

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

ALAN J. FELTOON,	:	MARCH TERM, 2002
Plaintiff	:	No. 4314
2Ce, INC.,	:	
Derivative Plaintiff	:	
v.	:	Commerce Program
JAMES A. NOLEN, MIKE ROSEN, and	:	
2Ce, INC.,	:	
Defendants	:	Control Nos. 061874, 061079
		082209, 081413

**OPINION**

**Albert W. Sheppard, Jr., J.** ..... **November 1, 2002**

This case involves alleged acts of misappropriation of the assets of a corporation, which has currently ceased operations, and acts of corporate mismanagement by certain shareholder-directors to the detriment of the other shareholder-director.

Defendants, James A. Nolen, III (“Nolen”) and Mike Rosen (“Rosen”) separately filed Preliminary Objections asserting *inter alia* improper venue, failure to join 2Ce, Inc. as a nominal plaintiff, and demurring to certain counts.

This court previously ordered the joinder of 2Ce, Inc. and ordered the parties to conduct discovery and submit supplemental memoranda on the venue issue. Plaintiff, Alan J. Feltoon (“Feltoon”), filed an

Amended Complaint, in compliance with this Order. In turn, both defendants Rosen and Nolen filed a second set of Preliminary Objections, which virtually repeat the original objections. The parties filed supplemental materials pertinent to the venue issue.

This Opinion is submitted in support of this court's contemporaneous Order sustaining the Preliminary Objections on the basis of improper venue.

### **BACKGROUND**

The operative facts, as pled in the Amended Complaint, are as follows. Feltoon, who resides at 708 Iron Post Road, Moorestown, NJ 08057, is a minority shareholder of 2Ce, Inc. and served as an officer and director until his positions were purportedly terminated by the defendants. Am.Compl., ¶ 1. Nolen, who resides at 2400 White Horse Road, Berwyn, PA 19312, is a minority shareholder and member of the board of directors of 2Ce, Inc. Id. at ¶ 2. Rosen, who resides at 309 Berry Lane, West Chester, PA 19382, was the President and Chief Executive Officer of 2Ce, Inc., as well as a minority shareholder. Id. at ¶ 3. 2Ce, Inc., nominal defendant and derivative plaintiff, was founded in April 2000 to develop, market and sell proprietary application software which would enable users to view and utilize multiple Internet web sites at the same time with a three-dimensional appearance. Am.Compl., ¶ 5. The principal place of business of 2Ce, Inc. while it was in operation was Montgomery County. Pursuant to the Shareholders Agreement, 2Ce, Inc.'s board of directors consists of seven members, including the three "Founders Directors", i.e., Feltoon, Rosen and David Zelig, two "Investors Directors" and two "Independent Directors". Id. at ¶ 9.

The company's product, known as "CubicEye", was introduced commercially in May 2001. Id. at ¶ 5. CubicEye and its technology constituted 2Ce's principal asset from the time of the company's formation until it became inactive late in 2001. Id. As alleged, in 2000, Rosen and Nolen devised a

scheme to misappropriate the CubicEye product for Nolen's personal benefit and caused a shareholder to sell his "Founders Shares" to Nolen for an unreasonably low price. Id. at ¶ 12. Further, in the spring of 2001, Nolen and Rosen rejected a proposal whereby another investor would inject working capital into the company. Id. at ¶ 13. In addition, through the latter half of 2001, Nolen and Rosen purportedly engaged in other actionable conduct, including the termination of certain employees, the holding of a board of director meeting during which 2Ce, Inc.'s principal asset was pledged as collateral for a loan by Nolen to the company, the removal of Feltoon from the board of directors and the eventual conveyance of 2Ce, Inc.'s intellectual property and related assets to Nolen. Id. at ¶¶ 14-21. Shortly after November 19, 2001, Nolen and Rosen purportedly caused the company, which was effectively bankrupt, to cease operations. Id. at ¶ 21.

With this background, Feltoon filed this shareholder derivative action against the defendants, asserting claims for breach of fiduciary duty, waste of corporate assets, fraud, oppression of a minority shareholder and unjust enrichment.

## **DISCUSSION**

Plaintiff asserts that venue in Philadelphia County is proper against all defendants because Rosen, as President and Chief Executive Officer of 2Ce, Inc., purportedly conducted the affairs of the corporation from his architectural business offices in Philadelphia County, where he was served, and because 2Ce, Inc. was originally founded and incorporated in Philadelphia and regularly conducts business in Philadelphia even though its offices were moved to Montgomery County.

Defendants, in turn, assert that venue is not proper in Philadelphia County because the conduct of Rosen's Philadelphia-based architectural business is not related to the present action involving 2Ce, Inc.'s affairs, 2Ce, Inc. does not regularly conduct business in Philadelphia, and the pre-incorporation activities

of 2Ce, Inc. are irrelevant for purposes of determining proper venue.

“A plaintiff’s choice of forum is given great weight and a defendant has the burden in asserting a challenge to the plaintiff’s choice of venue.” Gilfor v. Altman, M.D., 770 A.2d 341, 343 (Pa.Super.Ct. 2001)(citing Masel v. Glassman, 456 Pa.Super. 41, 45, 689 A.2d 314, 316 (1997)). Nonetheless, the trial court has discretion in deciding whether to transfer venue. Id. at 343. Additionally, “a plaintiff’s choice of forum is accorded less deference when the plaintiff does not live in the forum district and none of the operative events occurred there.” International Mills Services, Inc. v. Allegheny Ludlum Corp., 2002 WL 748896, \*2 (C.P. Phila. April 11, 2002)(quoting Watt v. Consolidated Rail Corp., 1997 WL 288607, \*2 (E.D.Pa. May 21, 1997).

Rule 1006 of the Pennsylvania Rules of Civil Procedure (“Pa.R.Civ.P.”) states, in relevant part, as follows:

- (a) Except as otherwise provided by Subdivision (b) and (c) of this rule, an action against an individual may be brought in and only in a county in which the individual may be served or in which the cause of action arose or where a transaction or occurrence took place out of which the cause of action arose or in any other county authorized by law.
- (b) Actions against the following defendant, except as otherwise provided in Subdivision (c), may be brought in and only in the counties designated by the following rules ... corporations and similar entities, Rule 2179.
- (c) An action to enforce a joint or joint and several liability against two or more defendants, except in which the Commonwealth is a party defendant, may be brought against all defendants in any county in which the venue may be laid against any one of the defendants under the general rules of Subdivisions (a) or (b).

Pa.R.Civ.P. 1006 (a)-(c). Further, an individual defendant may be served at any office or usual place of

business which is charged with accepting services. Pa.R.Civ.P. 402(a)(iii).<sup>1</sup>

Moreover, Pennsylvania Rule of Civil Procedure 2179 provides, in relevant part:

(a) Except as otherwise provided by an Act of Assembly or by subdivision (b) of this rule, a personal action against a corporation or similar entity may be brought in and only in

- (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; or
- (4) a county where a transaction or occurrence took place out of which the cause of action arose.

Pa.R.Civ.P. 2179. 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, 49, 53 A.2d 79, 80 (1947). The court must analyze the quality and quantity of the Defendants' contacts with Philadelphia. Purcell v. Bryn Mawr Hosp., 525 Pa. 237, 243, 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 244, 579 A.2d at 1286.

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<sup>1</sup>Rule 402 provides, in pertinent part, as follows:

- (a) Original process may be served
- (1) by handing a copy to the defendant; or
  - (2) by handing a copy
    - (i) at the residence of the defendant to an adult member of the family with whom he resides; but if no adult member of the family is found, then to an adult person in charge of such residence; or
    - (ii) at the residence of the defendant to the clerk or manager of the hotel, inn, apartment house, boarding house or other place of lodging at which he resides; or
    - (iii) at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof. . . .

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. Id. “Those [acts] in ‘aid of a main purpose’ are collateral and incidental, while ‘those necessary to its existence’ are ‘direct’.” Masel, 456 Pa.Super. at 46, 689 A.2d at 317 (citation 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.; see also, Mathues v. Tim-Bar Corp., 438 Pa.Super. 231, 234, 652 A.2d 349, 351 (1994); Battuelo v. Camelback Ski Corp., 409 Pa.Super. 642, 645, 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, 43, 231 A.2d 140, 143 (Pa.1967); Monaco v. Montgomery Cab Co., 417 Pa. 135, 142, 208 A.2d 252, 256 (1965).

Where the defendant is physically present in the county, courts have generally accepted any amount of business as satisfying the quantity prong. See Canter, 426 Pa. at 44, 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, 417 Pa. at 143, 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, 456 Pa.Super. at 49, 689 A.2d at 318 (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).

Applying either the test for individuals under Pa.R.Civ.P. 1006 or the test for corporations under Pa.R.Civ.P. 2179, this court finds that venue in Philadelphia county is not appropriate in the present case.

**A. Venue Is Improper in Philadelphia Even Though Defendant Rosen Has A Philadelphia Architectural Business And Was Personally Served in Philadelphia Because Rosen's Architectural Business is Unrelated to the Present Action And Rosen Has Been Served in His Capacity as Director of Montgomery County Business.**

Here, it is true that defendant Rosen's architectural company, Mike Rosen Architects ("MRA"), is located at 1341 North Delaware Avenue, Philadelphia, PA 19125 ("the MRA address"). See Am.Compl., ¶ 3; Def. Rosen's Preliminary Objections to Am.Compl., ¶ 19.<sup>2</sup> Further, Rosen was personally served at the MRA office on April 26, 2002. See Docket Entry, dated 4/30/02, indicating affidavit of personal service upon Mike Rosen on April 26, 2002. It is also true that certain pre-incorporation activities, including the initial development of the CubicEye product, the registration of the domain name of 2Ce.dot.com,<sup>3</sup> the initial draft business plan, the original bank account, minimal consulting services with interns from the Art Institute of Philadelphia involving the development of CubicEye, and correspondence regarding a possible investment from Harron Capital, went through the MRA address. Rosen Dep. at 33-34, 39-40, 69-70, 86-87, 91-92, 95-97, 155, 179-180.<sup>4</sup>

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<sup>2</sup>See also, Def. Rosen's Preliminary Objections to Compl., ¶ 13.

<sup>3</sup>2Ce.dot.com is not the company but represented the entity prior to its incorporation in April, 2000. Rosen Dep. at 70-71

<sup>4</sup>Rosen's deposition transcript was attached as Exhibit A to defendant Rosen's Supplemental Mem. of Law.

Notwithstanding that Rosen has a Philadelphia office to conduct his architectural business or that he was personally served at this office or the fact that certain pre-incorporation activities concerning 2Ce, Inc. took place at the MRA office, this court does not find venue in Philadelphia county to be appropriate in this particular instance. As will be discussed *infra*, the record does not demonstrate that Rosen regularly conducted the business of 2Ce, Inc. from the MRA office, nor does it demonstrate that Nolen had any connection to Philadelphia County or that any of the circumstances set forth in Rule 2179 were met. While Rosen was presently served in Philadelphia County at his other business address, as allowed by Rule 402(a)(iii), this fact alone is insufficient to ground proper venue in this county. It would mean that any person or corporation could be sued in a particular venue merely because one of the defendants was physically present in the county, despite the fact that this physical presence was based on a separate and distinct reason for being in the county, which reason was unrelated to the action before the court. To permit this result would invite impermissible forum shopping. This court submits that Rule 1006(a)'s permissive language, allowing venue over an individual where said individual "may" be served, is not applicable here where the conduct complained of involves acts done in the name of the corporation in Montgomery County.

**B. Defendants' Contacts in Philadelphia County Do Not Meet the Criteria Set Forth in Pa.R.Civ.P. 2179.**

Here, plaintiff maintains that Rosen operated 2Ce, Inc. from his MRA office, and thus, that 2Ce, Inc. regularly conducted its business in Philadelphia, the causes of action arose there and many transactions or occurrences out of which the causes of action arose occurred in Philadelphia County. See Pl. Mem. of Law in Response to Def. Rosen's Preliminary Objections, at 4-5. However, plaintiff admits that the registered office of 2Ce, Inc. was in Montgomery County. Id. at 4.



It is not disputed that there was no Montgomery County office prior to the formation of 2Ce, Inc. and that the address used for the initial planning of the business entity was the MRA address. Rosen's Dep. at 73-74. Further, the address listed on the SS-4 Application for Employer ID Number is listed as the MRA address and the year 2000 corporate tax forms also list that address. Id. at 117-120. The original Articles of Incorporation, dated April, 20, 2000, list 1341 North Delaware Avenue as the official commercial registered office of 2Ce, Inc. Def. Rosen's Supplemental Mem. of Law, Exhibit B. However, notwithstanding this limited use of the MRA address prior to 2Ce, Inc.'s incorporation, the record does not demonstrate that Rosen or anyone else conducted the business of 2Ce, Inc. from that address or that any transaction or occurrence giving rise to these causes of action occurred in Philadelphia County.

It is clear from the Amended Complaint that the alleged misconduct by Rosen and Nolen took place at the earliest in the latter half of the year 2000 through November 2001, when the company ceased doing business. See Am.Compl., ¶ 12.

Rosen testified that the corporation had relocated to King of Prussia in or around May 2000. Rosen Dep. at 149-51. Further, on July 12, 2000, the corporation's official address was formally changed from the MRA Philadelphia address to 950 West Valley Forge Road, King of Prussia, PA 19406. Def. Rosen's Supplemental Mem. of Law, Exhibit C. From the time of its relocation, the corporate letterhead contained either the King of Prussia address or a Seattle, Washington address. Rosen Dep. at 182-84. While 2Ce, Inc.'s original bank account was located in Philadelphia, the account was moved to King of Prussia even though the checks still reflected the Philadelphia address. Id. at 171-73. Rosen also testified that he worked exclusively with 2Ce, Inc. at the King of Prussia office from June 2000 through November 2001. He testified that he may have received a few phone calls on his cell phone or obtained a few e-mails from his laptop computer while at the MRA address, but that was the extent of his connection with the

MRA office. *Id.* at 21, 23-24, 51-54, 159-60. In addition, many of the board meetings which took place in the latter half of 2001, the time period for defendants' alleged misconduct, were held at the King of Prussia offices or by conference calls. Rosen Dep. at 143-147. See also, Def. Rosen's Supplemental Mem. of Law, Exhibits D, E, H, I, K. Certain other board meetings were held at the offices of Stradley Ronon Stevens and Young in Philadelphia. Rosen Dep. at 138-142. Other meetings regarding the possible investment from Harron Capital took place in a restaurant in King of Prussia. Rosen Dep. at 102.

These circumstances do not meet any of the criteria set forth in Rule 2179 for conferring venue over a corporation. Clearly, after its incorporation, 2Ce, Inc.'s business was conducted out of the King of Prussia office. The few board meetings which took place in Philadelphia, together with the initial development of the CubicEye product and other limited pre-incorporation activities, do not meet the quality and quantity test set forth in *Purcell, supra*, to find that 2Ce, Inc. regularly conducted its business in Philadelphia prior to the cessation of its business in November 2001. Further, the record does not demonstrate that Philadelphia County was the situs of any transaction or occurrence which serves as the basis for the causes of action sued upon.

### **CONCLUSION**

For these reasons, the defendants' Preliminary Objections asserting improper venue should be sustained.<sup>5</sup> Further, pursuant to Pa.R.Civ.P. 1006(e), this action will be transferred to Montgomery County. The court will issue a contemporaneous Order consistent with this Opinion.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**

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<sup>5</sup>This court did not address the remaining Preliminary Objections.

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Plaintiff	:	No. 4314
2Ce, INC.,	:	
Derivative Plaintiff	:	
v.	:	Commerce Program
JAMES A. NOLEN, MIKE ROSEN, and	:	
2Ce, INC.,	:	
Defendants	:	Control Nos. 061874, 061079 082209, 081413

**ORDER**

AND NOW, this 1st day of November 2002, upon consideration of the Preliminary Objections of defendants, James A. Nolen and Mike Rosen, to the Amended Complaint of Alan J. Feltoon, individually and derivatively on behalf of 2Ce, Inc., the respective memoranda, all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that the Preliminary Objections asserting improper venue are **Sustained**, and that this action is **Transferred** to Montgomery County, with costs to be borne by plaintiff.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**