

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FIRST TENNESSEE BANK NATIONAL)
ASSOCIATION,)
)
Plaintiff,)
)
vs.) No. 07-cv-02664-BV
)
)
PACIFIC AMERICA GROUP, INC.)
d/b/a PACIFIC AMERICA MORTGAGE,)
WILLIAM OWEN, NANCY OWEN,)
HO SANG (PETER) YIM and)
DANNY PARK,)
)
Defendants.)

ORDER DENYING DEFENDANTS OWENS' MOTION TO TRANSFER FOR
CONVENIENCE AND TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE
PARTIES

Before the court is the December 11, 2007 amended motion¹ of the defendants, William Owen ("W. Owen") and Nancy Owen ("N. Owen")(collectively "the Owens"), pursuant to Federal Rule of Civil Procedure 12(b)(3), seeking an order, pursuant to 28 U.S.C. § 1404(a), transferring this case to the Central District of California for the convenience of witnesses and parties. Should that motion be denied, the Owens alternatively move, pursuant to Federal Rule of Civil Procedure 12(b)(7), for an order dismissing

¹ The Owens originally filed a motion to change venue on November 27, 2007. That motion was referred to the United States Magistrate Judge for a determination. Subsequently, the Owens filed the amended motion that is currently before the court.

this case for failure to join indispensable parties. The Plaintiff, First Tennessee Bank National Association ("First Tennessee"), filed a response in opposition to the Owens' motion. The motion was referred to the United States Magistrate Judge for a determination. For the reasons set forth below, the Owens' motion to transfer and the Owens' alternative motion to dismiss are denied.

PROCEDURAL AND FACTUAL BACKGROUND

First Tennessee is a national banking association with its principal place of business in Memphis, Tennessee. (Resp. Opp'n Am. Mot. 1.) The defendant Pacific American Mortgage ("PAM") is a secondary mortgage lender with its principal place of business in California. (Am. Mot. Transfer 3.) The individual defendants - the Owens, Ho Sang Yim ("Yim"), and Danny Park ("Park") - were each principal stockholders in PAM. (*Id.* at 6.) W. Owen also acted as president of PAM until he left the company in June 2007. (*Id.*) The Owens, Yim, and Park are California residents. (*Id.* at 5.)

On January 1, 2007, PAM entered into a Mortgage Warehouse Loan and Security Agreement ("the Warehouse Agreement") with First Tennessee, which provided for PAM to borrow up to \$12,000,000 from First Tennessee. (Resp. Opp'n Am. Mot. 2.) At the time PAM entered into the Warehouse Agreement, it also executed a Master Promissory Note ("the PAM Note") evidencing its obligations to

First Tennessee. (*Id.*) The Owens, Yim, and Park executed a Guaranty Agreement, personally guaranteeing PAM'S obligations to First Tennessee under the PAM Note in the event of PAM's default. (*Id.* at 2.)

Subsequently, PAM requested, and First Tennessee made, advances of \$2,400,000 from First Tennessee for the purpose of relending those funds to qualified borrowers. (*Id.* at 2.) The qualified borrowers are Cindy Yang (aka Cindy Cindy), Oscar Cuin (aka Oscar C. Casimoro and Oscar C. Cuin Casimoro), and Martha Sonia Pineda-Polanco (collectively "the PAM Borrowers"). (Am. Mot. Transfer 8.) The PAM Borrowers are California residents and are not parties to this lawsuit. (*Id.*) Pursuant to the Warehouse Agreement, First Tennessee took a security interest in the promissory notes signed by the PAM Borrowers. (Resp. Opp'n Am. Mot. 2.)

The PAM Note matured on June 30, 2007, but PAM failed to deliver any payments to First Tennessee. (*Id.*) After default, First Tennessee demanded payment from PAM pursuant to the PAM Note and Warehouse Agreement and from the individual defendants pursuant to their Guaranty Agreement. (*Id.*) On October 18, 2007, First Tennessee brought suit against PAM, the Owens, Yim, and Park for breach of contract, fraud, conspiracy, and unjust enrichment. (*Id.*)

On December 11, 2007, the Owens filed an Amended Notice of

Motion to Transfer or Dismiss, asking the court to transfer venue to the Central District of California, or, in the alternative, to dismiss for failure to join indispensable parties. Specifically, they argue that 28 U.S.C. § 1404(a) requires this court to exercise discretion and transfer venue to California for "the convenience of parties, witnesses, and in the interests of justice." (Am. Mot. Transfer 10.) They insist that California is the more appropriate forum because all the defendants and many of the witnesses are domiciled in California and all the events giving rise to this lawsuit occurred in California. (*Id.*) The Owens assert that they will not be afforded a complete defense in Tennessee because some witnesses may be unwilling to travel to Tennessee to appear live at trial and the Owens will be unable to compel their appearances via subpoena. (*Id.* at 18.) Additionally, they claim that defending this lawsuit in Tennessee will result in a considerable financial burden. (*Id.* at 13.)

Alternatively, the Owens argue that this lawsuit should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(7) for failure to join indispensable parties. (*Id.* at 17.) The Owens contend that the PAM Borrowers qualify as indispensable parties whose "presence is needed for a just adjudication" of this lawsuit, but joinder of these indispensable parties is improper because this court lacks personal jurisdiction over the PAM Borrowers. (*Id.* at 18, 22-23.) Therefore, the Owens argue that dismissal is

appropriate because there are indispensable parties who cannot be joined in the lawsuit. (*Id.* at 17.) Further, if this case is not dismissed, the Owens state that they will be forced to bring a separate action against the PAM Borrowers in California and that bringing a separate lawsuit would risk inconsistent rulings and unnecessarily duplicate the litigation costs. (*Id.*)

In opposition to the motion, First Tennessee insists that transferring this lawsuit is inappropriate because California is not a more convenient forum than Tennessee. (Resp. Opp'n Am. Mot. 3.) First Tennessee also asserts that dismissal of this lawsuit is inappropriate because the PAM Borrowers are not indispensable parties and their absence does not prevent granting "complete relief among existing parties." (*Id.* at 12.) Because First Tennessee has never alleged any wrongdoing on the part of the PAM Borrowers and because it has not suffered any injury from the PAM Borrowers, First Tennessee argues that the PAM Borrowers are not necessary parties to this lawsuit. (*Id.*) Further, First Tennessee contends that only relief between the current parties is relevant and any relief the Owens may be entitled to from the PAM Borrowers is irrelevant in determining if the PAM Borrowers' presence is required in this lawsuit. (*Id.* at 13.) First Tennessee claims that because complete relief can be granted without making the PAM Borrowers parties to this lawsuit, their presence is unnecessary and dismissal of this lawsuit for failure to join them as parties would

be inappropriate. (*Id.* at 13-14.)

ANALYSIS

A. Transfer of Venue Pursuant to 28 U.S.C. § 1404(a)

The Owens seek a transfer of venue to the Central District of California pursuant to 28 U.S.C. § 1404(a). 28 U.S.C. § 1404(a) permits a district court, in its discretion, to transfer any civil action to any other district or division where it might have been brought for the convenience of parties and witnesses or in the interest of justice. 28 U.S.C. § 1404(a)(1996). In determining whether a transfer of venue is appropriate, the district court must weigh several factors in considering the "interest of justice" and "convenience of the parties." *Picker Int'l, Inc. v. Travelers Indem. Co.*, 35 F. Supp. 2d 570, 572 (N.D. Ohio 1998). These factors include:

(1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to compel attendance of unwilling witnesses; (5) the costs of obtaining willing witnesses; (6) the practical problems indicating where the case can be tried more expeditiously and inexpensively; and (7) the interest of justice.

Carborundum Co., Pollution Control Div. v. Bay Fabricators, Inc., 461 F. Supp. 437, 440 (E.D. Tenn. 1978) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). These factors encompass the "private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-

interest concerns, such as systematic integrity and fairness.” *Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1137 (6th Cir. 1991); see also *United States v. Cinemark USA, Inc.*, 66 F. Supp. 2d 881, 887 (N.D. Ohio 1999)(stating that these public and private interests include the plaintiff’s choice of forum, location of documents, convenience of witnesses, the possibility of prejudice in either forum, and any practical problems with trying the case expeditiously and inexpensively).

The party requesting the transfer bears the burden of proof in showing that the balance of factors weigh in favor of transfer. *Picker*, 35 F. Supp. 2d at 573; see also *Plough, Inc. v. Allergan, Inc.*, 741 F. Supp. 144, 148 (W.D. Tenn. 1990); *Carborundum*, 461 F. Supp. at 439. There is a presumption favoring the plaintiff’s forum choice, and venue will not be transferred unless the defendant meets its burden. *Plough*, 741 F. Supp. at 148 (citing *Nicol v. Koscinski*, 188 F.2d 537 (6th Cir. 1951)). In order to receive a transfer of venue, the defendant must demonstrate that his choice of forum is more convenient than that of the plaintiff. *Roberts Metals, Inc. v. Fla. Props. Mktg. Group, Inc.*, 138 F.R.D. 89, 93 (N.D. Ohio 1991)(citing *Mead Corp. v. Oscar J. Boldt Constr. Co.*, 508 F. Supp. 193, 198 (S.D. Ohio 1981)). In the Sixth Circuit, the balance of all relevant factors must weigh *strongly* in favor of transfer. *Nicol*, 188 F.2d at 537 (emphasis added).

The decision to transfer venue is within the discretion of the

trial court. *Hunter Fan Co. v. Minka Lighting, Inc.*, No. 06-2108 M1/P, 2006 U.S. Dist. LEXIS 39080, at *4 (W.D. Tenn. June 12, 2006) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)). The court may deny the motion to transfer venue if after balancing all the relevant factors, it determines that the factors weigh evenly for either party. See, e.g., *Third Nat'l Bank in Nashville v. Shearson Equip. Mgmt. Corp.*, 619 F. Supp. 907, 911 (M.D. Tenn. 1984); see also *Hunter Fan Co.*, 2006 U.S. Dist. LEXIS 39080, at *7-8 (noting that 28 U.S.C. § 1404(a) provides only for a transfer to a more convenient forum, not to a forum that is equally convenient or inconvenient).

1. *Convenience of the Parties*

Each of the named defendants is a California resident. (Am. Mot. Transfer 5.) First Tennessee's headquarters and primary place of business is in the Western District of Tennessee. (Resp. Opp'n Am. Mot. 6.) Therefore, neither First Tennessee's choice of forum, the Western District of Tennessee, nor the Owens' requested forum, the Central District of California, would be more convenient for both parties. Because either choice will result in inconvenience for one of the parties, this factor does not support the Owens' motion to transfer venue but weighs in favor of First Tennessee's selection of its home forum. See *Hunter Fan Co.*, 2006 U.S. Dist. LEXIS 39080, at *7-8.

2. Convenience of Witnesses

Potential witnesses are located in both Tennessee and California. (Am. Mot. Transfer 9; Resp. Opp'n Am. Mot. 7-8.) While it is true that California would be a more convenient forum for the defendants' witnesses during trial, it is also true that Tennessee would be an equally convenient forum for First Tennessee's witnesses. Regardless, all potential witnesses can be deposed and their deposition testimony used during trial. Because First Tennessee will bear the expense of traveling to California to take the depositions of the defendants' witnesses and non-party witnesses residing in California, neither the defendants nor their witnesses will suffer any inconvenience. Accordingly, this factor does not weigh in favor of transfer of venue to California. See *Hunter Fan Co.*, 2006 U.S. Dist. LEXIS 39080, at *7-8; *Picker*, 35 F. Supp. 2d at 573.

3. Access to Proof

There is no physical evidence involved in this case, only documentary evidence. There are documents located in both California and Tennessee. The defendants' business records and documents are located in California, (Am. Mot. Transfer 9), but First Tennessee's records and documents pertaining to this lawsuit are located at its headquarters in Memphis, Tennessee. (Resp. Opp'n Am. Mot. 6-7.) Because documentary evidence is located in both Tennessee and California, transferring venue would not result in a

more convenient forum. Further, all documentary evidence can be easily transferred through postal mail, email, or other electronic means. See *Picker*, 35 F. Supp. 2d at 573-74. Therefore, this factor does not support the Owens' motion to transfer venue.

4. *Ability to Compel Witnesses*

Assuming that non-party witnesses would not be willing to travel to the Western District of Tennessee to appear live at trial, they can be subpoenaed for deposition and compelled to testify in California. Because both parties would be equally disadvantaged by the inability to compel non-party witnesses to testify live in the Western District of Tennessee, this factor does not favor transfer of venue to California.

5. *Interests of Justice*

Finally, the interests of justice support trying this lawsuit in the Western District of Tennessee. The business transactions and agreements which give rise to this lawsuit occurred in Tennessee. (Resp. Opp'n Am. Mot. 3.) Tennessee law governs the agreements at issue in this lawsuit. The application of Tennessee law supports First Tennessee's choice of its home forum. See, e.g., *Picker*, 35 F. Supp. 2d at 574 ("The district court which is located within the state whose law will be applied might be favored in the § 1404(a) balancing analysis, because it may be more familiar with that state's law than is the other district court.").

After balancing all the relevant factors, the court finds that

the Owens have not met their burden of showing that California is a more convenient forum. Because transfer of venue pursuant to 28 U.S.C. § 1404(a) is within the discretion of the trial judge and there is a strong presumption in favor of First Tennessee's selection of its home forum, the Owens' motion to transfer venue is denied.

B. Motion to Dismiss for Failure to Join Indispensable Parties

In the alternative, the Owens move to dismiss this lawsuit pursuant to Rule 12(b)(7) for failure to join indispensable parties under Rule 19 of the Federal Rules of Civil Procedure. Rule 12(b)(7) allows a court to dismiss a lawsuit for failure to join a party under Rule 19. FED. R. CIV. P. 12(b)(7)(2000). Rule 19 "establishes guidelines for determining when it is proper to dismiss a case because a person or entity has an interest in the outcome of the litigation that could be impaired in the absence of that person or entity." *Watson ex rel. Estate of Simon v. Herenton*, No. 04-2400B, 2005 WL 2177002, at *4 (W.D. Tenn. Sept. 8, 2005)(quoting *Glancy v. Taubman Ctrs., Inc.*, 373 F.3d 656, 664 (6th Cir. 2004)).

Subsection (a) of Rule 19 governs the joinder of parties needed for the just adjudication of a lawsuit if joinder is feasible. FED. R. CIV. P. 19. It provides:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject-matter of the action shall be joined as a party in the action if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating

to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1). If the person who is required to be joined if feasible cannot be joined, subsection (b) of Rule 19 provides that "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." FED. R. CIV. P. 19(b). The factors for the court to consider include: (1) the extent a judgment may prejudice the absent party or those already parties; (2) the extent protective provisions may lessen the prejudicial effect; (3) whether a judgment rendered in the party's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed. FED. R. CIV. P. 19(b).

In determining whether a claim should be dismissed for failure to join a party under Rule 19, courts follow a three-step analysis. *See Local 670, United Rubber, Cork, Linoleum and Plastic Workers of Am. v. Int'l Union, United Rubber, Cork, Linoleum and Plastic Workers of Am.*, 822 F.2d 613, 618 (6th Cir. 1987); *Ohio Sav. Bank v. Manhattan Mortgage Co.*, No. 1:04CV128, 2005 U.S. Dist. LEXIS 9357, at *13 (N.D. Ohio May 5, 2005); *Watson ex rel. Estate of Simon v. Herenton*, No. 04-2400B, 2005 WL 2177002, at *5 . First, the court must look at Rule 19(a) and determine if the party is a

necessary party. *Local 670*, 822 F.2d at 618; *Watson*, 2005 WL 2177002, at *5. Second, if the party meets one of the criteria of Rule 19(a), then the court must determine if joinder is feasible by considering whether the court has personal jurisdiction over the absent party and whether the absent party would destroy subject matter jurisdiction. *Local 670*, 822 F.2d at 618; *Watson*, 2005 WL 2177002, at *5. If, however, the court lacks personal jurisdiction over the party or the court would be deprived of subject matter jurisdiction, then the court must proceed to the third step in the analysis. It must then evaluate the factors under Rule 19(b) to determine if the lawsuit may proceed without the necessary party or if it must be dismissed because the party is indispensable. *Local 670*, 822 F.2d at 618; *Watson*, 2005 WL 2177002, at *5.

If the court determines that the party does not meet the requirements of subsection (a) of Rule 19, then no further analysis is necessary. *Local 670*, 822 F.2d at 618; see also *Temple v. Synthes Corp.*, 498 U.S. 5, 8 (1990) (holding that no analysis under Rule 19(b) was necessary because the requirements of Rule 19(a) were not satisfied). Courts have held that Rule 19 is more than a rule of convenience or pragmatism, and it applies only in situations where joinder is necessary. *Watson*, 2005 WL 2177002, at *4 (quoting *Marshall v. Navistar Int'l Transp. Corp.*, 168 F.R.D. 606, 609 (E.D. Mich. 1996)). Additionally, even though defendants may want to avoid multiple litigation or inconsistent relief, it "takes more than the

impending hazard of such a predicament to make a party necessary." *Id.* (quoting *Marshall*, 168 F.R.D. at 610). The party seeking dismissal bears the burden of demonstrating that dismissal is proper under Rule 19. *Id.* at *5 (citing *Marshall*, 168 F.R.D. at 611).

These factors should not be applied in a rigid manner but should take into account the practicalities of each case. *Local 670*, 822 F.2d at 618 (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n.12 (1968)). Further, an entire suit should not be dismissed if meaningful relief can still be accorded, even if some forms of relief may not be available due to the absence of certain parties. *Id.* (quoting *Smith v. United Brotherhood of Carpenters and Joiners of Am.*, 685 F.2d 164, 166 (6th Cir. 1982)).

In the present case, complete relief can be afforded to those already parties to the lawsuit without the presence of the PAM Borrowers. The PAM Borrowers are not parties to the agreements upon which this lawsuit is based, i.e., the Warehouse Agreement, the PAM Note, and the Guaranty Agreement. (Resp. Opp'n Am. Mot. 12-13). Additionally, the PAM Borrowers did not take any action contributing to the Owens' default under any of the agreements at issue. *Id.* Although the Owens may later seek indemnification against the PAM Borrowers, this is not a basis for making the PAM Borrowers parties to the present action under Rule 19(a). *See, e.g. Ohio Sav. Bank*, 2005 U.S. Dist. LEXIS 9357, at *18 (holding that, in a breach of

contract action, indemnification or contribution proceedings against third parties were not a basis for dismissal under Fed. R. Civ. P. 12(b)(7) or Fed. R. Civ. P. 19)). Further, in a breach of contract action, only the parties to the contract are necessary parties under Rule 19. See *id.* at *18-19. In the instant case, First Tennessee and the named defendants are the only parties to the agreements in question. Only the named defendants are liable to First Tennessee for the default of the contracts which are the subject matter of this lawsuit. Because the absence of the PAM Borrowers does not prevent granting complete relief among the existing parties, the Owens have not met their burden of demonstrating that the PAM Borrowers are necessary parties under Rule 19(a). Because the requirements of Rule 19(a) have not been satisfied, no further analysis is necessary. See *Temple*, 498 U.S. at 5. Accordingly, the Owens' motion to dismiss for the inability to join indispensable parties is denied.

CONCLUSION

For the foregoing reasons, the Owens' motion to transfer for convenience and the motion to dismiss for inability to name indispensable parties are denied.

IT IS SO ORDERED this 4th day of April, 2008.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE