

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

SUFFOLK, SS.

SUPERIOR COURT
CA NO. 04-3613-BLS2
(Judge Botsford)

WASTE MANAGEMENT OF)
MASSACHUSETTS, INC.)
Plaintiff)
)
v.)
)
COTTAGE DEVELOPERS, LLP; JEROME)
GAGLIARDUCCI; and ZANE MIRKIN,)
Defendants)

DEFENDANTS’ MOTION TO DISMISS OR TRANSFER

Defendants, Cottage Developers, LLP, Jerome Gagliarducci, and Zane Mirkin, for their Motion to Dismiss the Complaint of Plaintiff, Waste Management of Massachusetts, Inc. (“WMM”), in favor of a prior pending action between the same parties in Hampshire County, or to transfer and consolidate this action with the Hampshire County action, state as follows:

INTRODUCTION

The Defendants and their affiliates entered into an arrangement with WMM to operate a transfer station in Wilbraham and to own and operate a landfill closure project in Springfield. Beginning in January, 2004, based on a disputed claim of indemnity arising from the arrangement, WMM threatened to take offsets against certain obligations it owed to affiliates of the Defendants. This would have triggered cross-default provisions which could have threatened the entire ongoing relationship.

To address the indemnity issue, on August 13, 2004, the Defendants, along with two affiliates, filed suit for declaratory judgment in Hampshire County, the location of the WMM western Massachusetts office with which the Defendants dealt. Later on the same

day, WMM filed this action claiming indemnity in Suffolk County, relying on Middlesex venue due to a WMM office alleged to be located in Woburn, Massachusetts.

Venue is proper in western Massachusetts, where the parties' relationship is centered. All parties are located in western Massachusetts. The two operations on which the parties' relationship is based, a transfer station in Wilbraham and the landfill in Springfield, are in western Massachusetts. All factors which the Court weighs in exercising its discretion – including the dispute's connection to the forum, as well as proof in the form of witnesses and documents – favor dismissal of this action in lieu of the previously filed Hampshire County case, or transfer and consolidation with that case.

FACTUAL BACKGROUND

Attached as Exhibit 1 to this Motion is the Complaint of Zane Mirkin, Jerome Gagliarducci, Western Recycling, Inc., JPZ, Inc., and Cottage Developers, LLP against WMM, filed in Hampshire County Superior Court at 12:27 p.m. on August 13, 2004 (hereafter, the "Hampshire Complaint" or "Hampshire Action"). Due to their bulk, the exhibits submitted by the Defendants in support of this Motion are contained in a separately bound volume, served and filed with this Motion, and incorporated in this Motion.

Attached as Exhibit 2 is WMM's complaint in this action, which was filed on August 13, 2004 (the "BLS Complaint"). Although the Business Litigation Section apparently does not time-stamp complaints when filed, the understanding of the Defendants' counsel is that the BLS Complaint was filed at or around 3:00 p.m.

The Background of the Dispute

The City of Springfield operated a landfill through the 1950s and '60s on Turnbull Street in Springfield (the "Landfill"). (Hampshire Complaint, ¶ 7). The Landfill was not closed in accordance with the requirements of the Massachusetts Department of Environmental Protection ("DEP"). (Hampshire Complaint ¶8).

In 2001, Western Recycling (in which Messrs. Gagliarducci and Zirkin are principals) owned and operated a transfer station on Boston Road in Wilbraham. WMM expressed interest in acquiring that operation. Western Recycling and its principals also learned of the Landfill and its environmental problems, which were the subject of ongoing dispute between the City of Springfield and the DEP. (Hampshire Complaint, ¶ 10).

In the Spring of 2002, the City of Springfield, the DEP, Western Recycling and WMM began discussions about an arrangement by which WMM would operate the Wilbraham transfer station operation, Mr. Gagliarducci and Mr. Mirkin, through an affiliate, would take title to the Landfill, and WMM would undertake an appropriate closure of the Landfill in accordance with DEP guidelines. (Hampshire Complaint, ¶ 11). On or about July 30, 2002, various agreements were reached among the DEP, the City of Springfield, WMM, and entities affiliated with Mr. Gagliarducci and Mr. Mirkin, copies of some of which are attached to the Hampshire Complaint as Exhibits B through F.

Among the agreements was the DEP Administrative Consent Order, which governed closure of the Landfill under DEP regulations ("ACO"), and which is attached to the Hampshire Complaint as Exhibit D. WMM, the City of Springfield, and Cottage Developers, LLP are all parties to the ACO. Under the ACO, WMM undertook "primary responsibility" for accomplishing the closure. (Hampshire Complaint, ¶ 15).

A dispute arose from WMM's failure to comply with deadlines contained in the ACO, which led it to attempt to obtain signatures of the parties for an amendment to the ACO. This triggered a dispute between the City of Springfield and the Defendants on the subject of back taxes at the Landfill property, arising from the City's claim that Cottage Developers LLP was in material breach of an agreement between them on the subject. Ultimately, WMM paid to the City of Springfield back-taxes in the amount of approximately \$1 million on the real estate upon which the Landfill sits, over Cottage Developers' strong objection. (Hampshire Complaint, ¶¶ 15-23).

In late January, 2004, WMM notified Cottage Developers in writing that it would seek indemnity from Mr. Gagliarducci and Mr. Mirkin under their guaranty for the back taxes paid. (Hampshire Complaint, Ex. F). WMM also stated that it would take an offset in the amount it paid to the City of Springfield in back taxes against the installment payment which would be due in November, 2004 under the Promissory Note (Hampshire Complaint, Exhibit C).

One of the Defendants' affiliates, JPZ, Inc., is a Plaintiff in the Hampshire Action. JPZ, Inc. is the owner of the real estate on which the Wilbraham transfer station is located, and leases that land to WMM as part of the arrangement. The lease is Exhibit B to the Hampshire Complaint. The Promissory Note contains a cross-default provision by which, in the event WMM defaults in payments under the Note, such a default would be grounds for eviction under the JPZ, Inc. lease. (See, Hampshire Complaint, Exhibit C at p. 3).

Between January and late July, 2004, no formal action was taken by WMM with respect to WMM's assertion that it was owed indemnity, or that it would take an offset

against the November, 2004 payment. During that time, counsel for the Defendants wrote to WMM to ask if it would consider discussions to attempt to resolve the matter. (Affidavit of Frank Fitzgerald, Exhibit 3 hereto, ¶ 5). WMM made no positive response to that request. (Fitzgerald Affidavit, Ex. 3, ¶ 5). WMM made a formal demand for indemnity in late July, 2004. (Hampshire Complaint, ¶ 28).

After WMM's formal demand for indemnity, the Defendants' corporate counsel again inquired of WMM if settlement discussions would be appropriate. (Fitzgerald Affidavit, Ex. 3, ¶ 7). Again, no positive response was received from WMM or its counsel. (Fitzgerald Affidavit, Ex. 3, ¶ 7).

Against this background, Mr. Mirkin, Mr. Gagliarducci, Western Recycling, JPZ, Inc., and Cottage Developers LLP filed their Complaint for Declaratory Judgment against WMM on August 13, 2004. The filing of the Complaint was motivated by a desire to resolve a discreet issue between the parties, which potentially could be resolved with minimal interference with other aspects of the parties' relationships, and to prevent an escalation of drastic remedies, which could potentially cause a complete rupture of all the relationships between the parties, as relates to the Landfill and the Wilbraham transfer station, which would be profoundly detrimental to all parties. (Hampshire Complaint ¶25-27, 34).

The Locations of Parties and Witnesses

Defendant Jerome Gagliarducci lives in Wilbraham, Massachusetts, which is in Hampden County, which is adjacent to Hampshire County. (Hampshire Complaint, ¶ 1). Defendant Zane Mirkin lives in Longmeadow, Hampden County, Massachusetts. (see, Hampshire Complaint at ¶ 2). Defendant Cottage Developers is a limited liability

partnership with its principal place of business in Wilbraham, Hampden County, Massachusetts. (Hampshire Complaint ¶5).

WMM currently owes Western Recycling, Inc. (a Plaintiff in the Hampshire Action) further annual installments under a Promissory Note which is in the total amount of \$3 million. (Ex. C to the Hampshire Complaint). Western Recycling has its principal place of business in Wilbraham, Massachusetts. Its principals include Jerome Gagliarducci and Zane Mirkin (Hampshire Complaint at ¶ 3).

JPZ, Inc. is the owner of the transfer station on Old Boston Road in Wilbraham, Hampden County, Massachusetts, which was the subject of the transaction between WMM and Western Recycling. (Hampshire Complaint ¶4).

In the ACO (Exhibit D to the Hampshire Complaint), WMM gave its address as 600 New Ludlow Road, South Hadley, Massachusetts 01075, and gave a New England regional office address at 4 Liberty Lane West, Hampton, NH. (Exhibit D at p. 1).

WMM gave the same South Hadley address in the “Remedial Project Construction Agreement” by which Cottage Developers, LLP, owner of the real estate containing the Landfill, engaged WMM to operate and supervise the closure of the Landfill. (Hampshire Complaint, Ex. E).

According to DEP records, available online, the Wilbraham transfer station is owned by JPZ, Inc. and operated by WMM with its address listed as 600 New Ludlow Rd., South Hadley, in Hampshire County. (See, Ex. 6, excerpt of DEP listing of active handling facilities in Massachusetts).

According to the records of the Secretary of the Commonwealth, Waste Management of Massachusetts, Inc., has its “principal office in Massachusetts” at 101 Federal Street in

Boston, which is also the address of its registered agent for service, CT Corporation System, at the 101 Federal Street address. The addresses of the officers and directors of the company are all given as Houston, Texas, which is the location of the Waste Management national headquarters. (A copy of the Secretary of the Commonwealth corporate record for Waste Management of Massachusetts, Inc. is attached hereto as Exhibit 4).

The Waste Management corporate website lists the 600 New Ludlow Road, South Hadley address as one of its locations, based on a search (within the Waste Management website) for zip code of 01060. (A copy of the printout with this listing is attached hereto as Exhibit 5).

Aside from the parties, a central player in the dispute is the City of Springfield, as well as its new mayor, Charles Ryan, and its new city solicitor, Patrick Markey, who acted on behalf of the City at the time when WMM sought an extension of the ACO, and at the time the City demanded payment of all back-taxes on the Landfill property. Both Mayor Charles Ryan and City Solicitor Patrick Markey live in Springfield. The City of Springfield's municipal offices are in downtown Springfield at 36 Court Street.

Another central player in the dispute is the DEP, which issued the ACO which governs the closure of the landfill, and to which the City of Springfield, the DEP, WMM and Defendant Cottage Developers LLP are parties. The DEP has its Western Region headquarters in Springfield at 436 Dwight Street, Suite 402. (see, Exhibit 7, excerpt from Massachusetts Lawyers Diary and Manual, for the DEP).

Of the 50 or 60 meetings between or among the City of Springfield, WMM, the Western Region DEP, the Town of Wilbraham, and the Defendants or their affiliates, on

the subject of the landfill and transfer station arrangement, almost all of them took place in western Massachusetts: at the City's offices in Springfield, at attorney Fitzgerald's office in Springfield, at the DEP office in Springfield, at the WMM South Hadley office, or Wilbraham's counsel's office in Chicopee. (Ex. 3, Fitzgerald Aff. ¶4). The only exceptions were two or three meetings at Waste Management's regional office in New Hampshire, and four or five meetings in Boston with WMM's counsel. (*id.*)

ARGUMENT

The Defendants in this case were served with WMM's complaint in this case before WMM was served as a defendant in the Hampshire Action. The Defendants therefore served this Motion, and will presumably file it, before receiving what the Defendants anticipate will be similar motion by WMM challenging venue in Hampshire County. The Defendants have no preference as to which county's Court should decide the issue of venue.

A. The Defendants do not Consent to BLS Session Venue

As an initial matter, the Defendants understand that this Court's policy is to accept cases where both parties have consented and agreed to the case being filed in the business litigation session. Administrative Directive no. 03-1 provides as follows:

Juries, in cases that demand them, will be drawn from the Suffolk County venire. This will be pursuant to the presumed waiver of venue in other than Suffolk County by the party choosing to file there, and by the concomitant waiver by all other parties if they participate without challenging the Suffolk County venue. If such a challenge to venue is made, however, it will be presented for consideration to the BLS justice to whom the case is first assigned. If the challenge is allowed, the case will be transferred to the county or judicial district appropriate under present venue statutes.

“Superior Court Business Litigation Session Extension and Expanded Venue”,
Administrative Directive no. 03-1, dated February 12, 2003.

The Defendants do not now agree to this case being filed in or remaining in the Business Litigation Session of the Superior Court, as was indicated to WMM’s counsel before this suit (and the Hampshire Complaint) was filed. On this basis, the Defendants request that this action be dismissed, or transferred to Hampshire County for consolidation, under the authority of Superior Court Administrative Directive No. 03-1. The Defendants would strongly object to transfer to Middlesex County, for the reasons contained throughout this Motion.

B. This Action Should be Dismissed Because the First-Filed Rule Clearly Favors Western Massachusetts Venue

This Court may exercise its discretion in considering whether the Hampshire Action or the Business Litigation Session is the appropriate venue for the parties’ dispute. Massachusetts Rule of Civil Procedure 42(a) provides that when “actions involving a common question of law or fact are pending before the Court, in ... different counties,” the Court “may order all the actions consolidated; and it may make such orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay. Mass.R.Civ.Pro. 42(a).

Massachusetts courts confronted with competing lawsuits by the same parties in different venues have looked to federal case law on the subject. In *Storagenetworks, Inc. v. Metromedia Fibernetwork Service, Inc.*, 13 Mass. L. Rptr. 640, Judge Fahey determined that no Massachusetts court had addressed the “first-filed rule” and applied federal case law:

Apart from who filed first, other factors to be considered in exercising its discretion include ‘judicial and litigant economy, the just and effective disposition of disputes, the possible absence of jurisdiction over all necessary parties, as well as a balancing of conveniences that may favor the second forum.’ [citation omitted].

Storagenetworks, Inc. v. Metromedia Fibernetwork Service, Inc., 13 Mass L. Rptr. 640 (copy attached as Exhibit 8).

Under the “first-filed rule,” the first-filed complaint is generally preferred, unless special circumstances or the balance of convenience indicates otherwise. *Kleinerman v. Luxtron Corp.*, 107 F.Supp. 2d 122, 124 (D.Mass. 2000); *Holmes Group v. Hamilton Beach/Proctor Silex*, 249 F.Supp. 2d 12, 15-16 (D. Mass. 2002). The presumption in favor of the first-filed action is rebuttable, based on exercise of the Court’s discretion in considering the appropriate factors. *Dupont Pharmaceuticals Company v. Sonus Pharmaceuticals, Inc.*, 122 F. Supp. 2d. 230, 231 (D. Mass. 2000). That an action is a declaratory judgment action does not bar application of the first-filed presumption. *GSI Lumonics, Inc. v. Biodiscovery, Inc.*, 112 F.Supp. 2d 99, 104-05 (D.Mass. 2000).

Application of these principles clearly favors Hampshire County as the proper venue for this case.¹ As explained in more detail below, the balance of convenience weighs heavily in favor of Western Massachusetts, which is the location of the projects at issue,

¹ In addition, Massachusetts Rule of Civil Procedure 12(b)(9) provides as follows:

Every defense, in law or fact, to a claim for relief in any pleading... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:...

(9) Pendency of a prior action in a court of the Commonwealth.

Mass.R.Civ.Pro. 12(b)(9). “A dismissal under 12(b)(9) may be appropriate if the parties and issues are identical to those in the prior pending action. See, Smith & Zobel, Rules Practice §12.15.1 (1974 & Supp. 1992).” *Harvard Community Health Plan, Inc. v. Zack*, 35 Mass. App. Ct. 649, 652 (1992)(additional citations omitted); *see also, Conant v. Kantrovitz*, 29 Mass. App. Ct. 998, 999 (1990). Although generally directed at claim-splitting by a plaintiff, this Rule provides additional authority for dismissal of this action based on the pendency of the Hampshire Action.

as well as all of the parties, witnesses, and documents. Nor are there any “special circumstances” which would justify venue other than in Hampshire County.

1. THE COMPETING ACTIONS

Following months of inaction by WMM on its claim, the Defendants filed first in Hampshire County. The Defendants filed the Hampshire Complaint at 12:27 p.m. on Friday, August 13 (see, Ex. 1, timestamp). It is the undersigned counsel’s understanding that this action was filed at a later time on the same day. (see, Factual Background, *infra*, p. 2). The parties to this case are: Plaintiff WMM; Defendants Cottage Developers, LLP; Jerome Gagliarducci; and Zane Mirkin. The parties to the Hampshire Action are: Plaintiffs Zane Mirkin; Jerome Gagliarducci; Western Recycling, Inc.; JPZ, Inc.; Cottage Developers, LLP; and Defendant WMM. All of the parties to this action are parties to the Hampshire Action.

Issues are essentially identical: in this action, WMM seeks to recover on a claim of breach of contract, for indemnity arising from its payment of back-taxes to the City of Springfield for the real estate upon which the Landfill is located. The Hampshire Complaint seeks a declaration of the rights and obligations of the parties with respect to WMM’s claim for indemnity arising from the same events, although it also seeks a declaration with respect to remedies which may be exercised by WMM under its Promissory Note. (Hampshire Complaint, Ex. C).

Consequently, as the first-filed action, the Hampshire Action should be the venue for the parties’ dispute, and this action dismissed or transferred, unless WMM could make the requisite showing that that the balance of convenience favors venue in this court, or that venue here is indicated due to special circumstances. Because WMM cannot make

either showing, this action should be dismissed or transferred for consolidation to Hampshire County.

Although the Defendants believe that the Hampshire Action was filed first, it would not make any difference if this case were filed first. In that case, the presumption that this action would have priority would be soundly rebutted, because the balance of convenience overwhelmingly favors the Hampshire Action, and Middlesex County has no connection at all to the dispute.

2. THE BALANCE OF CONVENIENCE

In determining whether the presumption favoring the first-filed action has been rebutted, the factors considered are: “(1) the Plaintiff’s choice of forum; (2) the convenience of the parties; (3) the convenience of witnesses and location of documents; (4) any connection between the forum and the issues; (5) the law to be applied; and (6) the state or public interest at stake.” *Kleinerman*, 107 F.Supp.2d at 125; *see, Holmes Group*, 249 F.Supp.2d at 17 (same).

The Plaintiff’s choice factor looks to the choice of plaintiff in the first-filed action, *see, Holmes Group*, 249 F.Supp. 2d at 19, so this factor favors the Hampshire action. The strong presumption in favor of plaintiff’s choice obtains even when the first-filed action is for declaratory judgment, as is the case here. *Id.*

As for convenience of the parties, they are all located in western Massachusetts. WMM’s own office for purposes of the Landfill and Wilbraham transfer station projects, is in South Hadley in Hampshire County. That WMM has offices with no relation to the dispute elsewhere in the state cannot be counted in its favor on this factor. All of the Defendants in this case, and the plaintiffs in the Hampshire Action reside in neighboring

Hampden County. The Court may take judicial notice of the fact that the City of Boston is approximately 100 miles from Northampton and approximately 80 miles from Springfield. The parties would be subject to three to four hours of travel for any dealings with this Court, but would travel no more than half an hour if venue is retained in Hampshire County.

With respect to witnesses and documents, all of the relevant proof – in the form of witnesses, documents, and the sites of the Landfill and transfer station – are in western Massachusetts, primarily in Springfield, but including Hampshire County, where WMM maintains the office through which it has had all of its dealings with the other parties. Two non-parties are of crucial importance: (1) the City of Springfield, its mayor Charles Ryan, and its City Solicitor Patrick Markey, all of whom reside and work in western Massachusetts, in Springfield; and (2) the Western Region DEP, based in Springfield. Almost all of the meetings among these parties were in western Massachusetts. (See, Fitzgerald Affidavit, Ex. 3, ¶ 4). In short, all or substantially all of the witnesses and documents are in western Massachusetts, which favors the Hampshire Action. None of the proof resides in Middlesex County.

As to the fourth factor, as discussed above, there is no connection whatsoever between the issues and the Middlesex forum invoked arbitrarily by WMM in this case. WMM's selection of Middlesex venue was solely to fix venue for the convenience of its Boston counsel; otherwise the choice was essentially random. Waste Management is a huge multi-national corporation with its national headquarters in Houston, Texas. WMM also has dozens of sites throughout Massachusetts, at transfer stations and landfills, as indicated through appropriate searches on its website, www.wm.com (see, Ex. 5).

Consequently, for purposes of venue, WMM was in a position to name any county in the Commonwealth as one where it had a “usual place of business” within the meaning of the venue statute, M.G.L. c. 223 §§ 1, 8. WMM has selected as a usual place of business an address in Woburn, Massachusetts, in Middlesex County.

Neither Middlesex County nor Woburn has any connection whatsoever to the underlying occurrences alleged in either the Hampshire Complaint or in this action, except for the fact that WMM was able to select it from amongst any of the counties it may have picked as containing one of its usual places of business. The only connection Middlesex County appears to have to the dispute is that, in accordance with the Superior Court Administrative Directive 03-1, Middlesex venue may be used to assert venue in the BLS session, as WMM has done in this case.

The Defendants do not contend that venue is invalid in Middlesex, but rather that such venue is selected by WMM solely for the convenience of its counsel, and is extremely inconvenient for every other party in the case, as well as all of the potential witnesses in the case, all of which are in western Massachusetts. This factor clearly favors dismissal of this case, in favor of the Hampshire Action.

The factors on application of law and public interest do not favor either party. The law will be same in either venue, and the straight-forward contract claim is well within the expertise of either court.

3. SPECIAL FACTORS

WMM would need to show that special factors weigh in its favor to avoid the presumption favoring the first-filed Hampshire Action. The typical example of a special factor is when the first-filed action is the result of a race to the court house. *Kleinerman*,

107 F.Supp.2d at 124; *Holmes Group*, 249 F.Supp.2d at 16. Obviously, in this dispute, the parties filed within hours of each other, but special circumstances within the meaning of the rule require something more than haste to file when litigation appears inevitable. The Defendants filed the Hampshire Complaint when it appeared that resolution through other means would not be possible. This factor does not favor either party.

The indemnity dispute arose in late January, 2004, when WMM paid the back taxes on the Landfill property. WMM then wrote to the Defendants that it would claim indemnity under the individual Defendants' guarantees, and take an offset against the November, 2004 installment due to an affiliate of the Defendants under the note (Hampshire Complaint Exhibit C).

Between January and July, the Defendants' corporate counsel contacted WMM in writing and by telephone to discuss attempting to resolve the indemnity dispute. The Defendants became increasingly concerned about WMM's threat to take the offset, which would trigger a default by WMM under the transfer station lease (Hampshire Complaint Exhibit B) and could lead to a serious rupture of the relationship. (Hampshire Complaint ¶25-27, 34).

After WMM's formal written demand for indemnity in late July, the Defendants' counsel again approached WMM about discussing a possible resolution. (Fitzgerald Aff. Ex. 3, ¶5-7). Those efforts obviously did not appear hopeful to either side, with both sides filing suit on the same day. There is no special factor justifying avoiding the presumption in favor of the Hampshire Action.

Conclusion

For all of the foregoing reasons, venue is appropriate in Hampshire County. This action should be dismissed or transferred there for consolidation.

WHEREFORE, the Defendants request that this action be dismissed, and that Hampshire County be the venue for the parties' dispute; or that this action be transferred and consolidated with the Hampshire Action; or such other and further relief as this Court deems just and proper.

DEFENDANTS, COTTAGE
DEVELOPERS, LLP; JEROME
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CERTIFICATE OF SERVICE

I, John E. Garber, Esq., hereby certify that on this 2nd day of September, 2004, I served a copy of the foregoing via FedEx Express to counsel.

Subscribed under penalties of perjury.

John E. Garber, Esq.