(Cite as: 1994 WL 608798 (Bankr.D.Vt.))

In re ST. JOHNSBURY TRUCKING CO., INC., Debtor.

The OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ST. JOHNSBURY TRUCKING

COMPANY, INC., and St. Johnsbury Trucking Company, Inc., Plaintiff,

v.

BANKERS TRUST COMPANY, as agent, Defendant.

BANKERS TRUST COMPANY, as agent, Counterclaimant,

v.

ST. JOHNSBURY TRUCKING COMPANY, INC., and William M. Clifford.

Bankruptcy No. 93-B-43136(FGC).

Adv. No. 93-1073.

United States Bankruptcy Court. D. Vermont.

Oct. 21, 1994.

C. Reis, Obuchowski & Reis, Bethel, VT, and, S.L. Chenetz, Marcus Montgomery, P.C., New York City, for Official Committee of Unsecured Creditors (Committee).

H. Berman, and J.P.S. LeShaw, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, New York City, for St. Johnsbury Trucking Co., Inc. (Debtor).

C. Platto, and G.J. Vitt, Brooks, McNally, Whittington, Platto & Vitt, Norwich, VT, and J. Pritchard, and S. Schindler, Winthrop, Stimson, Putnam & Roberts, New York City, for Bankers Trust Co. (Bank).

S. Hoort, J. Sigel, and N. Creswell, Ropes & Gray, Boston, MA, for William M. Clifford (Clifford).

MEMORANDUM OF DECISION ON BANKERS' 28 USC § 1406 MOTION TO DISMISS OR TRANSFER VENUE

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** Bankers' "Motion for an Order Pursuant to 28 USC § 1412 and Bankruptcy Rule 7087 Transferring Venue of Adversary Proceeding from the District of Vermont to the Southern District of New York" [FN1] was denied by Order of this Court entered on Jan. 5, 1994. Our Jan. 17, 1994 "Memorandum of Decision on Change of Venue Motion", 1994 WL 18686 (hereinafter "Memorandum"), set forth the reasons for our decision. We concluded there that all five counts against Bankers in this adversary proceeding were properly venued in Vermont. At the time the adversary was filed, we held, the District of Vermont was a proper venue for Count 1 under 28 USC § 1409(c) and 28 USC § 1391(b)(2). Memorandum, 1994 WL 18686 at *4. We concluded that because venue was proper as to Count 1, the remaining four counts were also properly venued in Vermont under the doctrine of pendent venue, despite the fact that they had no independent basis for venue in this district. Id., * 2, *5. Finally, we held that Bankers could not cause venue that was proper at the time of filing to become improper by taking a dive on Count 1, thereby leaving only Counts 2-5 to be determined, none of which have an independent basis for venue. Id., *4.

Bankers' new counsel now moves pursuant to 28 USC § 1406(a) for an order dismissing Counts 2-5 for lack of proper venue, or, in the alternative, transferring venue to the Southern District of New York. Bankers contends that our prior ruling was in error, and urges us to reconsider. Our second look at settled matters leaves us convinced we got it right the first time. We note first that, like Bankers' former counsel, we do not believe that § 1406(a) [FN2] provides a basis for the relief Bankers seeks. As Bankers' former counsel noted in its prior memorandum in support of the last venue motion, 28 USC § 1412, not § 1406, governs transfer of venue in core proceedings in bankruptcy. See, Bankers' Dec. 9, 1993 Memorandum, 21 n. 12; Luciano v. Maggio, 139 B.R. 572, 575 (E.D.N.Y.1992). Moreover, § 1406(a) applies only when there "is filed a case laying venue in the wrong division or district...." (Emphasis added.) Here, we have neither a flawed filing nor a case.

"Venue ... is generally determined at the time the suit is commenced." Id., at *4. At the time this adversary proceeding was filed, "Venue [was] proper in the District of Vermont ... because Count 1 fulfills the requirements of § 1409(c), which makes § 1391 available as a basis for venue." Memorandum, 1992 WL 18686 at *3. By its terms, § 1406(a) applies to a filing made in the wrong venue, which is not the case here. To hold that venue, though proper when filed, subsequently became improper because Bankers chose to take a dive on Count 1 "would permit Bankers to manipulate Plaintiffs' choice of forum." Id., at *4.

The fact that this is a "proceeding," not a "case" also makes § 1406(a) inapplicable. In our

prior opinion we reviewed the varied phrasings Congress used in the venue statutes to distinguish among the various forms of suit. We concluded that "the distinctive phrasings which appear in the various venue statutes reviewed ... were intended by Congress." Id., at *3. A "case" is "different and distinct", id., from a "proceeding." The difference is that "anything that occurs within a case is a proceeding," including "contested matters, adversary proceedings, [and] any disputes related to administrative matters." H.R.Rep. 95-595, 95th Cong., 1st Sess. (1977), reprinted in 2 App. Collier on Bankruptcy, 445 (15th ed. 1994). Accordingly, we hold that 28 USC § 1406(a) does not authorize transfer of this adversary proceeding to another venue.

***2** Bankers also argues that we erred in ruling that the doctrine of pendent venue permitted Counts 2 through 5 to be heard in Vermont. Bankers concedes that we may, in our

sound discretion, exercise venue over an improperly venued claim (1) if it shares a common nucleus of operative fact ... with a properly venued claim and (2) if appending the improperly venued claim to a properly venued claim would further the policy goals of judicial economy, convenience, avoidance of piecemeal litigation and fairness which underlie the doctrine.

Bankers' Memo, 14-15. We erred, Bankers says, because no common nucleus of operative fact links Count 1 and the remaining counts, and no policy goals are furthered. Our Memorandum did not specifically address either criterion in connection with Bankers' claim that venue was improper. We believed, based on the parties' arguments and pleadings that "[b]oth sides agree that if venue is proper as to [Count 1], we may also determine the remaining counts under the doctrine of pendant (sic) venue." [FN3] Memorandum, 1992 WL 18686 at *2. Although we never addressed the issue of whether a common nucleus of operative fact linked Count 1 with the remaining counts, we did address the policy issues in connection with Bankers' request that venue be transferred to the Southern District of New York. Finding "that the balance tips decidedly in favor of Plaintiffs," we denied Bankers' motion for transfer of venue. Id., at *5. We believe the specific reasons set out in our Memorandum are quite sufficient to meet the second criteria for the doctrine of pendent venue, and, indeed, as we earlier ruled, would support granting of a § 1412 motion to transfer venue to Vermont had the case originally been filed in the Southern District of New York. Id., at *5-*6. The early determination of Count 1, we believe, is a concrete example of the Vermont venue's salutary effect on judicial economy. We believe the dispute would have been hotly contested indeed had the adversary proceeding been filed in any other district.

We also believe that Count 1 and the remaining counts share a common nucleus of operative fact. All five counts arise out of and relate to a common set of documents. The collection account at issue in Count 1 was, in Bankers' own characterization, "an integral component of a complex cash management system that allowed St. Johnsbury to borrow and repay working capital funds on a daily basis." Bankers' December 29, 1993 Post-Hearing Reply, 11. Debtor was required to deposit the proceeds of accounts receivable at issue in Counts 2 through 5

into the collection account at issue in Count 1, and then to transfer cleared funds to Bankers to pay down the indebtedness. The collection account was thus an important piece of the system constructed by the parties to process the accounts receivable at issue in Counts 2 through 5. Count 1 alleges that, notwithstanding language which purported to give Bankers ownership of the account, the Collection Account Agreement was intended by the parties to give Bankers merely a collateral assignment of St. Johnsbury's interest in the account, and that "the parties to the Collection Account Agreement so conducted themselves at all times since its execution."

***3** The evidence of the parties' conduct relating to the bank account will also inform two other issues which have yet to be decided in this adversary proceeding. First, it impacts choice of law. We decided at an October 19, 1994, hearing in this matter that federal choice of law principles should be applied to determine which state's law governs the trial of this matter. Thus, the collection account and the parties' conduct with respect to it are among the contacts to be considered in determining which state's law is most appropriate. Koreag, Controle et Revision v. Refco F/X Associates, Inc. (In re Koreag, Controle et Revision), 961 F.2d 341, 350 (2d Cir.1992), cert. den., 113 S.Ct. 188 (1992). Second, the parties conduct and the records relating to the collection account will shed light on whether the accounts receivable records maintained in Vermont were the "controlling records." See, 9A VSA § 9-103 Comment 2. Thus, we believe that all five counts share a common nucleus of operative fact, which began with a common paper pedigree and continued in the parties' later conduct in transforming Debtor's accounts receivables into payments to Bank. Bankers' capitulation on Count 1 does not erase that common core of shared fact.

Accordingly, we reaffirm our prior holding that the District of Vermont is a proper venue for this adversary proceeding.

FN1. Our subject matter jurisdiction over this controversy arises under 28 USC § 1334 (b) and the General Reference to this Court under Part V of the Local District Court Rules for the District of Vermont. This is a core matter under 28 USC §§ 157(b)(2)(A) and (K).

FN2. Section 1406(a) provides:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Emphasis added.

FN3. In prosecuting this motion, Bankers argues vigorously that no such agreement was ever entered into by the parties. We acknowledge for the record that we are

unaware of and did not intend to suggest that the parties had formally stipulated that venue over all counts was proper under the doctrine of pendent venue if venue was proper as to Count 1. Our characterization of the parties as having "agreed" was based on the arguments made by the parties in their pleadings. More specifically, battle was joined principally on the issue of whether Count 1 was properly filed. The parties virtually ignored the issue of whether pendent jurisdiction over the remaining counts was appropriate if Count 1 was properly venued. Upon review of the earlier pleadings, however, it is clear that Bankers did argue that Count 1 was unrelated to the other counts. See, Bankers' December 29, 1993 Post-Hearing Reply, 14 ("The Collection Account Agreement and Bankers' ownership or non-ownership of the Bank Account is utterly irrelevant to the enforceability of Bankers' security interest in the Accounts."). Because Bankers did indeed raise the issue, we should have addressed it then, and do so now.

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