



United States District Court, M.D. Florida.

JASPER CORP., Plaintiff,  
v.  
NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA, Defendant.

**No. 98-2532-CIV-T-17E.**

Sept. 3, 1999.

Michael Byrley Colgan, Timothy Allen Andreu, Glenn, Rasmussen & Fogarty, Tampa, FL, [William Keith Fendrick](#), Annis, Mitchell, Cockey, Edwards & Roehn, P.A., Tampa, FL, for Jasper Corp., plaintiff.

[Ronald J. Lewittes](#), Carlson & Bales, Miami, FL, [Michael S. Davis](#), Zeichner Ellman & Krause, New York, NY, for National Union Fire Insurance, Company of Pittsburgh, PA., defendant.

*ORDER ON DEFENDANT'S MOTION TO  
TRANSFER TO THE UNITED STATES DISTRICT  
COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK*

[KOVACHEVICH](#), Chief J.

\*1 THIS CAUSE is before the Court on Defendant's, National Union Fire Insurance Company of Pittsburgh, PA, Motion to Transfer this Action to the United States District Court for the Southern District of New York, (Dkt.28), filed on May 13, 1999, and Plaintiff's, Jasper Corp., Memorandum in Opposition, (Dkt.33), filed on June 2, 1999.

I. Background

On December 10, 1998, Plaintiff filed a cause of action against Defendant. (Dkt.1). Plaintiff's Amended Complaint, (Dkt.2), filed on December 15, 1998, states that on October 12, 1990, two non-party corporations, Celotex Corporation (hereinafter "Celotex") and Carey Canada, Inc. (hereinafter "Carey Canada") (collectively referred to as "Debtors") filed petitions for relief under Chapter 11 of the United States Bankruptcy Code (hereinafter the "Bankruptcy Code"). Celotex was indirectly owned by Plaintiff from 1988 until approximately May 31, 1997. Before the Debtors filed bankruptcy petitions for relief, Defendant issued thirty-five (35) supersedeas bonds. The supersedeas bonds named Celotex as principal and Defendant as surety and were issued pending the

appeal of judgments against the Debtors in state and federal courts throughout the United States.

Plaintiff brought the instant cause of action against Defendant under [28 U.S.C. § 2201](#) and [Federal Rule of Civil Procedure 57](#), seeking the entry of judgment declaring that: 1) there is no obligation to pay post-petition premiums on Defendant's supersedeas bonds; or, alternatively, 2) if there is an obligation to pay post-petition premiums on Defendant's supersedeas bonds, any liability Plaintiff may have is secondary to Celotex's legal obligation to make such payments; and 3) any secondary liability with respect to Defendant's supersedeas bonds was extinguished as a result of recent settlement among Defendant, Celotex, and others.

The following factual allegations are taken from Plaintiff's Amended Complaint, (Dkt.2), filed on December 15, 1998. Plaintiff is a corporation incorporated in Delaware with a principal place of business in Birmingham, Alabama. Plaintiff, until August 11, 1995, was the parent of JWC Holdings Corporation (hereinafter "JWC"). In August 1995, JWC was dissolved and its assets were transferred to Plaintiff. In connection with the transfer of assets, Plaintiff agreed to assume the liabilities of JWC to the extent that such liabilities did not exceed the value of JWC's assets transferred to Plaintiff. Defendant is a corporation organized under Pennsylvania law with its principal place of business in New York, New York.

Celotex is a manufacturer of building products. In 1972, Celotex expanded its business by acquiring the assets of Panacon Corporation (hereinafter "Panacon"). Panacon is the successor in interest to the Phillip Carey Manufacturing Company, which was also the parent of Carey Canada. Some of the products manufactured by Phillip Carey contained asbestos. Carey Canada mined and milled raw chrysotile asbestos fibers from 1958 until 1986.

\*2 As a result of Celotex's acquisition of Panacon, Celotex was confronted with massive asbestos-related bodily injury litigation. Carey Canada was also required to defend against asbestos-related claims. As a result of the asbestos-related litigation and the liabilities of Celotex and Carey Canada, both Celotex and Carey Canada filed Chapter 11 petitions on October 12, 1990. Less than one year before Celotex and Carey Canada filed Chapter 11 petitions, Celotex and Carey Canada entered into an agreement with Defendant concerning the issuance of supersedeas bonds to stay the execution of asbestos-related judgments against Celotex and Carey Canada.

By letter dated November 13, 1989, Defendant, through its agent AIG Risk Management, Inc. (hereinafter "AIG"), made a proposal to Celotex, through Celotex's broker, to provide a supersedeas bond program to Celotex. The supersedeas bond proposal provided that: 1) bond premiums were to be paid in accordance with Surety Association of America rates; 2) Celotex was required to provide collateral monies to secure the supersedeas bonds, with a start-up collateral requirement of five million dollars; 3) Celotex was required to pay Defendant an initial fee of \$71,500.00 at the inception of the bond program; and 4) a Standard AIG General Indemnity Agreement was to be executed by JWC.

Celotex did not respond in writing to the supersedeas bond proposal. However, the actions of the parties shows that Celotex agreed to the supersedeas bond proposal. On November 15, 1989, Defendant issued the first supersedeas bond, pursuant to the Celotex bond program. On November 20, 1989, Defendant issued three (3) additional supersedeas bonds, staying the execution of approximately \$900,000.00 in judgments against Celotex. Celotex was responsible for and paid for the initial bond premiums, as well as the \$71,500.00 fee to Defendant for setting up the bond program.

In connection with the issuance of the supersedeas bonds, Defendant and JWC entered into a security agreement on November 21, 1989. The Security Agreement bound all affiliates and subsidiaries of JWC and stated that the interest on deposited collateral monies would accrue to the benefit of JWC. On January 4, 1990, a General Agreement of Indemnity was executed by JWC in connection with the Celotex supersedeas bond program. The purpose of the General Agreement of Indemnity was to indemnify Defendant from all loss and expenses in connection with any of the supersedeas bonds.

As a result of the filing of Chapter 11 petitions by Celotex and Carey Canada, all litigation involving the Debtors was stayed, including those cases on appeal in which supersedeas bonds were posted. Due to the stay of action, no action could be taken against Defendant on any of the supersedeas bonds issued.

On or about July 28, 1992, Celotex initiated an adversary proceeding in the United States Bankruptcy Court for the Middle District of Florida, against several parties, including Defendant. In that proceeding, Celotex asserted that the supersedeas bonds were of no useful benefit to the Debtors and

maintained that any payment of bond premiums after the Court issued the injunction on October 17, 1990, was unwarranted.

\*3 On March 2, 1998, Plaintiff learned that the Debtors and Defendant were advancing arguments that directly and materially affected Plaintiff's rights and interests under the General Agreement of Indemnity and the Security Agreement. In particular, Plaintiff learned that one of the arguments advanced by the Debtors was that Plaintiff, not Celotex, was contractually obligated to pay post-petition premiums on the supersedeas bonds. Plaintiff also learned that Defendant was asserting that both Celotex and Plaintiff were fully responsible for paying the post-petition premiums. Both Defendant and Celotex argue that Plaintiff's obligation to pay the post-petition premiums arises from the dissolution of JWC. Plaintiff also learned that Celotex claimed entitlement to all accrued interest on the collateral monies provided to Defendant in accordance with the Security Agreement. As a result of this knowledge, Plaintiff filed a separate adversary proceedings in the Bankruptcy Court against Defendant, Celotex, and others.

On or about October 2, 1998, Defendant settled its supersedeas bond claim against Celotex, which included claims for unpaid bond premiums, interest, and attorney's fees. Under the terms of this settlement, Defendant released Celotex from all claims relating to the supersedeas bonds. On October 10, 1998, the Bankruptcy Court dismissed Plaintiff's complaint.

Count I of Plaintiff's Amended Complaint, in the instant action, seeks declaratory judgment on all unpaid bond premiums. Plaintiff states that declaratory judgment is warranted due to the Bankruptcy Court's injunction order staying all litigation involving the Debtors. Count II seeks declaratory judgment on Plaintiff's secondary liability due to the settlement between Defendant and Celotex.

On March 10, 1998, Defendant filed a Motion to Stay or Dismiss the instant cause of action, Case No. 98-2532-CIV-T-17E, in favor of an action that was commenced in the United States District Court for the Southern District of New York, Case No. 98-Civ-8770 (WHP), which involved the same parties and issues as the instant cause of action. Defendant asserted that this Court should abandon the "first-filed rule" because: 1) Plaintiff and Defendant each filed complaints less than one day apart in this Court and the United States District Court for the Southern District of New York; 2) Defendant filed its action in the Southern District of New York seeking monetary damages less than one

full day after Plaintiff filed its complaint seeking declaratory relief in this Court; 3) Plaintiff was able to file its action in this Court earlier because both Plaintiff's counsel and Defendant's counsel were required to appear before the United States Bankruptcy Court for the Middle District of Florida; 4) even though Plaintiff filed its complaint first, Defendant served its complaint first, thus requiring Plaintiff to move or answer Defendant's complaint before Defendant was required to answer or move in response to Plaintiff's complaint; 5) on February 1, 1999, Plaintiff requested that the United States District Court for the Southern District of New York rule on Plaintiff's Motion to Dismiss the New York action for lack of personal jurisdiction, or alternatively, stay the New York action; 6) on February 18, 1999, a pre-motion conference was held in the New York action; 7) because Defendant is the natural plaintiff in the dispute, as Defendant seeks to gain monetary damages in the New York action, while Plaintiff only seeks declaratory relief; and 8) because New York, where the transaction was negotiated and carried out, is the more appropriate forum.

\*4 On or about March 5, 1999, Plaintiff filed a Motion to Dismiss or Stay the New York action, which was denied on May 4, 1999. On approximately May 21, 1999, Plaintiff filed a Motion for Reconsideration or Reargument of its Motion to Stay the New York action. Plaintiff also seeks certification of the Order issued by the United States District Court for the Southern District of New York for purposes of appeal.

## II. DISCUSSION

Defendant's Motion to Transfer requests transfer of the instant action pursuant to [28 U.S.C. § 1404\(a\)](#), which states: "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." A district court may transfer any civil action, under [28 U.S.C. § 1404\(a\)](#), to any district where the action could have been brought for: 1) the convenience of the parties; 2) convenience of the witnesses; and 3) the interests of justice. See [American Aircraft Sales International, Inc. v. Airwarsaw, Inc.](#), 1999 WL 503965,\*3 (M.D.Fla.1999) (citing [Robinson v. Giarmarco & Bill, P.C.](#), 74 F.3d 253, 260 (11 th Cir.1996)). The Eleventh Circuit has determined that a court should be somewhat restrictive in transferring actions, stating that "[t]he plaintiff's choice of forum should not be disturbed unless the movant can show that it is clearly outweighed by other considerations." See *id.*

The standard for transfer under 1404(a) allows the trial court to exercise broad discretion. See [American Aircraft Sales International, Inc.](#), 1999 WL 503965,\*3 (citing [Codex Corp. v. Milgo Elec. Corp.](#), 553 F.2d 735, 737 (1 st Cir.1977)). Congress authorized courts to transfer the venue of a case in order to avoid unnecessary inconvenience to the litigants, witnesses, and the public and to conserve time, energy, and money. See [Van Dusen v. Barrack](#), 376 U.S. 612, 616 (1964).

The movant has the burden of persuading the trial court that the transfer is appropriate and should be granted. [Tampa Bay Storm, Inc. v. Arena Football League, Inc.](#), 932 F.Supp. 281, 282 (M.D.Fla.1996). In deciding whether a change in forum is warranted, the Court must consider the following factors: 1) Plaintiff's initial choice of forum; 2) convenience of the parties and witnesses; 3) relative ease of access to sources of proof; 4) availability of compulsory process for witnesses; 5) location of relevant evidence; 6) financial ability to bear the cost of the change; 7) and all other practical problems that make trial of the case easy, expeditious, and inexpensive. See [Tampa Bay Storm, Inc.](#), 932 F.Supp. at 282.

In the case at hand, there is no question that this action could have been brought in the Southern District of New York and Plaintiff has not suggested otherwise, although the Court does recognize that Plaintiff has suggested otherwise in previous filings. Therefore, the Court will move beyond a discussion of whether this action could have been brought in the Southern District of New York, and decide whether this action should be transferred to the Southern District of New York. After considering the issues surrounding the proposed transfer of this case, the Court finds that a transfer of this action to the United States District Court for the Southern District of New York is appropriate.

\*5 Throughout the record of this case, Plaintiff relies on the "first-filed rule," which states that when parties have instituted competing or parallel litigation in separate courts, the court initially having jurisdiction should hear the case. See [Allstate Insurance Company v. Clohessy](#), 9 F.Supp.2d 1314, 1315-16 (M.D.Fla.1998). However, it appears that Plaintiff has completely failed to recognize the primary purpose of the firstfiled rule, which is to conserve judicial resources and avoid conflicting rulings. See *id.* While the Eleventh Circuit does follow the first-filed rule, a court may depart from the firstfiled rule in certain compelling circumstances. See *id.* One such

compelling circumstance is where one party, on notice of a potential lawsuit, files a declaratory judgment action in its home forum. *See id.*; [Serco Serv. Co. v. Kelley Co., Inc.](#), 51 F.3d 1037, 1039 (Fed.Cir.1995); [Northwest Airlines, Inc. v. American Airlines, Inc.](#), 989 F.2d 1002, 1007 (8 th Cir.1993); [Tempco Elec. Heater Corp. v. Omega Eng'g Inc.](#), 819 F.2d 746, 749-750 (7 th Cir.1987). However, abandonment of the first-filed rule is not automatic; the court is instructed to use its discretion when making the decision to abandon the first-filed rule. *See* [Clohessy](#), 9 F.Supp.2d at 1316. Even where compelling circumstances are present, "the first-filed action is preferred, even if it is declaratory, unless consideration of judicial and litigant economy, and the just effective disposition of disputes, require otherwise." *Id.* (quoting [Serco](#), 51 F.3d at 1039).

This Court recognizes that it is well accepted that the forum where an action is first filed is given priority over subsequent actions, unless there is a showing of a balance of convenience in favor of the second forum or there are special circumstances which justify giving the priority to the second action. *See* [Clohessy](#), 9 F.Supp.2d at 1316. These principles are consistent with the doctrine of federal comity which requires federal district courts to refrain from interfering with each others' affairs in order to avoid duplication of judicial resources and conflicting decisions. *See id.* (citing [Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.](#), 342 U.S. 180, 185-86 (1952); [West Gulf Maritime Assoc. v. ILA Deep Sea Local 24, South Atlantic & Gulf Coast Dist. of the ILA, AFL-CIO](#), 751 F.2d 721, 728 (5 th Cir.1985)).

The United States District Court for the Southern District of New York has already addressed the application of the first-filed rule to this dispute. The Southern District of New York has also spent valuable time considering issues presented in the New York action. It would be a considerable waste of judicial resources for this Court to strictly adhere to the first-filed rule. This is especially true after consideration of the facts surrounding both the New York and the Florida cases. The evidence sufficiently establishes that Plaintiff filed the instant declaratory judgment action while engaging in a "race to the courthouse." This cause of action was filed less than one day before the New York action was filed. Moreover, Plaintiff was served in the New York cause of action first and was, therefore, required to respond before a response was required in the Florida cause of action. On the date that the Florida cause of action was filed, both Plaintiff's and Defendant's attorneys were required to appear before the United States

Bankruptcy Court in the Middle District of Florida. The circumstances encountered in the United States Bankruptcy Court led to the "race" to file a cause of action in the district court. As Plaintiff was in its home territory, Plaintiff was able to file the instant action hours before Defendant could file in New York. Plaintiff seeks a declaratory judgment, while Defendant, the plaintiff in the New York cause of action, seeks monetary damages. All of these facts and others contained in the record set forth sufficient factual justification for departing from the first-filed rule. Thus, Plaintiff's repeated reliance on the first-filed rule is misplaced.

\*6 Plaintiff also suggests that this Court should refrain from transferring this case to the Southern District of New York because Defendant has not sufficiently satisfied the requirements of [28 U.S.C. § 1404\(a\)](#). The Court has completely reviewed the records of this case, relevant case law, and the arguments of counsel, and finds, contrary to Plaintiff's assertions, that transfer is appropriate.

The Court is not strictly required to follow the first-filed rule and in light of the circumstances surrounding both this case and the New York case, departure from the first-filed rule is appropriate. As the Court has previously discussed the reasoning behind this departure, the Court will refrain from further discussion on departure from the first-filed rule. The Court's departure from the first-filed rule is not the only reason the Court relies on. The Court specifically has reviewed the exhibits and affidavits submitted by both parties and finds that considerations, such as: 1) the convenience of the parties and witnesses; 2) Plaintiff's initial choice of forum and the circumstances surrounding that choice; 3) ease of access to sources of proof; 4) availability of compulsory process for witnesses; and 5) the location of relevant witnesses all warrant transfer of this case to the Southern District of New York. The Court also specifically considered the practical problem of expeditiously and inexpensively resolving the issues presented.

The Court also notes Plaintiff's dissatisfaction with the Order denying Plaintiff's Motion to Dismiss the New York Action. Plaintiff states that: 1) the District Court for the Southern District of New York was not the proper court to resolve the first-filed issue; 2) the District Court for the Southern District of New York was not presented with sufficient evidence to determine that "[o]ther considerations, such as the convenience of the parties and witnesses, ease of access to sources of proof, and availability of process

to compel unwilling witnesses, militate in favor of resolving the parties' dispute in New York."; 3) Defendant presented "virtually" no details of any witness' knowledge; and 4) the District Court for the Southern District of New York was unaware of other evidence showing that the Middle District of Florida is appropriate because "[Plaintiff] did not present any evidence to the New York Court with respect to the first-filed rule or its exceptions. If [Plaintiff] had known that the New York Court would disregard the prevailing authority and proceed to determine the applicability of any exceptions to the first-filed rule, [Plaintiff] would have submitted the facts referenced herein which show that the Middle District of Florida is the appropriate forum for this action." However, the Court will not address Plaintiff's dissatisfaction with the United States District Court for the Southern District of New York, more than to state, once again, that the transfer of this action to the United States District Court for the Southern District of New York is appropriate. Accordingly, it is

**\*7 ORDERED** that Defendant's, National Union Fire Insurance Company of Pittsburgh, PA, Motion to Transfer this Action to the United States District Court for the Southern District of New York, pursuant to [28 U.S.C. § 1404\(a\)](#), be granted and the Clerk of the Court be directed to transfer this case for consideration with Case No. 98-Civ-8770 (WHP).

1999 WL 781808, 1999 WL 781808 (M.D.Fla.), 13 Fla. L. Weekly Fed. D 25

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