

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

PDP ENTERPRISES, INC.	:	COMMERCE PROGRAM
	:	
v.	:	JANUARY TERM 2001
	:	
NORTHWESTERN HUMAN SERVICES, INC.	:	No. 509
	:	
	:	Control No. 40864

ORDER

AND NOW, this 31st day of August 2001, on consideration of the preliminary objections of the defendant to the first amended complaint and the plaintiff's response, and in accordance with the court's contemporaneously-filed opinion, IT IS HEREBY ORDERED THAT

- (1) The objection to inclusion of impertinent matter is SUSTAINED and paragraphs 15 and 16 are STRICKEN from the first amended complaint; AND
- (2) All other objections are OVERRULED.

BY THE COURT:

JOHN W. HERRON, J.

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OPINION

Plaintiff PDP Enterprises (PDP) alleges that defendant Northwestern Human Services (NHS) did not pay for services rendered. At issue are NHS's preliminary objections to the first amended complaint. The court sustains the objections in part.

BACKGROUND

NHS is a Pennsylvania nonprofit corporation with offices in Lafayette Hill, Montgomery County. NHS has about 20 independently incorporated subsidiaries that provide social services to individual consumers. McClure dep. at 10, 16-17, 66, 84-85. Those social services include staffing homes for mentally retarded consumers and providing outpatient treatment of mental disorders and alcoholism. McClure dep. at 66. Northwestern Human Services of Philadelphia (NHS/Philadelphia) is the subsidiary that provides services in Philadelphia. NHS does not provide social services directly to individual consumers. McClure dep. at 79. Instead, it seems to be an umbrella company that oversees the activities of its 20 subsidiaries.

According to the first amended complaint, NHS and PDP entered into a consulting agreement

on April 3, 1998. PDP agreed to provide information technology services to NHS and its subsidiaries for a term of one year. NHS agreed to use PDP's services for a minimum of 40 hours per week. PDP agreed to submit biweekly invoices for payment, and NHS agreed to pay all undisputed amounts within 60 days after receiving the invoice. Unless one of the parties terminated the agreement at least 90 days before the end of the term, the agreement would automatically renew itself for an additional one-year term.

PDP alleges that the agreement renewed itself for successive one-year terms in April 1999 and in April 2000. PDP alleges that NHS breached the agreement by not paying for \$201,449.18 for services that PDP rendered. PDP also alleges that NHS breached the agreement by not using PDP for the minimum 40 hours per week.

The first amended complaint asserts claims for breach of contract and unjust enrichment. In its preliminary objections, NHS argues that (1) venue in Philadelphia is improper, (2) venue in Philadelphia is inconvenient, (3) the unjust enrichment claim is legally insufficient, (4) the unjust enrichment claim is insufficiently specific, and (5) the complaint contains scandalous and impertinent matter. NHS does not object to the legal sufficiency of the contract claim.

DISCUSSION

The court sustains the objection based on impertinent matter and overrules the other objections.

I. VENUE IN PHILADELPHIA IS PROPER BECAUSE NHS REGULARLY CONDUCTS BUSINESS HERE.

NHS objects to venue in Philadelphia. PDP argues that venue is proper in Philadelphia

because NHS regularly conducts business here. Pa.R.C.P. 2179(a)(2).¹ The court agrees with PDP and overrules the objection.

The issue of whether a corporation 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). The court must analyze the quality and quantity of NHS's contacts with Philadelphia. Purcell v. Bryn Mawr Hosp., 525 Pa. 237, 579 A.2d 1282, 1285 (1990). Under the regularly conducts business test of Rule 2179(a)(2), the contacts need not be related to the cause of action. Id. at 1286.

A. NHS's Contacts Meet the Quality Prong of Pa.R.C.P. 2179(a)(2).

To meet the quality prong of the test, a defendant's contacts with the county must be essential to or in direct furtherance of corporate objects, rather than being incidental acts. Purcell, 579 A.2d at 1285. Mere advertisement or solicitation of business within the county generally is not sufficient to

¹ NHS argues that Pa.R.C.P. 2179 does not apply here, and that the Nonprofit Corporation Law (NCL) requires this action to be heard in Montgomery County. 15 Pa.C.S.A. § 5793(a). The NCL provides for judicial review of corporate action of a nonprofit corporation:

Upon petition of any person whose status as, or whose rights or duties as, a member, director, member of an other body, officer or otherwise of a nonprofit corporation are or may be affected by any corporate action, the *court* may hear and determine the validity of such corporate action.

15 Pa.C.S.A. § 5793(a)(footnote omitted) (emphasis added). The NCL defines "court" as "the court of common pleas of the judicial district embracing the county where the registered office of the corporation is or is to be located. . . ." 15 Pa.C.S.A. § 5103. NHS's registered office is in Montgomery County. NHS argues that the NCL requires the Court of Common Pleas of Montgomery County to hear this action. NHS is incorrect. Section 5793 applies only to actions by petitions by directors, members and officers of nonprofit corporations. 15 Pa.C.S.A. § 5793(a). PDP is not such a person. Rule 2179 controls venue in this case.

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

The parties have produced evidence showing that NHS has two corporate objects: (1) owning and renting real estate, and (2) providing administrative services to the subsidiaries. First, NHS owns more than 100 pieces of real estate. The subsidiaries dispense mental health services from those properties and NHS receives rent. The rent paid to NHS on those properties makes up the lion's share of NHS revenue: of \$6 million in total annual revenue, \$5.5 million comes from rent. McClure dep. at 49. The remaining \$500,000 comes from investments. McClure dep. at 48-49, 80. NHS has no other revenue or funding sources. McClure dep. at 63. Therefore, NHS's primary revenue-generating function is being a landlord, and owning and renting properties is necessary to the corporate existence. Purcell, 579 A.2d at 1285 (stating that acts are direct if they are necessary to the corporate existence).

Second, NHS provides administrative services to NHS/Philadelphia and the other subsidiaries. Those services include budget oversight, facilities management, management information systems, accounting and human resources. McClure dep. at 14-16, 63-64, 69.

NHS's contacts with Philadelphia satisfy the quantity prong of Pa.R.C.P. 2179(a)(2). NHS has

a physical presence in Philadelphia essential to and in direct furtherance of a corporate object: it owns and rents 25 properties here. McClure dep. at 77-78. Those properties house 50 to 100 full-time residents from whom NHS derives \$1 million in rent per year. McClure dep. at 56-57. It is not relevant that a separate company, NHS/Philadelphia, staffs the homes and cares for the residents, McClure dep. at 84, because NHS is not in the business of providing social services.

B. NHS's Contacts Meet the Quantity Prong of Pa.R.C.P. 2179(a)(2).

To meet the quantity prong, the contacts must be “so continuous and sufficient to be general or habitual.” Purcell, 579 A.2d at 1285 (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 Canter, 231 A.2d at 143 (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 object, 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 (1997) (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).

NHS's contacts satisfy the quantity test. Its ownership of the 25 properties and its receipt of

rent are continuous. And the rents received on the Philadelphia properties make up one sixth of its yearly revenue. McClure dep. at 48-49.

C. NHS Regularly Conducts Business in Philadelphia

As a company that is in the business of owning and renting real estate and that receives one sixth of its revenues from rent on its Philadelphia properties, NHS regularly conducts business in Philadelphia.² The court overrules the objection to improper venue.³

II. THE COURT DENIES THE REQUEST FOR A CHANGE OF VENUE UNDER PA.R.C.P. 1006(d)(1).

NHS asks for a change of venue to Montgomery County under Pa.R.C.P. 1006(d)(1).⁴ The

² The evidence presented does not clarify how NHS provides administrative services to NHS/Philadelphia and how NHS is compensated for those services, McClure dep at 69, but NHS's having conducted business with a Philadelphia resident, NHS/Philadelphia, further supports venue in Philadelphia.

³ NHS argues that the court cannot attribute the contacts of NHS/Philadelphia to NHS because the two companies are separate and distinct. The court need not address that argument. For the venue analysis, the court has treated NHS and NHS/Philadelphia as separate and distinct entities and has disregarded the contacts of NHS/Philadelphia with Philadelphia.

⁴ The court does not decide if NHS properly raised forum non conveniens by preliminary objection. Where the parties agree that venue is proper, a defendant cannot raise forum non conveniens by preliminary objection. Instead, the defendant must file a petition for change of venue under Rule 1006(d). Pa.R.C.P. 1028(a)(1) note; Hosiery Corp. of Am. v. Rich, 327 Pa.Super. 472, 476 A.2d 50, 51 (1984) ("[If] venue is proper, the device of preliminary objections may not be used to raise a forum non conveniens argument."). This is because forum non conveniens involves fact issues that the court cannot address by preliminary objection. Id. The petition procedure allows for the taking of evidence to resolve those fact issues. Id.

NHS raised forum non conveniens and improper venue. A court often must consider outside facts when deciding a Rule 1028(a)(1) objection to improper venue. Pa.R.C.P. 1028(b)(2) & note. It

court denies the request. “For the convenience of the parties and witnesses the court upon petition from any party may transfer an action to the appropriate court of any other county where the action could originally have been brought.” Pa.R.C.P. 1006(d)(1). The court must give great weight to the plaintiff’s choice of forum. Cheeseman v. Lethal Exterminator, Inc., 549 Pa. 200, 701 A.2d 156, 162 (1997). The trial court has discretion to determine whether to grant a petition to transfer venue under Rule 1006(d)(1), but the defendant bears the burden of proving with detailed information on the record that the chosen forum is vexatious or oppressive to him. Id.

Though PDP could have brought this action in Montgomery County -- the location of NHS’s headquarters -- NHS has failed to meet its burden of proving that a Philadelphia is an oppressive or vexatious forum for NHS. NHS has not shown that Philadelphia is oppressive, vexatious or even inconvenient for it as a party: NHS’s headquarters are 3 miles from the Philadelphia County line. McClure dep. at 60. NHS has not shown that Philadelphia is inconvenient for witnesses. In fact, NHS has not even identified the witnesses. Cheeseman, 701 A.2d at 162 (“Claims by the defendant in its petition that no significant aspect of the case involves the chosen forum, and that litigating in another forum would be more convenient . . . do not amount to a showing that the chosen forum is oppressive or vexatious.”)

The court overrules this objection.

is not clear whether a court, with facts in hand to consider the improper venue objection, may then also consider the forum non conveniens argument. See Hosiery Corp., 476 A.2d at 51. Resolution of this issue is not necessary, for the court would have denied the venue change even had NHS filed a Rule 1006(d)(1) petition.

III. THE UNJUST ENRICHMENT CLAIM IS LEGALLY SUFFICIENT.

NHS argues that the unjust enrichment claim is legally insufficient because an express agreement existed between the parties. The court disagrees.

To state a claim for unjust enrichment, PDP must allege that it conferred benefits on NHS, that NHS appreciated those benefits, and that NHS accepted and retained the benefits under circumstances that would make it inequitable for NHS to keep the benefits without paying for them. Burgettstown-Smith Twp. Joint Sewage Auth. v. Langeloth Townsite Co., 403 Pa.Super. 84, 588 A.2d 43, 45 (1991). The complaint alleges facts from which the court could find that: (1) PDP gave computer services to NHS; (2) NHS knew about those services, accepted them and retained them; and (3) it would be inequitable for the NHS to keep the services without paying for them.

NHS argues that PDP cannot claim unjust enrichment because the parties had an express contract. See e.g., Gee v. Eberle, 279 Pa.Super. 101, 420 A.2d 1050, 1060 (Pa.Super.Ct. 1980). The caselaw on this issue is not consistent, but the essence of the doctrine on which NHS relies is that a plaintiff may not use unjust enrichment to vary the terms of “agreements deliberately entered into by the parties however harsh the provisions of such contracts may seem in the light of subsequent happenings.” Third Nat’l Bank & Trust Co. of Scranton v. Lehigh Valley Coal Co., 353 Pa. 185, 44 A.2d 571, 574 (1945). If a plaintiff agrees to do certain work for a certain price, the plaintiff may not use unjust enrichment theory to gain additional compensation for that work beyond the agreed-on price. Horsham Twp. v. Weiner, 435 Pa. 35, 255 A.2d 126, 130-31 (1969).

If the amounts that NHS allegedly owes to PDP are amounts owed for services provided under the written consulting agreement, PDP cannot claim unjust enrichment to get additional payment beyond

the amounts allowed in the terms of the agreement. But PDP has sufficiently pleaded unjust enrichment as an alternative to the contract claim. For example, NHS might argue that one of the parties terminated the agreement before the April 2000 to April 2001 term. In that case, PDP might be entitled to recover under an unjust enrichment theory for services rendered after the agreement expired. Or NHS might argue that the unpaid-for services that PDP provided were outside of the scope of the agreement. In that case, PDP might be entitled to recover under an unjust enrichment theory for services rendered beyond the scope of the agreement.

Because PDP's unjust enrichment claim is legally sufficient as an alternative to the contract claim, the court overrules NHS's demurrer.

IV. THE UNJUST ENRICHMENT CLAIM IS SUFFICIENTLY SPECIFIC.

NHS objects to the unjust enrichment claim on the ground that it is not specific enough. Pa.R.C.P. 1028(a)(3). The court overrules the objection. The unjust enrichment claim is clear enough to allow NHS to answer and frame a defense, and clear enough to convince the court that the claim is not a subterfuge. In re Estate of Schofield, 505 Pa. 95, 477 A.2d 473, 477 (1984) ("In satisfaction of the particularity requirement we have required that two conditions must always be met: the pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense, and they must be sufficient to convince the court that the averments are not merely subterfuge.").

V. THE COURT STRIKES PDP'S ALLEGATIONS OF WILLFUL AND WANTON CONDUCT.

Paragraphs 15 and 16 of the amended complaint allege that NHS's conduct was wilful and wanton. NHS argues that these allegations are scandalous and impertinent and should be stricken. Pa.R.C.P. 1028(a)(2). Allegations are scandalous and impertinent if they are "immaterial and inappropriate to the proof of the cause of action." Common Cause/Pa. v. Commonwealth, 710 A.2d 108, 115 (Pa.Comm.w.Ct. 1998), aff'd, 562 Pa. 632, 757 A.2d 367 (2000). PDP asserts two causes of action: breach of contract and unjust enrichment. The court doubts allegations that NHS wilfully and wantonly breached the contract or wilfully and wantonly received a benefit would cause a scandal, but state of mind is not material to these causes of action. Therefore, PDP's allegations that NHS acted wilfully and wantonly are at least impertinent. The court sustains the objection and strikes paragraphs 15 and 16.

CONCLUSION

The court will enter a contemporaneous order striking paragraphs 15 and 16 from the first amended complaint and overruling the other objections.

BY THE COURT:

JOHN W. HERRON, J.

DATE: August 31, 2001