THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

MARVIN A. LEVEY,	:	July Term, 2001
Plaintiff,	:	
	:	No. 2725
v.	:	
	:	Commerce Program
COGEN SKLAR LLP,	:	
Defendant.	:	Control No. 100202

ORDER

AND NOW, this 11th day of April, 2002, upon the consideration of the Preliminary Objection of Defendant Cogen Sklar, LLP ("Cogen Sklar") to the Complaint of Plaintiff Marvin Levey, the responses thereto, and in accordance with the Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the preliminary objection asserting improper venue is DENIED and further, that Cogen Sklar shall answer the complaint within twenty (20) days after entry of this Order.

BY THE COURT:

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JOHN W. HERRON, J.

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OPINION

Defendant Cogen Sklar LLP ("Cogen Sklar") filed this preliminary objection to the Complaint of Plaintiff Marvin A. Levey ("Levey") asserting improper venue. For the reasons stated below, the preliminary objection is overruled.

BACKGROUND

This case arises from a dispute over the payment of retirement income benefits and other compensation. Levey, a former partner of Cogen Sklar, commenced this action against the accounting firm to recover money allegedly owed to him pursuant to the Cogen Sklar Partnership Agreement ("Agreement"). Under the Agreement, partners may withdraw from the partnership at the end of Cogen Sklar's fiscal year or may be forced to retire once the partner has reached the mandatory retirement age. Post-employment compensation varied under the Agreement, depending on whether the partner withdraws or retires. The dispute has arisen because Levey claims to have retired, while Cogen Sklar argues he withdrew from the partnership and has since been allegedly engaged in competitive conduct

in violation of the Agreement. As such, Cogen Sklar has withheld Levey's post-employment compensation.

On July 23, 2001, Levey, a resident of Montgomery County, filed this action in Philadelphia County to recover, what he claims to be, retirement income benefits. One week later, on July 30, 2001, Cogen Sklar, located in Montgomery County, commenced an action in Montgomery County against Levey, claiming, inter alia, tortious interference with contractual relations with Cogen Sklar's clients. Subsequently, on August 31, 2001, Cogen Sklar timely filed these preliminary objections asserting improper venue. This Court, on January 8, 2002, ordered discrete discovery to develop a record concerning whether Philadelphia County is an improper venue to try this case.

DISCUSSION

"[A] plaintiff's choice of forum is given great weight." Masel v. Glassman, 689 A.2d 314, 316 (Pa. Super. 1997). For a defendant to challenge venue, one must raise a preliminary objection. See Pennsylvania Rules of Civil Procedure ("Rule")1028(a)(1); See also Rule 1006(e). Although a "defendant has the burden in asserting a challenge to... venue," Masel 689 A.2d 314, 316, the trial court has discretion in deciding whether or not to transfer venue. Gale. v. Mercy Catholic Med. Ctr., 698 A.2d 647, 650 (Pa. Super. 1997), app. denied, 552 Pa 696, 716 A.2d 1249 (1998).

Pursuant to Rule 2130(a), Levey asserts that venue is proper in Philadelphia County. The rule provides, in pertinent part:

> [A]n action against a partnership may be brought in and only in a county where the partnership regularly conducts business, or in the county where the cause of action arose or in a county where a transaction or occurrence took place out of which the cause of action arose.

Here, it is undisputed that neither Levey's cause of action nor a transaction or occurrence occurred in Philadelphia County. Instead, Levey asserts that venue is proper in Philadelphia because Cogen Sklar regularly conducts business here.[1] The issue of whether a partnership regularly conducts business in a county is an issue of fact. New v. Robinson-Houchin Optical Co., 357 Pa. 47, 53 A.2d 79, 80 (1947). In determining whether venue is improper, the court must analyze both the quality and quantity of acts in the forum county. Purcell v. Bryn Mawr Hosp., 525 Pa. 237, 579 A.2d 1282, 1285 (1990). Guided by these principles, this Court turns to the instant case.

A. Cogen Sklar's Acts Meet the Quality Prong of Rule 2130(a).

To meet the quality prong of the test, a defendant's acts within the county must be essential to or in direct furtherance of corporate objects, rather than being incidental acts. Purcell, 579 A.2d at 1285. "[T]hose [acts] in 'aid of a main purpose' are collateral and incidental, while 'those necessary to its existence' are 'direct.'" Id.(citations omitted). Mere advertisement or solicitation of business within the county generally is not sufficient to satisfy the quality test, because advertisement is generally incidental to the corporate objects. Id.; Mathues v. Tim-Bar Corp., 438 Pa. Super. 231, 652 A.2d 349, 351 (1994); Battuelo v. Camelback Ski Corp., 409 Pa.Super. 642, 598 A.2d 1027, 1029 (1991). Rather, the defendant must have had physical presence in the county, for example, by operating a branch office in the county, Gale v. Mercy Catholic Med. Ctr. Eastwick, Inc., 698 A.2d 647, 652 (Pa.Super.Ct. 1997), or by entering the county to make sales, Canter v. American Honda Motor

[1] It is undisputed by both parties that although Cogen Sklar is a partnership and Rule 2130(a) applies to it as a result, the "regularly conducts business" test is not different from that applied to corporations under Rule 2179(a).

Corp., 426 Pa. 38, 231 A.2d 140, 143 (1967); Monaco v. Montgomery Cab Co., 417 Pa. 135, 208 A.2d 252, 256 (1965).

Here, Cogen Sklar's acts meet the quality test. To begin with, Cogen Sklar's corporate objective is to provide accounting and business consulting services to its clients throughout the Delaware Valley. Pl's Reply Mem. of Law, Exh D. In promoting its corporate objective, Levey argues that not only does Cogen Sklar regularly advertise in media in Philadelphia County, but employees of the accounting firm also meet and do business with clients in Philadelphia. While Cogen Sklar's advertising in Philadelphia County alone does not satisfy the quality test, certainly, entering Philadelphia to meet and assist clients at their offices not only "aids... [its main purpose]" of providing accounting services, but these on-site services are "necessary to its existence" as an accounting firm. Purcell, 579 A.2d at 1285. Specifically, affidavits and deposition testimony have shown that employees at Cogen Sklar performed accounting services such as audits, review of documents, and tax services in Philadelphia. Pl's Supp. Reply Mem. of Law at 3. Just as in Canter, where the acts of a car dealer driving into Philadelphia to demonstrate cars and to consummate sales were acts directly essential to the car company's corporate objective of selling such cars, so too is it patently evident that conducting on-site audits, due diligence of clients' tax records, and other such accounting services is absolutely necessary and essential to an accounting firm's existence as it is the very nature of the accounting business to provide such services. Canter, 231 A.2d at 143. As such, the court concludes that Cogen Sklar's acts in Philadelphia meet the quality prong of Rule 2130(a).

B. Cogen Sklar's Acts Meet the Quantity Prong of Rule 2130(a).

To meet the quantity prong, the partnership must regulalry conduct business in the forum

county. Specifically, acts performed must be "so continuous and sufficient to be general or habitual." Purcell, 579 A.2d at 1285 (citation omitted). These acts need not be performed on a fixed schedule, but rather "[t]he question is whether the acts are being 'regularly' performed within the context of the particular business." Canter, 231 A.2d at 142 (citation omitted). Further, these acts may be performed "'regularly' even though these acts make up a small part of its total activities." Id at 143 (citation omitted).

Where the defendant is physically present in the county, courts have generally accepted any amount of business as satisfying the quantity prong. See id. (holding that venue was proper in Philadelphia where defendant auto dealer demonstrated and sold cars in Philadelphia, even though the defendant's Philadelphia sales were only 1-2% of total business); Monaco, 208 A.2d at 256 (holding that venue was proper in Philadelphia where defendant cab company drove passengers to Philadelphia, even though those fares were only 5-10% of the total business). On the other hand, where the defendant never entered the county in furtherance of the corporate objective, the mere fact that the defendant conducted some of its business with county residents was not sufficient to confer venue. Masel v. Glassman, 456 Pa.Super. 41, 689 A.2d 314, 317 (1999) (holding that venue was improper in Philadelphia County when physician services company received 20% of gross revenues from Philadelphia third party payers and 3% from Philadelphia residents, but conducted no operations in Philadelphia).

Here, Cogen Sklar regularly conducts business in Philadelphia County. To begin with, approximately 27% of Cogen Sklar's clients are located in Philadelphia County. Pl's Supp. Reply Mem. of Law at 5 (citations omitted). In fact, these Philadelphia clients have generated substantial

revenue for Cogen Sklar. Specifically, "[i]n 1999, Cogen Sklar's total billings were $4,601,257, of which $1,549,907 (33.7%) were to clients located in Philadelphia County. Similarly, in 2000, Cogen Sklar's total billings were $4,858,015, of which $2,108,128 (43.4%) were to clients in Philadelphia." Id. (citations omitted). The fact that the accounting firm generates over 2 million dollars in revenue from Philadelphia clients, clearly shows that Cogen Sklar regularly conducts business in Philadelphia.

Cogen Sklar, counters and argues that like the Masel court, this court should reject venue based on income received from Philadelphia residents. Instead, Cogen Sklar argues that the focus of the inquiry should be where the work for these Philadelphia clients was completed. However, although the parties were unable to provide this court with the exact number of hours Cogen Sklar's employees spent in Philadelphia, they have submitted Monthly Master Schedules ("Schedules") demonstrating that the conduct by Cogen Sklar employees in Philadelphia is general or habitual. These Schedules show where Cogen Sklar employees were scheduled to be at any given time, and with which client. While the accuracy of its own Schedules have been called into question by Cogen Sklar, there is nothing in the record to suggest that when a Cogen Sklar employee is not in the "office," as is labeled and designated by the Schedule, he is anywhere but with the client listed. As such, "when a Philadelphia client is listed under a partner or employee's name, that would mean...that the individual is meeting with the client at the client's Philadelphia office." Pl's Supp. Reply Mem. of Law at 7, n 2. According to this Schedule, in 1999, "out of approximately 258 working days... employees of Cogen Sklar worked all or part of 231 days in Philadelphia." Id. at 10 (citing Appendix, Exh. G ¶9; Exh. L). In 2000, "out of approximately 257 working days... employees worked all or part of 231 days in Philadelphia." Id. As such, these acts in Philadelphia are clearly general or habitual.

Finally, while there is no documentation on the record that shows the precise number of hours of work performed in Philadelphia, Cogen Sklar's Philadelphia Business Tax Returns demonstrate that it regularly conducts business in Philadelphia. Specifically, in 1999 and 2000, 6.4% and 4.1% of Cogen Sklar's revenues were generated in Philadelphia, respectively. Pl's Supp. Mem. of Law at 12. Contrary to Cogen Sklar's argument that under Pennsylvania law these "meager percentage[s] [do] not equate to 'regularly conducting business,'" Def's Supp. Mem. of Law at 8, Pennsylvania courts have held that even 1-2% of the total business was enough to meet the quantity test. See Canter, 231 A.2d at 143. As such, this court concludes that Cogen Sklar's acts in Philadelphia satisfy the quantity test.

Having determined that the quality of Cogen Sklar's acts in Philadelphia further its corporate objective, and that the quantity of Cogen Sklar's acts rise to the level of regularly conducting business in Philadelphia, this court overrules the preliminary objection asserting improper venue.

CONCLUSION

For the reasons stated above, the preliminary objections of Cogen Sklar to the complaint of Levey are overruled.

BY THE COURT:

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JOHN W. HERRON, J.

DATE: April 11, 2002