are in South Dakota. It also contends that the costs associated with litigation would be greater in Utah than in South Dakota.

The court is inclined to agree with Tri-State's assessment that "this matter turns on the facts and circumstances surrounding Mr. Hodges' employment with Westway, and the interpretation of the insurance contract under these facts, including where Mr. Hodges employment contract was signed and the nature and duration of his employment with Westway". Mem. Opp'n at 9-10. Such an inquiry does not appear to require multiple witness or voluminous records such that Westway would experience any significant hardship, financial or otherwise, in trying the case in Utah. Moreover, any inquiry would most likely involve testimony from Hodges, who resides in Utah and who, Tri-State suggests without contradiction, may not be subject to jurisdiction in South Dakota. In sum, after carefully considering the written memoranda of the parties and the applicable law, the court concludes that Westway has failed in its burden of establishing that the circumstances of this case weigh in favor of transfer.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Westway's Motion to Dismiss or Transfer is **DENIED**.

DATED this 7th day of October, 2004.

BY THE COURT:



DAVID SAM
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
District of Utah
October 8, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:04-cv-00358

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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