

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

NORMAN MCMAHON :
 :
 Plaintiff, : SEPTEMBER TERM 2012
 : No. 01707
 :
 v. :
 :
 INNOVATIVE PAYROLL SERVICES LLC :
 and :
 JOHN S. SCHOLTZ :
 :
 Defendants. : Control Number: 12120864
 :

ORDER

AND NOW, this 9th day of January, 2013, upon consideration of Defendants Innovative Payroll Services LLC and John S. Scholtz's Preliminary Objections to Plaintiff's Complaint, and Plaintiff's response thereto, it is hereby **ORDERED AND DECREED**:

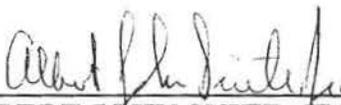
- (1) The Preliminary Objection asserting improper venue for this case is **SUSTAINED**.
- (2) The case is **DISMISSED** without prejudice to re-file in New Jersey, in accordance with the accompanying memorandum opinion.

BY THE COURT:

Mcmahon Vs Innovative P-ORDOP



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ALBERT JOHN SNITE, JR., J.

Plaintiff alleges Defendants breached the Operating Agreement and is entitled to fifty percent (50%) of the revenue of IPS Payall Solutions from the time of his purported ouster, and for continuing various contracts and accounts that plaintiff brought to the joint venture, as well as other claims stemming from the payroll services business. To the contrary, Defendants claim there was no breach of the Operating Agreement, as Plaintiff allegedly forged a business contract with a client, Capital One Bank. Further, Defendants state that under the Operating Agreement, Innovative and McMahon were free to compete with each other.

The complaint was filed on September 14, 2012 by Plaintiff, consisting of fifteen (15) Counts. A praeceipe to reinstate the complaint was filed on October 1, 2012.

These preliminary objections followed, on the basis of improper venue or improper service of a summons or complaint pursuant to Pa. R. Civ. P. 1028(a)(1), and in the alternative, under the doctrine of forum non conveniens pursuant to 42 P.S. §5322(e), and demurrer pursuant to Pa. R. Civ. P. 1028(a)(4).

DISCUSSION

I am sustaining the current preliminary objection based on improper venue, concluding that Defendants have shown that Philadelphia County is not the proper venue; and therefore I am not addressing the other objections. I am dismissing the case without prejudice to re-file in New Jersey.

Plaintiff Norman McMahon is an individual residing at 801 Lawrence Lane, Newtown Square, PA 19073. Defendant Innovative is a New Jersey limited liability company with its principal place of business at 2750 Westfield Avenue, Pennsauken, NJ. Plaintiff asserts Innovative has a “normal place of business” located at 1420 Cleveland Avenue, Wyomissing, PA

19002.¹ Defendant John S. Scholtz is an adult individual residing at 725 Johns Lane, Ambler, PA 19002.

As an initial matter, venue is the right of a party sued to have the action brought and heard in a particular judicial district.² “Although a plaintiff, as a rule, may chose the forum in which to bring suit, that right is not absolute.”³ Pennsylvania Rule of Civil Procedure Rule 2179(a) governs venue for a personal action against a corporation or similar entity. Rule 2179(a) provides five bases to establish venue: (1) the county where its registered office or principal place of business is located; (2) a county where it regularly conducts business; (3) the county where the cause of action arose; (4) a county where a transaction or occurrence took place out of which the cause of action arose; or, (5) a county where the property or a part of the property which is the subject matter of the action is located provided that equitable relief is sought with respect to the property.

Here, Plaintiff brought suit in Philadelphia County, for no apparent reasons stated in the complaint. Defendants’ principal place of business is in New Jersey, no alleged incidents occurred in Philadelphia County, Plaintiff nor Defendants reside in or do business in Philadelphia County, and there is no property involved in the subject matter. Only in responsive pleading by Plaintiff has it been alleged that any incidents whatsoever occurred in Philadelphia County, thus, attempting to establish venue under either Rule 2179 subsection (2), the regularly

¹ Complaint ¶3. This address as a place of business is highly disputed by Defendants. See Defendants’ Preliminary Objections to the Complaint ¶14. Plaintiff alleges that Defendant Innovative website shows this Pennsylvania address for Defendant. See Plaintiff’s Response to Defendants’ Preliminary Objections ¶3.

² McGinley v. Scott, 401 Pa. 310, 316 (Pa. 1960).

³ Zappala v. Brandolini Prop. Mgmt., 909 A.2d 1272, 1281 (Pa. 2006).

conduct of business, or subsection (4), transaction or occurrence took place out of which the cause of action arose, cited above.⁴

In its response, Plaintiff asserts that “the overwhelming majority of the meetings of IPS occurred in the office of Innovative member, Attorney Robert Mand, in the Cira Center in Philadelphia . . . [and] meeting in Philadelphia, Pennsylvania was more convenient”⁵ Convenience does not establish venue under any subsection of Pa R. Civ. P. 2179, nor does the presence of individual members of a limited liability company.⁶

Additionally, Plaintiff states in its response that: “most of the meetings of IPS, including the meetings where IPS was negotiated and formed, and where the Operating Agreement was drafted and signed, and almost all the meetings thereafter, all took place at the office of Innovative member, Philadelphia Attorney Robert Mand, in his office in the Cira [sic] Center Philadelphia. Contrary to the Defendants’ contention, this action arises from the Operating Agreement which was negotiated and signed and substantially performed in Philadelphia.”⁷ These statements made by Plaintiff are not supported in the complaint, nor is there any evidence

⁴ It should be noted that these arguments are not made directly in Plaintiff’s Response. Plaintiff bases its response memorandum on Pennsylvania’s “Long Arm Statute”, which applies to personal jurisdiction, not venue. Personal jurisdiction is not contested in this case. I am interpreting Plaintiff’s reference to the Operating Agreement being “negotiated and signed in Philadelphia” as an attempted venue assertion, and not personal jurisdiction as claimed.

⁵ Plaintiff’s Response to Defendants’ Preliminary Objections ¶5.

⁶ See Hospicomm, Inc. v. Int’l Senior Dev., LLC, 2001 Phila. Ct. Com. Pl. LEXIS 41, at *21-23 (CCP Phila County 2001) (noting that a limited liability company is a corporation for venue purposes under Rule 2179, not a partnership, where “venue generally is proper against all defendants in any county where it is proper against one defendant.”).

⁷ Plaintiff’s Response to Defendants’ Preliminary Objections ¶23.

or affidavits attached to the responsive pleading to support the allegations.⁸ Defendants, on the other hand, offer a showing a proof that Philadelphia is improper venue.

The issue of whether a corporation regularly conducts business in a county is an issue of fact.⁹ The Pennsylvania Supreme Court has further held that “regularly conducting business” shall be based on both “quality and quantity. . . . Quality of acts means those directly, furthering or essential to, corporate objects; they do not include incidental acts. Quantity means those acts, which are so continuous and sufficient to be general or habitual.”¹⁰ In the case at hand, attached to Defendants’ Preliminary Objections to the Complaint as Exhibit D is an Affidavit of Defendant Scholtz, CEO of Innovative. Scholtz stated:

7. All of [Innovative and McMahon’s] negotiations and business activities took place in New Jersey. IPS conducted no business during the period of its active operation in Philadelphia County.

8. The transaction which resulted in the dissolution of the business relationship between McMahon and Innovative occurred in Hudson County, New Jersey, after Capital One Bank, Hudson County’s representative, informed Innovative that a contract presented to Innovative by McMahon, had been forged. The meeting at which McMahon was confronted with the allegation of forgery, during which he did not deny that forgery, took place in Hudson County, New Jersey.¹¹

This lack of both quality and quantity of acts involving Philadelphia County shows that Innovative would not meet the standard under Pa. R. Civ. P. 2179(a). Plaintiff’s denial of these facts are “bald allegations” and has offered no affidavits or other evidence to the contrary in support its new venue claims made in the responsive

⁸ See Schultz v. MMI Prods., 30 A.3d 1224, 1231 (Pa. Super. Ct. 2011) (noting that Appellants’ challenge to the trial court’s decision to transfer venue failed, as Appellants submitted no evidence to the contrary of Appellee’s factual allegations).

⁹ New v. Robinson-Houchin Optical Co., 357 Pa. 47, 53 A.2d 79, 80 (1947).

¹⁰ Schultz v. MMI Prods., 2011 Phila. Ct. Com. Pl. LEXIS 290, at *3 (Pa. C.P. 2011), aff’d, 30 A.3d 1224 (Pa. Super. Ct. 2011) (citation omitted).

¹¹ Affidavit of John S. Scholtz, Member and Principal of Innovative Payroll Services LLC.

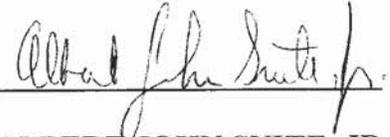
pleadings (not in the complaint). Alternatively, Defendant offered proof that no event relevant to this case occurred in Philadelphia, and none of the parties is located in Philadelphia. In light of the facts presented to the court, Defendants assertion that venue is not proper is reasonable. Any allegation of any incidents occurring whatsoever in Philadelphia County is not adequately supported in the pleadings, and is contested by the Scholtz Affidavit. Defendants' objections as for why Philadelphia County is the improper venue are compelling, and this court is within its discretion to sustain the preliminary objection.

CONCLUSION

In conclusion, I am of the opinion that there is proper basis to sustain the Defendants' preliminary objection based on improper venue, as Plaintiff's complaint does not comply with Pa. R. Civ. P. 2179(a). Therefore, I am dismissing this case, with leave to re-file in New Jersey in the proper county.

BY THE COURT:

DATE: January 9, 2013


ALBERT JOHN SNITE, JR., J.