

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

YANKEE SUPPLY CO. &	§	
WAREHOUSE RACK CO.	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION NO. H-06-2170
	§	
STEPHEN COX, INC. a/k/a	§	
COX INDUSTRIAL EQUIPMENT CO.	§	
& STEPHEN COX	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION

Before the court is defendants’ motion to dismiss for lack of personal jurisdiction and alternative motion to transfer venue to the Eastern District of Missouri under 28 U.S.C. § 1406(a). (Dkt. 6).¹ Plaintiffs Yankee Supply Co. (“Yankee”) and Warehouse Rack Co. (“Warehouse”) have filed a response (Dkt. 11), to which defendants have replied (Dkt. 12). The parties appeared at a hearing on September 19, 2006 for oral argument and to offer any evidence the parties wished to present on the issue of personal jurisdiction. Having considered the motions, submissions of the parties, arguments of counsel, and applicable law, the court recommends that defendants’ Rule 12(b)(2) motion be GRANTED and that the case be transferred to the Eastern District of Missouri.

¹ Defendants’ motion invokes FED. R. CIV. P. 12(b)(6), but a motion to dismiss for lack of personal jurisdiction is properly brought under Rule 12(b)(2).

BACKGROUND

This case arises from a contract dispute between defendant Stephen Cox, Inc., also known as Cox Industrial Equipment Co. (a Missouri corporation with its principal place of business in Missouri) and plaintiff Yankee Supply Co. (a Rhode Island corporation with its principal place of business in Rhode Island). Individual defendant Stephen Cox (a resident of Missouri) is the president and sole shareholder of the corporate defendant, but he is not a party to the contract. Plaintiff Warehouse Rack Co. (principal place of business in Houston, Texas) is also not a party to the contract.

The following jurisdictional facts are not controverted:

- In October 2005, Yankee agreed to pay Cox Industrial \$390,000 for certain retail racking and other material obtained from closed Home Depot stores. Neither party to the contract was a Texas entity.
- Yankee wire transferred over \$390,000 in funds from Rhode Island to Cox Industrial in Missouri in October and December 2005.
- The contract called for some of the goods to be shipped to Rhode Island and some to Houston, Texas. None of these goods were ever shipped.
- Cox Industrial sent invoices addressed to Yankee in Rhode Island. Two of these invoices dated 10/12/05 reflect \$119,975 worth of goods to be shipped to Houston from out of state. Again, these goods were never shipped to Houston.

- Cox Industrial wire transferred a partial rebate of approximately \$70,000 to Yankee. These funds were sent from Missouri to Rhode Island.
- Yankee had a joint venture agreement with Warehouse of Houston, Texas under which Warehouse would contribute to the purchase price paid to Cox Industrial. However, Cox Industrial was not aware of the terms of the joint venture.
- In unrelated transactions, in December 2005 and January 2006, Cox Industrial entered into agreements to sell equipment to Warehouse and to purchase racking from Warehouse. These agreements have been fully consummated.

The parties' principal factual dispute concerns whether Cox participated in conference telephone calls with representatives of Warehouse in Texas discussing the transaction at issue. Cox Industrial insists that all its communications and correspondence were with Yankee and its representatives, and that at no point did it contact any party located in Texas concerning this transaction. Plaintiffs have responded with affidavits declaring that Steve Cox participated in multiple conference calls with Yankee *and* Warehouse representatives during which "the transaction was discussed including shipping the goods to Houston, Texas." Given the procedural posture of this motion, this factual disagreement must be resolved in favor of the plaintiffs.

At the hearing, counsel for the Cox defendants explained that the goods in dispute are racking materials, which his client buys from an individual named John Reid. Reid acquires

racking materials from Home Depots that are shutting down, and sells them to buyers, such as Cox Industrial. In turn, Cox Industrial resells the materials to suppliers such as Yankee. Reid allegedly triple-sold the materials in question, thereby preventing Cox Industrial from shipping the materials to Yankee. Cox recently filed a Racketeer Influenced and Corrupt Organizations Act (“RICO”) action against Reid, which is currently pending in the Eastern District of Missouri. Plaintiffs did not contest these assertions by defendants’ counsel.

ANALYSIS

I. Motion to Dismiss for Lack of Personal Jurisdiction

A. Standard of Review

The Cox defendants challenge this court’s personal jurisdiction under Federal Rule of Civil Procedure (12)(b)(2). The burden of proving personal jurisdiction lies with the party seeking to invoke the court’s jurisdiction. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1067 (5th Cir. 1992), *cert. denied*, 506 U.S. 867 (1992). Any disputes over jurisdictional facts must be resolved in favor of the plaintiff. *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 418 (5th Cir. 1993).

B. Personal Jurisdiction Standard

A federal district court sitting in diversity may exercise personal jurisdiction over a foreign defendant if (1) the long-arm statute of the forum state creates personal jurisdiction over the defendant; and (2) the exercise of personal jurisdiction is consistent with the due process guarantees of the United State Constitution. *Revell v. Lidov*, 317 F.3d 467, 469 (5th

Cir. 2002). The Texas long-arm statute authorizes the exercise of personal jurisdiction to the full extent allowed by the Due Process Clause of the Fourteenth Amendment. *Id.* at 469-70.

The Due Process Clause of the Fourteenth Amendment permits a court to exercise personal jurisdiction over a foreign defendant when (1) that defendant has purposely availed itself of the benefits and protections of the forum state by establishing “minimum contacts” with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend “traditional notions of fair play and substantial justice.” *Id.* at 470. Sufficient minimum contacts will give rise to either specific or general jurisdiction. *Id.* Specific jurisdiction over a nonresident corporation is appropriate when that corporation has purposefully directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities. *See Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000). General jurisdiction will attach where the nonresident defendant’s contacts with the forum state, although not specifically related to the plaintiff’s cause of action, are continuous and systematic. *Id.*

1. Specific Jurisdiction

Responding to defendants’ motion, plaintiffs make no attempt to distinguish between the activities of the individual defendant and the corporate defendant. Yet for personal jurisdiction purposes, “[e]ach defendant’s contacts with the forum State must be assessed individually.” *Calder v. Jones*, 465 U.S. 783, 790 (1984).

In support of their contention that Defendant Cox Industrial “purposely directed” its

activities toward forum residents, plaintiffs rely on three points: (1) some of the goods in question were to be shipped to Houston; (2) Steve Cox participated in several conference telephone calls which included Warehouse representatives in Houston; and (3) Warehouse, a Houston-based company, paid part of the purchase price pursuant to a separate joint venture agreement with Yankee. Cox Industrial responds that the goods were never shipped to Texas, that it did not initiate any phone calls to Texas, and that Warehouse was not a party to the contract in any event.

Even if Warehouse had been a party to the contract, it is well established that merely entering a contract with a resident is not sufficient to create jurisdiction over the nonresident. *Burger King v. Rudzewicz*, 471 U.S. 462, 478 (1985); *Freudensprung v. Offshore Technical Services, Inc.*, 379 F.3d 327, 344 (5th Cir. 2004); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986). Rather, the court must examine the nature and extent of the contractual relationship and its formation. *Stuart v. Spademan*, 772 F.2d 1185, 1194 (5th Cir. 1985). Factors such as prior negotiations, contemplated future consequences, terms of the contract, and the parties' actual course of dealing may be considered to assess whether the defendant purposefully established contact with the forum state. *Stuart*, 772 F.2d at 1193. In addition, where the bulk of contract performance occurs outside of the forum state, there is not sufficient contact between the defendant and the forum state to cross the minimum contacts threshold. *See Dickson Marine Inc., v. Panalpina, Inc.*, 179 F.3d 331, 337-38 (5th Cir. 1999).

In this case, the bulk of contract performance was to take place outside of Texas. The purchase money was transferred by wire from Rhode Island to Missouri; a partial refund was wired from Missouri back to Rhode Island. Invoices were likewise transmitted from Missouri to Rhode Island. The invoices attached to plaintiffs' original complaint indicate that goods were to be shipped to and from various locations outside Texas. Although two of the invoices direct that certain goods should "ship to Houston," no goods were actually shipped here. Further, even if Cox Industrial had shipped some goods to Houston, the isolated shipment of goods to the forum state carries little weight in minimum contacts analysis. *See Stuart*, 772 F.2d at 1193 (citing *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1028 (5th Cir 1983), *cert. denied*, 466 U.S. 962 (1984)). Finally, the telephone calls between forum resident Warehouse and Cox are insufficient to constitute purposeful activity directed toward Texas. *See Hydrokinetics, Inc.*, 700 F.2d at 1029.

Considering the totality of the facts presented, this court concludes that there were insufficient minimum contacts between Cox Industrial and the state of Texas to justify the exercise of specific jurisdiction over Cox Industrial. The court need not consider the fairness requirement of the due process test because the fairness prong does not compensate or overcome the minimum contacts requirement. *Stuart*, 772 F.2d at 1194 (citing *Growden v. Ed Bowlin & Assocs., Inc.*, 733 F.2d 1149, 1150-51 (5th Cir. 1984)).

The same conclusion is reached with respect to individual defendant Stephen A. Cox. An individual's contacts with a forum are not to be judged according to his employer's

activities in that forum. *Calder*, 465 U.S. at 790; *see Morris v. Powell*, 150 S.W.3d 212, 218 (Tex.App. – San Antonio 2004) (“An individual’s transaction of business within Texas solely as a corporate officer or employee does not create personal jurisdiction over that individual even though a Texas court has in personam jurisdiction over the corporation.”) (citing *Stuart*, 772 F.2d at 1197). By the same token, an individual’s status as an employee does not insulate him from jurisdiction. *Calder*, 465 U.S. at 790.

Cox is a citizen and resident of the state of Missouri. He is not a party to the contract at issue, nor is there any allegation that the corporate defendant is his alter ego. There is no evidence or allegation that Cox acted in any capacity other than as an employee and officer of Cox Industrial. Nor is there evidence that he traveled to Texas in connection with this (or any other) transaction. His only contacts with Texas concerning the disputed transaction consisted of an unspecified number of conference calls with certain Warehouse employees in Houston. These minimal contacts have already been held insufficient to establish specific jurisdiction over the corporate defendant, which was the actual party to the contract underlying the dispute. Likewise, such contacts are insufficient for specific jurisdiction over Cox himself. *See Stuart*, 772 F.2d at 1193-94.

2. General Jurisdiction

General jurisdiction can be assessed by evaluating contacts of the defendant with the forum over a reasonable number of years, up to the date the suit was filed. *Access Telecom, Inc. v. MCI Telecomms. Corp*, 197 F.3d 694, 717 (5th Cir. 1999). The contacts should be

examined “in toto,” and not in isolation from each other. *Id.*

Plaintiffs argue that this court has general jurisdiction over Cox Industrial because it has maintained continuous and systematic contacts with Texas. In addition to Cox’s conference calls with Warehouse and the two invoices directing shipment to Houston, plaintiffs point to the unrelated equipment purchase and sale transactions between Cox Industrial and Warehouse in December 2005 and January 2006.

The contacts plaintiffs describe are less systematic and continuous than the ones the Supreme Court found insufficient to confer general jurisdiction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 404, 418-19 (1984). Helicopteros had purchased helicopters, spare parts, and accessories from Texas over a seven year period. Helicopteros also sent prospective pilots to Texas for training and managers and maintenance personnel visited Texas. *Id.* at 411. Nevertheless, the Court held that “[p]urchases and related trips, standing alone are not a sufficient basis for a State’s assertion of jurisdiction.” *Id.* at 417.

In rejecting the assertion of general jurisdiction, the Supreme Court emphasized the same facts that Cox Industrial invokes here: the defendant was never authorized to do business in Texas, never had an agent for service of process in Texas, never signed a contract in Texas (although it did contract with residents of Texas several times), never had any employees based in Texas, never maintained an office in Texas, maintained no records in Texas, and had no shareholders in Texas. *See id.* at 411-12.

Like the corporate defendant in *Helicopteros*, Cox Industrial has not had such

systematic and continuous contacts with Texas as to establish general jurisdiction in this court. Nor have the plaintiffs asserted any basis for general jurisdiction over the individual defendant Cox.

This court concludes that there is not a sufficient basis to exercise personal jurisdiction over either defendant, and recommends that Cox's motion to dismiss for lack of personal jurisdiction be granted.

II. Motion to Transfer Venue

Defendants alternatively seek to transfer this case to the Eastern District of Missouri.² Plaintiffs oppose transfer to Missouri, and argue that Yankee's home state of Rhode Island would be a preferable forum if a transfer is necessary.

A motion to transfer venue is addressed to the discretion of the trial court. *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989). Section 1404(a), Title 28 of the U.S. Code provides that “[f]or the convenience of the parties and witnesses, in the interest

² Defendants invoke 28 U.S.C. § 1406(a), which authorizes transfer of a case “laying venue in the wrong division or district.” However, the predicate for defendants’ motion is not improper venue, but lack of personal jurisdiction. Defendants’ motion is therefore more properly considered under 28 U.S.C. § 1404(a), which authorizes transfers between districts having proper venue. *See Koehring Co. v. Hyde Constr. Co.*, 324 F.2d 295, 297-98 (5th Cir. 1963); 15 Wright, Miller & Cooper, Federal Practice & Procedure § 3827, p. 265 (1986) (§1404(a) is “the correct way” to transfer a case in which venue is proper but personal jurisdiction is lacking). *But see Dubin v. United States*, 380 F.2d 813, 815-16 (5th Cir. 1967) (authorizing transfer under § 1406(a) in such circumstances). Section 1404(a) is especially appropriate here, given that the parties present differing transfer alternatives, which are more readily compared under the convenience factors developed in case law applying that section.

of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” In deciding a motion to transfer, courts are required to make an “individualized, case-by-case consideration of convenience and fairness.” *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). The initial inquiry is whether the judicial district to which transfer is sought would have been a district in which the claim could have been filed. *In re Horseshoe Entertainment*, 337 F.3d 429, 433 (5th Cir. 2003), *cert. denied*, 540 U.S. 1049 (2003). After that, the court should address the two broad issues referred to in § 1404(a), the “convenience of parties and witnesses” and the “interest of justice.” *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004).

Among the factors appropriately considered³ in the transfer analysis are the following: (1) availability and convenience of witnesses and parties; (2) availability of process to compel attendance of unwilling witnesses; (3) cost of attendance for willing witnesses; (4) relative ease of access to sources of proof; (5) where the events took place; (6) administrative difficulties flowing from court congestion; (7) familiarity of the forum with the law governing the case; (8) avoidance of unnecessary problems of conflict of laws or application of foreign law; (9) judicial economy; and (10) the interest of justice in general. *See Volkswagen*, 371 F.3d at 203; *Nabors Drilling USA, LP v. Markow, Walker & Reeves*,

³ One factor emphatically excluded from consideration is the location of counsel. *Volkswagen*, 371 F.3d at 206 (reversible error to consider location of counsel under § 1404(a)); *Horseshoe*, 337 F.3d at 434 (location of counsel is “irrelevant and improper for consideration” in determining § 1404(a) transfer motion).

P.A., 2006 U.S. Dist. LEXIS 57529, at *8-9 (S.D. Tex. 2006). No single factor is dispositive. *Volkswagen*, 371 F.3d at 203.

There is no question that the plaintiffs could have brought this suit in the Eastern District of Missouri, where the defendants reside. Three related factors point decisively in favor of the Missouri venue: availability of parties, availability of process to compel witness attendance, and judicial economy. An individual named John Reid is alleged to have played a pivotal role in the events giving rise to this action, and would be the likely target of a third party complaint by Cox Industrial.⁴ It is conceded that the Missouri federal court would have personal jurisdiction over Reid, and in fact Cox Industrial already has a suit pending against Reid in that jurisdiction. By the same token, *in personam* jurisdiction over Reid by a Rhode Island court appears problematic at best, since he was not a party to the contract with Yankee. Although not currently joined as a party to this suit, the ability to acquire jurisdiction over Reid and to compel his testimony strongly supports transfer to the Eastern District of Missouri. *See Volkswagen*, 371 F.3d at 204 (as used in § 1404(a), the terms “parties” and “witnesses” contemplate parties and witnesses in all claims properly joined in a proceeding, not just those involved in the original complaint). Judicial economy would also be served by transfer to Missouri, because Cox Industrial has already initiated an action there against Reid concerning the transactions at issue. “Transfer is particularly appropriate where related

⁴ It must be stressed at this point that the allegations against Mr. Reid are merely allegations, and this court makes no finding or assumption of wrongdoing on his part.

cases involving the same issues are pending in another court.” *DataTreasury Corp. v. First Data Corp.*, 243 F.Supp.2d 591, 594 (N.D. Tex. 2003); *see also Jarvis Christian College v. Exxon Corp.*, 845 F.2d 523, 528-29 (5th Cir. 1988).

The other relevant factors do not strongly favor either proposed venue. The alleged wrong, i.e. the failed deliveries, occurred in several states. To the extent the focus is upon correspondence and telephone communications between the plaintiff in Rhode Island and the defendants in Missouri, there is nothing to choose between the two venues. This is admittedly not a document heavy case, nor has either side contended that the relative cost of witness attendance or access to sources of proof is significant. Likewise, neither side has argued that court congestion, familiarity with governing law, or conflict of law issues are particularly relevant. Plaintiff’s choice of forum, although sometimes a relevant consideration, is not a factor here because the plaintiffs’ chosen forum, the Southern District of Texas, does not have personal jurisdiction over the defendants. *See Horseshoe*, 337 F.3d at 434-35 (plaintiff’s choice of forum is relevant only if the chosen venue is proper).

After carefully considering all the relevant factors, the court concludes that the interest of justice and the convenience of the parties are best served by transferring this case to the Eastern District of Missouri.

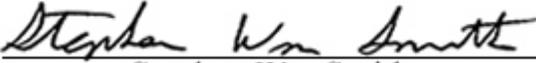
RECOMMENDATION

For these reasons, it is recommended that defendants’ motion to dismiss for lack of personal jurisdiction be GRANTED. The court also recommends that defendants’ motion

to transfer this case to the United States District Court for the Eastern District of Missouri be GRANTED.

The parties have ten (10) days from receipt of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

Signed at Houston, Texas on October 6, 2006.



Stephen Wm Smith
United States Magistrate Judge