UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GUARDIAN AUTO GLASS, LLC,

Plaintiff,

Case No. 12-11813
Honorable Denise Page Hood

v.

KEN STAPLES, JR.,

Defendant.
_____/

ORDER GRANTING MOTION TO TRANSFER VENUE TO THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA AND DENYING MOTION FOR CONTEMPT

I. BACKGROUND

On April 23, 2012, Defendant Ken Staples, Jr. ("Staples") removed the instant action from the Oakland County Circuit Court, State of Michigan. Plaintiff Guardian Auto Glass, LLC ("Guardian") filed a Complaint on April 4, 2012 at 3:23 p.m. against Staples alleging two counts: Injunctive Relief (Count I) and Breach of Contract (Count II) (*Guardian v. Staples*, Case No. 12-11813 (E.D. Mich.)). There are two other related cases involving the same facts. One case was filed a few hours earlier than this case on April 4, 2012 at 12:15 p.m. before the Circuit Court of Fairfax County, Virginia by Staples for declaratory judgment against Guardian, which was removed by Guardian to the Eastern District of Virginia on April 27, 2012. (*Staples v. Guardian*, Case No. 12-00477 (E.D. Va.)) The other case was filed on April 9, 2012 by Glass America, Inc. against Guardian for declaratory judgment before the Circuit Court of Fairfax County, Virginia, which was removed by Guardian to the Eastern District of Virginia on . (*Glass America v. Guardian*, Case No. 12-00484 (E.D. Va.)) In the two-related cases in the Eastern District of Michigan, Guardian filed Motions to Dismiss arguing that the instant case before this Court will address all legal and factual

issues raised in the two suits filed in Virginia. The court in Virginia denied without prejudice the motions to dismiss and stayed the case pending this Court's resolution of the instant motion.

The Complaint before this Court alleges that Staples is a former employee of Guardian. (Comp., ¶ 1) Guardian is a provider of auto glass replacements and windshield chip repairs. (Comp., ¶ 7) Staples was hired by Guardian on September 21, 2009 as an Account Manager in the Ashland, Virginia market. (Comp., ¶ 8)

Guardian invested substantial time, effort, capital and other resources in developing and acquiring valuable competitive information and data concerning the Ashland, Virginia area's auto glass replacement business. (Comp., ¶ 9) Guardian took measures to preserve the confidentiality of its confidential and proprietary information by requiring all sales representatives and managers to execute confidentiality, non-solicitation, and non-compete agreements and designing and implementing security and other measures that have restricted access to the confidential and proprietary information on a need to know basis. (Comp., ¶ 9)

As a condition of continued employment with Guardian, Staples entered into and voluntarily agreed to be bound by an Invention Disclosure, Confidentiality, and Non-Competition Agreement ("Agreement") on November 11, 2010. The Agreement include provisions precluding Staples from: disclosing or using confidential information; competing with Guardian within a hundred mile radius of Guardian's Ashland, Virginia location for six months following termination; and soliciting Guardian's customers or employees. (Comp., ¶ 11)

On March 27, 2012, Staples voluntarily resigned his employment with Guardian, giving Guardian assurances that he would comply with the terms of the Agreement. (Comp., ¶ 18) Guardian was notified on March 30, 2012 by Michael Barry ("Barry"), Chief Executive Officer of

Glass America, a direct competitor of Guardian, that Staples would be commencing employment with Glass America on April 2, 2012. (Comp., ¶ 19) Barry indicated to Guardian that he did not believe the covenant to compete was enforceable against Staples due to alleged business practices that have nothing to do with the enforceability of the Agreement under Michigan law. (Comp., ¶ 19) Guardian's counsel immediately notified Staples in writing on April 2, 2012 of Staples' continuing obligations to Guardian under the Agreement. (Comp., ¶ 20) The three actions noted above were thereafter filed.

This matter is now before the Court on Staples' Motion to Transfer under Fed. R. Civ. P. Rule 1404 and Guardian's Motion for Contempt. Responses, replies and surreplies have been filed. A hearing was held on the matter.

II. ANALYSIS

A. Defendant's Motion to Transfer Venue

1. Agreement

Staples seeks to transfer this action to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses, because the alleged breach of contract and injury occurred in Virginia and a prior action by Staples was filed in Virginia. Guardian asserts that the forum selection clause in the Agreement provides that the Agreement is governed by the laws of the State of Michigan and that any legal proceeding in connection with the enforcement of the Agreement may be brought in any of the courts in Michigan, citing paragraph 11 of the Agreement:

> That this Invention Disclosure and Confidentiality Agreement will be governed, construed and interpreted to the laws of the State of Michigan and that any legal proceeding in connection with the enforcement of this Agreement may be brought in any of the courts

> of the State of Michigan and in any of the courts of the United States of America in the State of Michigan. I hereby irrevocably waive any objection which I might now or hereafter have to the above mentioned courts as the forum to hear and determine any suit, action or proceeding, and to settle any disputes, which may arise out of or in connection with this Agreement and I agree not to claim that any such court is not a convenient or appropriate forum.

(Agreement, ¶ 11)

2. Law

A civil action may be transferred from one district court to another pursuant 28 U.S.C. § 1404:

> (a) For the convenience of the 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); *Verve, L.L.C. v. Becton Dickinson & Co.*, No. 01-CV-74134-DT, 2002 WL 551031, at *1 (E.D. Mich. Mar. 29, 2002). Under this statute, district courts have broad discretion to transfer a case to any judicial district where it may have been brought originally. *Amphion, Inc. v. Buckeye Electric Co.*, 285 F. Supp. 2d 943, 947 (E.D. Mich. 2003).

Generally, a contractual forum-selection clause should be upheld so long as it is fair and reasonable in light of the surrounding circumstances. *M/S Bremen v. Zapata Off-Shore Co.*, 47 U.S. 1 (1972). This basic premise has been altered in the context of motions to transfer venue under 28 U.S.C. § 1404(a) by the Supreme Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988). A prior agreement between the parties concerning venue is not dispositive under § 1404(a), however the courts must consider a valid and otherwise enforceable forum-selection clause as just one of the relevant factors among many when deciding whether transfer of venue is appropriate under the statute. *Id.* at 31; *see also Kerobo v. Southwestern Clean Fuels, Corp.*, 285

F.3d 531, 537-38 (6th Cir. 2002) and *Langley v. Prudential Mortgage Capital Co., LLC*, 546 F.3d 365, 369 (6th Cir. 2008).

To determine whether to transfer a case, district courts should "weigh in the balance a number of case-specific factors." *Ricoh*, 487 U.S. at 32. The Supreme Court interpreted § 1404(a) as requiring the district court to "adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness. *Id.* at 29. An individualized assessment of the motion "encompasses consideration of the parties' private expression of their venue preferences" as set forth in a forum-selection clause, as well as "the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power." *Id.* at 29-30. The courts should consider the following factors in considering a motion under § 1404(a):

> (1) the convenience of the parties; (2) the convenience of the witnesses; (3) the location of relevant documents and relative ease of access to sources of proof; (4) the locus of the operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the cost of obtaining willing witnesses; (7) (8) the weight accorded the plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.

Overland, Inc. v. Taylor, 79 F. Supp. 2d 809, 811 (E.D. Mich. 2000)*; Audi AG v. D'Amato*, 341 F. Supp. 2d 734, 749 (2004). In all cases venue must be proper in the transferor and the transferee court under 28 U.S.C. § 1391. The defendant "bears the burden of demonstrating that fairness and practicality strongly favor the forum to which transfer is sought." *Id.*

3. Proper Venue/Choice of Forum

The first question this Court must answer is whether this action could have been brought in the Eastern District of Virginia. *Grand Kensington, LLC v. Burger King Corp.*, 81 F. Supp. 2d 834 (E.D. Mich. 2000). The venue statute, 28 U.S.C. § 1391(a) defines proper venue in a diversity case and states that a civil action may be brought only in (1) a judicial district where any defendant

resides, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought. 28 U.S.C. § 1391(a). Staples is a resident of Virginia. The Agreement was signed in Virginia. Guardian conducts business in Virginia and although Guardian asserts that its parent company's headquarters is in Michigan, the entity at issue does business in Virginia. All the actions by both parties in this case, specifically the alleged breach by Staples, occurred in Virginia. The action could have been brought in Virginia.

4. Convenience of Parties

Courts generally grant substantial deference to a plaintiff's chosen forum, especially where the plaintiff lives in his chosen jurisdiction. *Thomas v. Home Depot, U.S.A., Inc.*, 131 F. Supp. 2d 934, 937 (E.D. Mich. 2001) (citing *Brandon Apparel Group, Inc. v. Quitman Mfg. Co., Inc.*, 42 F. Supp. 2d 821, 833 (N.D. Ill. 1999)). A plaintiff's chosen forum, however, is not sacrosanct, and will not defeat a well-founded motion for change of venue. *Id*. Staples, an individual, resides in Virginia. The entity before the Court conducts business in Virginia and Guardian entered into the Agreement with Staples in Virginia. Guardian submitted the affidavit of Jim Latch who asserts that the litigation would be more convenient in Michigan because of the consistency and interpretation of the Agreement and that its parent corporation's headquarters is in Michigan. Latch is the President and Managing Partner of the entity that filed the suit, Guardian. It is noted that his affidavit was sworn before a notary public in Pennsylvania. Latch does not assert that he resides in Michigan. The federal court in Virginia is capable in interpreting any contract language according

to the laws of Michigan, if necessary. This Court has interpreted laws outside the State of Michigan. It is noted that the issue of which law applies is not before the Court at this time.

The substantial deference to a plaintiff's chosen forum has been overcome by Staples' arguments and by Guardian's failure to allege that Latch, its president, resides in Michigan. As to the convenience of the parties, this factor weighs in favor of Staples and litigation in Virginia.

5. Convenience of Witnesses

Regarding the convenience of the witnesses, Staples has submitted an affidavit indicating that the raw numbers of witness and the residence of key witnesses are located in Virginia. Latch's affidavit filed on behalf of Guardian does not identify any other non-party witnesses that would testify. Guardian merely asserts that only parties would testify. The convenience of witnesses weighs in Staples' favor and litigation in Virginia.

6. Location of Documents/Access of Proof

As to the location of relevant documents, relative ease of access to sources of proof and the locus of the operative facts, there is no dispute that the Agreement was entered into in Virginia, the acts complained of by Guardian occurred in Virginia. Other than the forum selection clause, there are no alleged facts occurring in Michigan. Guardian, as alleged in its Complaint, sought to expand its business in Virginia. These factors weigh in favor of Staples and litigation in Virginia.

7. Ability to Compel Attendance of Unwilling Witnesses

This Court does not have the ability to compel the attendance of unwilling witnesses located in Virginia, other than the parties in this case. Fed. R. Civ. P. 45(c)(3)(A). The Virginia federal court would have the ability to compel unwilling non-party witnesses. It appears that any witness to be called by Guardian in Michigan, if any, would be employees of Guardian which would not

require an order to appear by this Court. This factor weighs in favor of Staples and litigation in Virginia.

8. Cost of Obtaining Willing Witnesses

The cost of obtaining willing witnesses weigh in favor of Staples and in litigation Virginia. Guardian has not identified a Rule 30(b) witness located in Michigan. Guardian's President, Latch, does not assert in his affidavit that he resides in Michigan. Staples, however, is a resident of Virginia. Any other non-party witness would be located in Virginia, as noted in Staples' affidavit. Staples is an individual, compared to Guardian a corporation which conducts business in Virginia. The cost to Staples outweighs the cost to Guardian, in light of the fact that Guardian conducts business in Virginia and any witness to the entry of the Agreement on behalf of Guardian would likely reside in Virginia.

9. Choice of Forum

The weight accorded Guardian's choice of forum is generally substantial and especially since the Agreement contains a forum selection clause that actions to enforce the Agreement may be filed in Michigan. However, the forum selection clause does use the word "may" which means that Guardian could have filed the instant suit in Virginia. Also, apart from the forum selection clause, the venue statute under § 1391 states that an action is generally brought where a defendant resides in a diversity action. This factor weighs in Guardian's favor and its choice of forum, although only slightly.

10. Efficiency and Interests of Justice

The trial efficiency and the interests of justice also weigh in favor of Staples and litigation in Virginia, in light of the factors noted above. The only party in Michigan, if a party at all, is

Guardian's parent company. Again, apart from the forum selection clause, all the alleged injuries occurred in Virginia and the Agreement was entered into in Virginia. In addition, there are currently two cases before the Virginia federal district court which are related to this case. It is more efficient for one court to handle all three cases.

Weighing the factors noted above, Staples has carried his burden that the venue should be transferred to the Eastern District of Virginia.

B. Plaintiff's Motion for Contempt

Guardian seeks an order of contempt claiming that Staples violated the Oakland County Circuit Court's Order for Preliminary Injunction entered April 11, 2012. The order directed Staples to return within three calendar days from the service of the order all documents and confidential information of Guardian. Guardian asserts that Staples violated this order by filing, under seal, the documents before the Virginia state court. This preliminary injunction order was entered prior to the removal of the case to this Court on April 23, 2012.

Staples responds that there was a lack of effective notice of the show cause motion and hearing date before the Oakland County Circuit Court on Staples' Virginia counsel, David Mahdavi. Mahdavi was emailed the complaint and motion fro temporary restraining order on April 6, 2012, but was not served with the Order to Show Cause which set the date for the hearing on April 11, 2012. Staples was served with the complaint, motion for temporary restraining order and the Order to Show Cause with the hearing date on April 6, 2012, but assumed that his counsel, Mahdavi, also received the order with the hearing date. By the time Mahdavi received the documents received by his client, the preliminary injunction order had been entered.

Staples filed certain documents before the Virginia court under seal. Staples asserts that

none of the documents contain confidential or proprietary information. In an abundance of caution, Staples filed the documents before the Virginia court pending the determination of whether he has violated the Agreement at issue and whether Staples retained any confidential or proprietary information. Staples asserts he has no documents that would fall under the Preliminary Injunction Order entered by the Oakland County Circuit Court.

There are two types of contempt: criminal and civil. The real distinction between criminal and civil contempt is the nature of the relief sought and the purpose of that relief. *Penfield Co. v. SEC*, 330 U.S. 585 (1947). A contempt proceeding is civil if the purpose is "remedial" and intended to coerce the person into doing what he is supposed to do. *Shillitani v. U.S.*, 384 U.S. 364 (1966). Civil contempt is to coerce future compliance with the order and to compensate the opposing party for the party's violation of an order. *United States v. Bayshore Associates, Inc.*, 934 F.2d 1391, 1400 (6th Cir. 1991). Remedial or compensatory action are essentially backward looking, seeking to compensate the complainant through payment of money for damages caused by past acts of disobedience. *Garrison v. Cassens Transport Co.*, 334 F.3d 528, 543 (6th Cir. 2003)(quoting *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1344 (3d Cir. 1976)). Wilfulness is not a necessary element of civil contempt. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1948); *TWM Mfg. Co. v. Dura Corp.*, 722 F.2d 1261, 1273 (6th Cir. 1983). The burden of proof in a civil contempt proceeding is on the party seeking a contempt order but need not be beyond a reasonable doubt. *Int'l Union, United Mine Workers of America, v. Bagwell*, 512 U.S. 821, 827 (1994). Civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are coercive sanctions and avoidable through obedience. *Id.* at 827. Civil sanctions may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. *Id.*

If the purpose is to vindicate the court's authority by using "punitive" measures or punishing the wrongdoer, the proceeding is one for criminal contempt. *Garrison*, 334 F.3d at 543. Criminal contempt is a crime and the penalties, including imprisonment and noncompensatory fines, may not be imposed without the protections of the Constitution required in criminal proceedings. *Int'l Union, United Mine Workers of America*, 512 U.S. at 826, 838. The rules governing criminal contempt proceedings are found in Fed. R. Crim. P. Rule 42(b). For "serious" criminal contempt proceedings involving imprisonment of more than six months or noncompensatory and excessive fines, these protections include the right to a jury trial. *Id.* at 826-27, 838-39.

In order to hold a litigant in contempt, the movant must present clear and convincing evidence that shows that the litigant "violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Electrical Workers Pension Trust Fund of Local Union No. 58 v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 379 (6th Cir. 2003). "Clear and convincing evidence is not a light burden and should not be confused with the less stringent, proof by a preponderance of the evidence." *Id.* Once the movant establishes a prima facie case, the burden shifts to the contemnor who may defend by coming forward with evidence showing that he or she is *presently* unable to comply with the court's order by showing categorically and in detail why he or she unable to comply with the court's order. *Id.* A court must evaluate whether the contemnor took all reasonable steps within his or her power to comply with the court's order. *Id.*

Guardian alleges in its motion that Staples breached the Agreement at issue by retaining documents and by being employed by a competitor in violation of the Agreement. The Court will not address these claims since these are at issue in the Complaint which is not before the Court. The

Court will only address whether Guardian has satisfied its burden that Staples violated the preliminary injunction order entered by the Oakland County Circuit Court. At the onset, although the preliminary injunction order was not entered by this Court, the Court considers the order as the law of the case.

As to whether Staples violated the preliminary injunction order, Staples responds that he has no confidential information that would fall within the preliminary injunction order. Staples also asserts that the documents were filed under seal with the Virginia court to determine whether these documents were in fact confidential or proprietary. As to the act of filing the documents before the Virginia court, this act is not in violation of the preliminary injunction order since there is litigation pending in that court. Guardian has not submitted any authority that the act of filing documents before another court, where those documents may be relevant in the proceedings before that court should be punished, even when a preliminary injunction order addresses the document. The preliminary injunction order at issue does not prohibit such submission to a court. The preliminary injunction order only restrains Staples from providing to his current employer, any such proprietary or confidential information. Guardian has not carried its burden that the filing of these documents before the Virginia court violated the preliminary injunction order since there is no evidence submitted that Staples provided any such documents to his current employer.

Regarding the issue of "return" of the documents, Staples may not have complied with the preliminary injunction order by failing to return any of the documents at issue. However, Staples asserts that the documents in his possession are not confidential or proprietary information. The issue of whether the Agreement is enforceable and whether the related documents are subject to the Agreement are issues raised in the three cases before this Court and the Virginia court.

Given that there are now three cases pending relating to the Agreement at issue, these documents may be relevant to the claims in litigation. If Staples is in possession of original documents, computers, disks or other storage devices which belong to Guardian, Staples should return such documents and devices, but retain copies of documents which counsel believes are relevant to the litigation. Because the issue of whether the documents retained by Staples are confidential or proprietary information under the Agreement, Guardian has not shown by convincing evidence that Staples has violated the preliminary injunction order.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Defendant's Motion for Transfer of Venue (Doc. No. 3, 4/30/2012) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Contempt (Doc. No. 7, 5/9/2012) is DENIED.

IT IS FURTHER ORDERED that the Clerk transfer this action forthwith to the United States District Court, Eastern District of Virginia, Alexandria Division. This case is CLOSED in this District's docket.

Dated: July 31, 2012

S/Denise Page Hood
Denise Page Hood
United States District Judge

I hereby certify that a copy of the foregoing document was served upon counsel of record on July 31, 2012, by electronic and/or ordinary mail.

S/LaShawn R. Saulsberry
Case Manager