Lacrosse Unlimited, Inc. v. California Lacrosse, Inc.

2017 | Cited 0 times | E.D. New York | February 3, 2017

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

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16-CV-6685 (JFB) (GRB) _____ LACROSSE UNLIMITED, INC., Plaintiff,

VERSUS CALIFORNIA LACROSSE, INC., Defendant.

_____ MEMORANDUM AND ORDER

February 3, 2017 _____ JOSEPH F. BIANCO, District Judge:

Plaintiff Lacrosse Unlimited, Inc. brought an action, setting out claims for, inter alia, fraudulent inducement and breach of contract, against defendant California La- crosse, Inc. in New York state court. Defend- ant removed the case to this court and now moves, pursuant to 28 U.S.C. § 1404(a), to transfer this case to the United States District Court for the Southern District of California.

For the reasons set forth below, the Court grants defendant's motion to transfer venue. Specifically, the Court finds in its discretion that, because defendant filed a lawsuit con- cerning the same subject matter against plain- tiff in the Southern District of California be- fore plaintiff brought this action, the " first- filed rule" warrants transfer of this case. See Employers Ins. of Wausau v. Fox Entertain- ment Group, Inc., 522 F.3d 271, 274–275 (2d Cir. 2008) ("As a general rule, ' [w]here there are two competing lawsuits, the first suit

should have priority.'" (quoting First City Nat' l Bank & Trust Co. v. Simmons, 878 F.2d 76, 79 (2d Cir. 1989) (alteration in origi- nal))). In particular, defendant' s California lawsuit seeks money damages rather than a declaratory judgment, and plaintiff did not di- rectly threaten litigation prior to its filing. Therefore, the "anticipa tory lawsuit" excep- tion to the first-filed rule does not apply. See id. Moreover, plaintiff has identified no other special circumstances that make New York so convenient as to give the second-filed ac- tion priority. See id. Accordingly, defend- ant's motion to transfer the case to the United States District Court for the Southern District of California is granted under Section 1404(a).

I. BACKGROUND

A. Facts The following facts are taken from plain- tiff's Amended Complaint (ECF No. 11 (" Pl.'s Compl.")), defendant's complaint in the California proceeding (see Decl. of Ed- ward J. O'Connor i n Support of Def.'s Mot. to Transfer Venue ("O'Connor Decl.") , Ex. 5, ECF No. 10-2 ("Def.'s Compl.")), and the parties' submissions in connection with de- fendant' s motion to transfer venue.

On September 1, 2014, the parties entered into an Asset Purchase Agreement ("APA") with plaintiff agreeing to purchase various assets, including eight retail stores, an inter- net-based lacrosse retail sales business, and plaintiff's oper ations for retail sales made di- rectly to lacrosse organizations ("Team Sales") , from defendant. (Pl.'s Compl. ¶¶ 13–14; Def.'s Compl. ¶ 5 .) Of the eight retail stores, six were located in California, with three of those in San Diego. (See Decl. of Steve Sepeta in Support of Def.'s Mot. to Transfer Venue ("Sepeta Decl."), Ex. 1 at 4.) The APA obligated plaintiff to pay defendant (1) an initial amount of $333,553 and (2) a percentage of the gross revenues related to Team Sales over a three-year period after the APA closed, to be made each quarter (the "royalty payments") . (Pl.'s Compl. ¶ 15; Def.'s Compl. ¶ 5.) Plaintiff was also to sub- mit quarterly reports detailing its revenues, complete with copies of general ledger activ- ities, within fifteen days of the end of each quarter (the "Quarterly R eports"). (Def.'s Compl. ¶ 5.) In addition to the assets outlined above, plaintiff also agreed to purchase $800,000 of lacrosse apparel bearing the brand name "Adrenaline" over a three -year period. (Pl.'s Compl. ¶ 18; APA § 2(e)(ii).) Defendant also agreed not to conduct retail sales operations within thirty miles of the stores subject to the APA (the "non- compete provision") . (See APA § 9.)

A contractual dispute arose between the parties in the summer of 2015 when defend- ant allegedly failed to transfer some of the as- sets. (See Decl. of Eric Mueller in Opp'n. to Def.'s Mot. to Transfer Venue, ECF No. 18 ("Mueller Decl."), ¶ 7). In response to this

alleged failure, plaintiff stopped making roy- alty payments. (Id. ¶ 9; Def.'s Compl. ¶¶ 7– 9.) According to plaintiff, around the time it stopped making payments, its president, Joe DeSimone, "told [defendant] that something needed to be done about [defendant's alleged violations of the agreement,] otherwise we would have to go to court [sic]." (Decl. of Joe DeSimone in Opp'n to Def.'s Mot. to Transfer Venue, ECF No. 19 ("De Simone Decl."), ¶ 16). The parties then engaged in extensive settlement negotiations to resolve the matter. (Mueller Decl. ¶ 11; Sepeta Decl. ¶ 4.) After several months without a resolu- tion, defense counsel sent plaintiff a letter containing a "Notice o f Breach of the APA, a Demand for Payment and a Demand for In- spection" on July 6, 2016, in which defendant notified plaintiff that it "need[ed] to see sub- stantial progress toward resolution by July 15, 2016" but still "reserve[d] all rights and remedies." (O'Connor Decl., Ex. 3.) Later, on August 5, 2016, plaintiff's counsel asserts that he mentioned in a phone call with de- fense counsel that plaintiff "had serious claims it would pursue against [defendant] related to team sales if the matter was not re- solved soon." (Mueller Decl. ¶ 15; see also O'Connor Decl. ¶ 4.)

The parties ultimately could not resolve the matter, and, on August 19, 2016, defend- ant filed an action in the District Court for the Southern District of California, asserting claims for breach of

contract, specific perfor- mance, accounting, conversion, and declara- tory relief. (See Def.'s Compl.) Defendant served plaintiff with the complaint on Octo- ber 18, 2016 (O'Connor Decl., Ex. 10), and plaintiff filed an answer and counterclaim on November 7, 2016, raising claims of fraudu- lent inducement, breach of the APA's non- compete provision, breach of the APA's de- livery provisions, account stated for failure to pay an invoice, and indemnification. (Id., Ex. 12.) The case is currently pending before District Judge Cathy Ann Bencivengo and Magistrate Judge Jill L. Burkhardt of the Southern District of California.

B. Procedural History Plaintiff commenced this action on Octo- ber 31, 2016—prior to filing its answer and counterclaim in the California case—in the Suffolk County Supreme Court, raising claims identical to those in its California counterclaim. (Sepeta Decl., Ex. 11.) De- fendant removed the case to this Court, as- serting diversity jurisdiction, on December 2, 2016. (ECF No. 1.) Defendant filed its mo- tion to change venue on December 22, 2016 (ECF No. 10), 1

plaintiff filed its opposition on January 6, 2017 (ECF No. 17), and de- fendant filed a reply on January 13, 2017 (ECF No. 20). Oral argument took place on January 23, 2017. The Court has fully con- sidered the submissions of the parties.

II. SECTION 1404(A) MOTIONS Under 28 U.S.C. § 1404(a), "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may trans- fer any civil action to any other district or di- vision where it might have been brought." In general, "[d]istrict courts have broad discre- tion in making determinations of conven- ience under Section 1404(a) and notions of convenience and fairness are considered on a case-by-case basis." D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 106 (2d Cir. 2006); accord Publicker Indus. Inc. v. United States (In re Cuyahoga Equip. Corp.), 980 F.2d 110, 117 (2d Cir. 1992). In determining whether to transfer venue, courts consider (1) whether the action could have been brought in the proposed forum; and (2) whether the transfer would "promote the con- venience of parties and witnesses and would

1 Defendant also filed a motion for a preliminary in- junction on December 23, 2016 (ECF No. 23), but the

be in the interests of justice." Clarendon Nat'l Ins. Co. v. Pascual , No. 99-CV-10840 (JGK) (AJP), 2000 WL 270862, at *2 (S.D.N.Y. Mar. 13, 2000) (quoting Coker v. Bank of Am., 984 F. Supp. 757, 764 (S.D.N.Y. 1997) (other citations omitted)). Ordinarily, "[a] motion to transfer under § 1404(a) . . . calls on the district court to weigh in the balance a number of case-spe- cific factors," Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988), including: "' (1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of ac- cess to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel the attendance of unwilling witnesses, and (7) the relative means of the parties,"' Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 832 (S.D.N.Y. 2012) (quoting N.Y. Marine and Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102, 112 (2d Cir. 2010)).

Nevertheless, "[w]here there are two competing lawsuits, the first suit should have priority." Employers Ins. of Wausau, 522 F.3d at 274–75 (quoting Simmons , 878 F.2d at 79) (alteration in original). The Second Circuit has " recognized only two exceptions to the first-filed rule: (1) where the 'balance of convenience' favors the second- filed ac- tion, and (2) where ' special circumstances' warrant giving priority to the second suit." Id. (citations omitted). The most notable "special circumstance" under the second ex- ception is " where the first-filed lawsuit is an improper anticipatory declaratory judgment action." Id. For a first-filed suit to be con- sidered "anticipatory," "it must be filed in re- sponse to a direct threat of litigation that gives specific warnings as to deadlines and

briefing on that motion was stayed pending the out- come of this motion (ECF, Scheduling Order dated January 23, 2017). subsequent legal action." Id. In Federal In- surance Co. v. May Department Stores Co., 808 F. Supp. 347, 350 (S.D.N.Y. 1992), for example, May Department Stores, an insur- ance policyholder, " wrote to Federal [Insur- ance Company] informing it that if it did not satisfy May' s claim under the Policy by May 15, 1992, May planned to sue on the Policy." Federal brought suit for declaratory judgment on May 11, 1992, and the court held that the action qualified as a "special circumstance[]" warranting departure from the first-filed rule because it was filed "immediately after re- ceiving notice of planned suit from the other party." Id.

By contrast, in Employers Insurance of Wausau, the Second Circuit held that a suit by insurers was not "anticipatory." 522 F.3d at 276–77. In that case, insurer s brought an action against various media company poli- cyholders, seeking a declaratory judgment that the insurers had no obligation under a se- ries of policies to provide coverage in con- nection with a copyright-infringement law- suit filed against the policyholders. Id. at 273–74. After informing the insurers of the pending copyright lawsuit, the policyholders issued "requests for information," "coverage requests," and "other inquiries." Id. at 276. They eventually retained "coverage counsel," and "the general tenor of the communications leading up to the [insurer's] action" indicated that "litigation was clearly on the horizon." Id. at 277. Nevertheless, " there was no notice letter or other communication conveying a specific threat of litigation" by the policy- holders. Id. As such, the Second Circuit concluded that the insurers' declaratory judg- ment action "was not improperly anticipa- tory" because "it was not a response to a di- rect threat of litigation." Id. It, therefore, held that the district court erred in departing from the first-filed rule on this basis. Id. at 278.

III. DISCUSSION As set forth below, defendant's lawsuit in California plainly predates plaintiff's instant action, and plaintiff has failed to establish ei- ther that "the balance of convenience" favors litigation in this district or that "special cir- cumstances" exist warranting departure from the first-filed rule. See id. at 274–75. Be- cause neither exception to the first-filed rule applies, defendant's motion to transfer venue is granted.

As a threshold matter, the Court con- cludes that plaintiff has not shown that the balance of convenience so favors New York as to overrule the first-filed rule. All the claims in the dispute arise

from the parties' execution of the APA and fulfilment of their obligations thereunder. The APA closed in California, and 75% of the brick-and-mortar stores subject to it are located there. Furthermore, many of the salespeople involved with the business plaintiff purchased reside in Cal- ifornia, as does the individual who allegedly fraudulently induced plaintiff to enter into the contract. Finally, plaintiff's claim for breach of the non-compete provision turns on the op- eration of several of the defendant's Califor- nia businesses. Thus, the second, third, and fifth convenience factors—convenience of witnesses, relative ease of access to sources of proof, and the locus of operative facts, re- spectively— are, at the very least, neutral. Meanwhile, the remaining factors are plainly neutral, given that plaintiff's choice of forum is offset by defendant' s (since defendant filed first), neither party has identified any unwill- ing witnesses, and there is no major disparity in the means of the parties. Indeed, plaintiff admitted at oral argument that, at best, the convenience factors are neutral between the two locations. Thus, this exception does not apply. See id. at 275 (" [A]n even or incon- clusively tilted 'balance of convenience' would ordinarily support application of the first-filed rule." (quoting Columbia Pictures Indus., Inc. v. Schneider, 435 F. Supp. 742, 751 (S.D.N.Y.1977))).

Moreover, plaintiff has not established that a "special circumstance[]" exists to jus- tify departure from the first-filed rule. Plain- tiff asserts that defendant's California action constitutes an "anticipatory action," and thus the first-filed rule does not apply. For the fol- lowing reasons, the Court disagrees.

First, the chief marker of an "anticipatory action" for purposes of this exception is relief sought in the form of a declaratory judgment. See, e.g., id. at 275–77; Federal Ins. Co., 808 F. Supp. at 350. Defendant's California law- suit, however, seeks other forms of relief, in- cluding monetary damages. (See Def.'s Compl.) Thus, this is not a case where " fed- eral declaratory judgment is . . . a prize to the winner of a race to the courthouses." Em- ployers Ins. of Wausau, 522 F.3d at 275.

Second, plaintiff has not established that it made a "direct threat of litigation." Id. at 277 (emphasis added). Plaintiff here only made vague assertions that it " would have to go to court" (DeSimone Decl. ¶ 16), or "would pursue [its serious claims] against [defendant] . . . if the matter was not resolved soon" (Mueller Decl. ¶ 15; see also O'Co n- nor Decl. ¶ 4.). These statements are a far cry from the direct, specific threat by the policy- holder in Federal Insurance Co., which set a specific date by which the insurer was to re- spond before the policyholder would file suit.

2 Plaintiff's president vaguely asserts that, at some point around the time they stopped making payments, he "told [defendant] that something needed to be done about [defendant's alleged violations of the agree- ment] otherwise we would have to go to court [sic]." (DeSimone Decl., ¶ 16.) Plaintiff has not, however, specified precisely when this communication occurred or to whom it was made. Nor has it presented any ev- idence to corroborate this statement. In any event, as noted, the content of the communication is too indefi- nite to constitute a "direct threat of litigation" under

See Federal Ins. Co., 808 F. Supp. at 350. In- stead, like the communications in Employers Insurance Co., the "general tenor" of plain- tiff's communications here simply indicated that "litigation was clearly on the horizon," which is not sufficient to suspend the first- filed rule, absent a "notice letter or other communication conveying a specific threat of litigation." 522 F.3d at 277 (emphasis added). In fact, the communication that comes closest to a direct threat of litigation under this body of law was the July 6, 2016 letter from defense counsel to plaintiff's counsel demanding " substantial progress to- ward resolution by July 15, 2016." (O'Con- nor Decl., Ex. 3.) By contrast, plaintiff has not identified a specific communication that mentioned the possibility of a lawsuit prior to receiving the letter. 2

Indeed, the only spe- cific communication that plaintiff has identi- fied raising the possibility of litigation—the August 5, 2016 telephone conversation be- tween counsel for both parties—occurred af- ter defendant sent this letter. (See Mueller Decl. ¶ 15.) The fact that defendant engaged in settlement negotiations after sending the letter and before filing suit does not render that lawsuit anticipatory.

In sum, plaintiff has not established that the California action is an "anticipatory ac- tion" and, correspondingly, has failed to show a "special circumstance" sufficient to overcome the first-filed rule.

Employers Ins. of Wausau, 522 F.3d at 275, and Fed- eral Ins. Co., 808 F. Supp. at 350. Moreover, plaintiff asserts that the communication took place around the time of the stoppage of the royalty payments, which occurred in the summer of 2015—approximately one year before defendant eventually filed suit. Thus, de- fendant did not rush to the courthouse with an antici- patory lawsuit in response to this vague assertion by plaintiff. IV. CONCLUSION For these reasons, the Court finds that the first-filed rule warrants granting defendant's motion to transfer the proceedings. The Clerk of the Court is directed to transfer the case to the United States District Court for the South- ern District of California under 28 U.S.C. § 1404(a).

SO ORDERED.

_____ JOSEPH F. BIANCO United States District Judge

Dated: February 3, 2017

Central Islip, NY

* * * Plaintiff is represented by Evangelos Michailidis and Gerard S. Catalanello, Duane Morris LLP, 1540 Broadway, New York, NY 10036. Defendant is represented by David Harrison, Harrison, Harrison & Associates, Ltd., 110 Highway 35, 2nd Floor, Red Bank, NJ 07701, and Edward J. O'Connor, Solo- mon Ward Seidenwurm & Smith, LLP, 401 B Street, Suite 1200, San Diego, CA 92101.