IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JENNY SHIPTOSKI, on behalf of herself and similarly situated employees,	:	**Civil No. 3:16-CV-1216**
Plaintiffs,	:	**(Judge Mariani)**
v.	:	**(Magistrate Judge Carlson)**
SMG GROUP, LLC,	:	
Defendant.	:	

REPORT AND RECOMMENDATION

I. Factual and Procedural Background

This is a collective action to recover overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19, filed by Plaintiffs Jenny Shiptoski, Pamela Bush, Michele Nightingale, Brittany Schwartz, and Matthew Walter, on behalf of a collective consisting of approximately 94 persons. This case was initially filed in this court some two years ago, on June 20, 2016. (Doc. 1.) After protracted litigation in this court devoted to the issue of conditional collective certification, (Docs. 15-42), this court conditionally certified this case as a collective action under the FLSA, and potential plaintiffs were notified of the opportunity to join this litigation which was pending in the United States District Court for the Middle District of Pennsylvania. (Docs. 43-80.) The parties currently report that approximately 94 plaintiffs have opted-into this FLSA collective action.

While many of these plaintiffs reside outside Pennsylvania, of those plaintiffs who live in this state, it is reported that approximately 71% reside in the Middle District of Pennsylvania, and 21% of the Pennsylvania plaintiffs reside in an adjacent federal district, the Eastern District of Pennsylvania.[1]

The defendant SMG Group, LLC, is located and maintains its principal place of business in Allentown, Pennsylvania. Allentown is located in the Eastern District of Pennsylvania, the federal district which is immediately adjacent to this district. Moreover, SMG's offices in Allentown are a mere 75 miles from this Court in Scranton, a drive of a little more than one hour.

During the past two years as the parties have litigated preliminary issues in this court, it has never been suggested that this venue is a difficult, oppressive or unduly inconvenient forum in which the litigate these claims, claims that involve numerous plaintiffs who reside in this district. However, in August of 2018, SMG Group, Inc., filed a motion to transfer this case pursuant to 28 U.S.C. §1404 to the

[1] We note that these statistics total approximately 92% of the Pennsylvania resident plaintiffs, which leads us to conclude that the remaining Pennsylvania resident collective plaintiffs reside in the only other remaining federal district within the Commonwealth, the Western District of Pennsylvania. For many of the Western District plaintiffs, of course, a decision to transfer this case to the Eastern District of Pennsylvania would likely impose some additional hardship since it would mean that they would have to travel through this district where the case was originally filed in order to attend court proceedings instead of simply traveling to this neighboring district for court matters.

United States District Court for the Eastern District of Pennsylvania. (Doc. 85.) This motion is fully briefed by the parties and is, therefore, ripe for resolution.

Recognizing that these questions are consigned to the sound discretion of the court, for the reasons set forth below, in the exercise of this discretion it is recommended that the motion to transfer be denied.

II. Discussion

A. Motion to Transfer—Standard of Review

Section 1404 of Title 28, United States Code governs discretionary motions to transfer cases, and provides in pertinent part as follows:

> **(a)** For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

28 U.S.C. § 1404 (a).

It is well-settled that in this setting:

> The burden of establishing the need for transfer . . . rests with the movant, 1A Pt. 2 Moore's ¶ 0.345[5]; Shutte v. Armco Steel Corp., 431 F.2d 22 (3d Cir.1970), cert. denied, 401 U.S. 910, 91 S.Ct. 871 (1971). And, "in ruling on defendants' motion the plaintiff's choice of venue should not be lightly disturbed." 1A Pt. 2 Moore's ¶ 0.345[5] at 4360; 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters § 3848, at 385 (2d ed. 1986); Schexnider v. McDermott Int'l, Inc., 817 F.2d 1159 (5th Cir.1987); Miracle Stretch Underwear Corp. v. Alba Hosiery Mills, Inc., 136 F.Supp. 508 (D.Del.1955)

Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995).

When considering the exercise of our discretion to transfer a case under §1404 to any other district where the action could have been brought, we are enjoined at the outset to be mindful of the fact that: " 'a plaintiff's choice of forum is a paramount consideration in any determination of a transfer request, and that choice should not be lightly disturbed.' Advanced Fluid Sys., Inc. v. Huber, No. 1:13–CV–3087, 2014 WL 1808652, at *17 (M.D.Pa. May 7, 2014) (quoting Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir.1970))." Sinclair Cattle Co. v. Ward, 80 F. Supp. 3d 553, 564 (M.D. Pa. 2015). Moreover, while §1404 by its terms cites only three factors to be considered in ruling on a motion to transfer—convenience of witnesses, convenience of parties, and the interests of justice—in practice we are instructed to engage in a multi-facetted analysis when addressing such motions.

Specifically we are cautioned to consider and evaluate a host of private and public interests when exercising discretion in this field. On this score:

> The private interests [we must consider] have included: plaintiff's forum preference as manifested in the original choice, 1A Pt. 2 Moore's ¶ 0.345[5], at 4363; the defendant's preference, 15 Wright, Miller & Cooper § 3848, at 385; whether the claim arose elsewhere, id. § 3848; the convenience of the parties as indicated by their relative physical and financial condition, id. § 3849, at 408; the convenience of the witnesses—but only to the extent that the witnesses may actually be unavailable for trial in one of the fora, id. § 3851, at 420–22; and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum).

Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995).

The public interest we are enjoined to weigh, in turn:

> [H]ave included: the enforceability of the judgment, 1A Pt. 2 Moore's ¶ 0.345[5], at 4367; practical considerations that could make the trial easy, expeditious, or inexpensive, id.; the relative administrative difficulty in the two fora resulting from court congestion, id., at 4373; 15 Wright, Miller & Cooper § 3854; the local interest in deciding local controversies at home, 1A Pt. 2 Moore's ¶ 0.345[5], at 4374; the public policies of the fora, see 15 Wright, Miller & Cooper § 3854; and the familiarity of the trial judge with the applicable . . . law.

Jumara v. State Farm Ins. Co., 55 F.3d 873, 879–80 (3d Cir. 1995).

In this case, all parties agree that venue properly lies here in the Middle District of Pennsylvania. Likewise, it is undisputed that venue over this lawsuit would also rest in the defendant's preferred venue, the Eastern District of Pennsylvania. Thus, the instant case presents us with the truly discretionary choice contemplated by §1404(a), a choice to transfer a case between two districts where the lawsuit might have been brought. Recognizing the wholly discretionary nature of this choice, we nonetheless conclude that the factors which govern the exercise of that discretion weigh heavily in favor of continued retention of jurisdiction by this court. Accordingly, for the reasons set forth below, we recommend that this motion to transfer be denied.

B. The Defendant's Motion to Transfer Should Be Denied.

Applying these discretionary guideposts to the instant case we begin, as we must, with a consideration of the plaintiffs' choice a forum, a factor which "is a

paramount consideration in any determination of a transfer request." Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir.1970). Here, the plaintiffs' choice has been unequivocally expressed through their filing of this lawsuit in this court. This choice, which is entitled to great weight in the balancing of interests, has also been acquiesced in by the defendant for the past two years. Indeed, until recently, during this extended period SMG Group did not voice the slightest objection to litigating this case in the plaintiffs' venue of choice, the federal district immediately adjacent to the defendant's place of business. Given the "paramount" importance attached to this choice of forum by the plaintiffs, we are mindful that "that choice should not be lightly disturbed." Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir.1970). We are also cognizant of the fact that the burden of establishing the need for transfer rests with the movant, SMG. Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). Therefore, our consideration of the remaining discretionary private and public interests commended to our attention focuses on whether SMG has shown that these remaining factors sufficiently tilt in favor of a transfer of this lawsuit that they outweigh the plaintiffs' choice of forum.

We find that they do not.

Turning first to the private interests identified by the courts as relevant to this determination, many of these private interests are either essentially neutral, provide scant support for a transfer of the lawsuit, or actually favor retention of

jurisdiction by this court. To be sure, the defendant has voiced a preference for litigation closer to its home office, but in this case these considerations of distance and inconvenience for a party are entitled to little weight, since the federal courts in Scranton are a mere 75 miles from the defendant's principal place of business. Thus, the distance to be traveled by these parties is less than 100 miles, and as such this relatively short traveling distance is typically treated as a *de minimis* burden of parties and witnesses. Indeed, many courts cite this "100 mile rule" when evaluating complaints by parties that the distances involved in litigation are unduly burdensome. See In re Volkswagen AG, 371 F.3d 201, 204 (5th Cir. 2004). Further, when we consider the question of inconvenience for the witnesses, we also "recognize[] litigation is an inconvenient exercise. Therefore, it is not whether witnesses are inconvenienced by litigation but, rather, whether witnesses 'actually may be unavailable for trial in one of the fora' that is a determinative factor in the transfer analysis. Jumara, 55 F.3d at 879." Cradle IP, LLC v. Texas Instruments, Inc., 923 F. Supp. 2d 696, 700 (D. Del. 2013). Finally, it is evident that these considerations of convenience for parties and witnesses do not turn exclusively on the mathematics of mileage. Rather, "in evaluating the convenience of the parties, a district court should focus on the parties' relative physical and financial condition." Cradle IP, LLC v. Texas Instruments, Inc., 923 F. Supp. 2d 696, 699–700 (D. Del. 2013).

Balancing all of these considerations, we find that they do not favor transfer of this case. While we concede some inconvenience for the defendant by virtue of litigation in a forum that it a little more than an hour from its principal place of business, that inconvenience is minimal. In contrast, for many of the Pennsylvania-resident plaintiffs this district would be a more convenient forum for litigation than a courthouse located in another district. Further, as to the out-of-state plaintiffs, the balance of convenience between this district and the Eastern District of Pennsylvania is roughly equivalent. Moreover, with respect to the witnesses it has not been shown that any witness may actually be unavailable for trial before this court, the benchmark standard of witness inconvenience established by the court of appeals in its seminal decision in Jumara. Finally, in striking this balance of convenience, we note that SMG Group, Inc., has greater institutional and financial resources than the numerous individual plaintiffs. Therefore, when we consider the parties' relative physical and financial condition, Cradle IP, LLC v. Texas Instruments, Inc., 923 F. Supp. 2d 696, 699–700 (D. Del. 2013), this factor also weighs in favor of retaining jurisdiction in this court. In short, then, considerations of balancing convenience for parties and witnesses do not call for the transfer of this case.

Among these private interests, we also cautioned to consider the location of books and records, a factor which does tilt somewhat in SMG's favor since its

records are retained in Allentown. However, "[t]he Third Circuit in Jumara again advised that, while the location of books and records is a private interest that should be evaluated, it is not a determinative factor unless 'the files c[an] not be produced in the alternative forum.' Jumara, 55 F.3d at 879." Cradle IP, LLC v. Texas Instruments, Inc., 923 F. Supp. 2d 696, 700 (D. Del. 2013). In this case "the realities of our electronic age" strongly suggests that arrangements could be made to present these books and records in a form which would not require the physical transportation of these records from Allentown to Scranton. Cradle IP, LLC v. Texas Instruments, Inc., 923 F. Supp. 2d 696, 700 (D. Del. 2013). Therefore this consideration, standing alone, would not overcome the plaintiff's choice of forum or dictate the transfer of this case.

Having found that an informed assessment of the private interests does not call for a transfer of this lawsuit, we consider the relevant public interests. These public interests include:

> [T]he enforceability of the judgment, 1A Pt. 2 Moore's ¶ 0.345[5], at 4367; practical considerations that could make the trial easy, expeditious, or inexpensive, id.; the relative administrative difficulty in the two fora resulting from court congestion, id., at 4373; 15 Wright, Miller & Cooper § 3854; the local interest in deciding local controversies at home, 1A Pt. 2 Moore's ¶ 0.345[5], at 4374; the public policies of the fora, see 15 Wright, Miller & Cooper § 3854; and the familiarity of the trial judge with the applicable . . . law.

Jumara v. State Farm Ins. Co., 55 F.3d 873, 879–80 (3d Cir. 1995).

Many of these public interest factors have little practical relevance in this case. For example, there are no problems of enforceability of judgments which favor one forum over another. Similarly, there are no differences in the public policies of the two forum courts which would bear on the question of whether this lawsuit should be transferred. Further, in our view, as between these two adjoining federal districts there are no clear practical considerations that could affect the easy, speed, or expense of trial. In the same vein, the relative administrative difficulty in the two fora resulting from court congestion are roughly equivalent and do not strongly favor a case transfer.

However, one of these public interest factors strongly favors retention of this case in this jurisdiction—the familiarity of the trial judge with the case and the law. Over the past two years this court has become familiar with the parties' claims, and defenses, and has become fully acquainted with the factual background of this dispute. Furthermore, it is undisputed that the assigned district judge is highly experienced in the management of FLSA litigation. See e.g., GARY RAPCZYNSKI, et al., Plaintiffs, v. DIRECTV, LLC, & MASTEC NORTH AMERICA, INC., Defendants., No. 3:14-CV-2441, 2016 WL 1071022, at *1 (M.D. Pa. Mar. 17, 2016); Chung v. Wyndham Vacation Resorts, Inc., No. 3:14·CV·00490, 2014 WL 4437638, at *1 (M.D. Pa. Sept. 9, 2014) ; Sakalas v. Wilkes Barre Hosp. Co., No. 3:11-CV-0546, 2014 WL 1871919, at *1 (M.D. Pa.

May 8, 2014); Creed v. Benco Dental Supply Co., No. 3:12-CV-01571, 2013 WL 5276109, at *1 (M.D. Pa. Sept. 17, 2013). Accordingly, this final public interest factor actually favors retention of the instant case by this court.

In sum, finding that SMG has not shown that an evaluation of these private and public interests favors setting aside the plaintiff's choice a forum, a factor which "is a paramount consideration in any determination of a transfer request," Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir.1970), we recommend that this motion to transfer be denied.

III. Recommendation

Accordingly, for the foregoing reasons, IT IS RECOMMENDED that the Defendant's motion to transfer (Doc. 85) be DENIED.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record

developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 26th day of September, 2018.

S/Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge