UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

HILB ROGAL & HOBBS COMPANY, AND HOBBS GROUP, LLC, PLAINTIFFS,	:	CIVIL ACTION NO. 3:04-cv-1541 (JCH)
v.	:	FEBRUARY 14, 2005
DOUGLAS J. MACGINNITIE, DEFENDANT.	:	

RULING ON PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER [DKT. NO. 6], PLAINTIFF'S MOTION TO REMAND [DKT. NO. 15], AND DEFENDANT'S MOTION TO DISMISS OR TRANSFER [DKT. NO. 23]

Plaintiffs, Hilb Rogal & Hobbs Company ("Hilb") and Hobbs Group, LLC ("Hobbs") (together "HRH"), bring a motion to remand this case back to Connecticut Superior Court pursuant to 28 U.S.C § 1441. Defendant Douglas J. MacGinnitie ("MacGinnitie") opposes the motion to remand and has filed a motion to dismiss pursuant to Rule 13(a) of the Federal Rules of Civil Procedure and the "first-filed rule" or, in the alternative, to transfer the case to the United States District Court for the Northern District of Georgia pursuant to 28 U.S.C. § 1404(a). For the reasons that follow, Hilb's motion to remand is **DENIED** and its application for a temporary restraining order is **DENIED AS MOOT**. McGinnitie's motion to transfer is **DENIED**. MacGinnitie's motion to dismiss is **GRANTED**, and the case is **ADMINISTRATIVELY DISMISSED** as discussed in Section II.b.1.C.

I. BACKGROUND

Hilb is a Virginia corporation engaged in the business of insurance and risk management. Hilb has offices in numerous states, including Connecticut, but its

principal place of business is Richmond, Virginia. In July 2002, Hilb acquired Hobbs, a Delaware corporation (the "Acquisition"). MacGinnitie, an attorney and a citizen of Georgia,[1] served as Vice President and General Counsel for Hobbs between October 1998 and September 2003. When MacGinnitie joined Hobbs, he entered into an employment agreement. That agreement contained, *inter alia*, choice of law and consent to jurisdiction provisions.

The choice of law provision states that the contract shall be governed "in accordance with the laws of the State of Connecticut without giving effect to the conflict of laws provisions thereof." Mem. Supp. Mot. to Remand at Ex. B, ¶ 18 ("Employment Agreement at ¶"). The parties dispute the meaning of the consent to jurisdiction section. That section reads as follows:

> I agree that all actions, suits, and proceedings arising out of or based upon this agreement or the subject matter hereof may be brought and maintained in the federal and state courts of the State of Connecticut. By execution hereof: (A) I hereby irrevocably submit to the jurisdiction of the federal and state courts in the State of Connecticut for the purpose of any action, suit, or proceeding arising out of or based upon this agreement or the subject matter hereof: and (B) I hereby waive to the extent not prohibited by applicable law, and agree not to assert, by way of motion, as a defense or otherwise, in any such action, suit or, proceeding, any claim that I am not subject personally to the jurisdiction of the above-named courts, that I am immune from extraterritorial injunctive relief or other injunctive relief, that my property is exempt or immune from attachment or execution, that any such action, suit, or proceeding may not be brought or maintained in one of the above-named courts, that any such action, suit, or proceeding brought or maintained in one of the above-named courts should be dismissed on the grounds of forum non conveniens, should be transferred to any court other than one of the above-named courts, should be stayed by virtue of the pendency of any other action, suit, or proceeding in any court other than one of the above-named courts, or that

[1]MacGinnitie asserts that he lived and worked in Georgia throughout his employment with Hobbs and HRH, and continues to do so to this day.

> this agreement or the subject matter hereof may not be enforced in or by any of the above-named courts. I hereby consent to service of process in any such action, suit, or proceeding in any manner permitted by the laws of the State of Connecticut, agree that service of process by registered or certified mail, return receipt requested, is reasonably calculated to give actual notice, and waive and agree not to assert by way of motion, as a defense or otherwise, in any such action, suit, or proceeding any claim that such service of process does not constitute good and sufficient service of process.

Employment Agreement at ¶ 20.

On June 26, 2002, MacGinnitie entered into a separate employment contract, the Acknowledgment and Amendment Agreement, as a condition precedent to the Acquisition. See e.g., Mem. Supp. Mot. to Remand at Ex. C ("Second Agreement", together with the Employment Agreement, the "Agreements"). MacGinnitie agreed to continue in the employ of HRH "under the Existing Agreement in accordance with the terms and conditions thereof," and to be "bound by the terms thereof, as amended and modified" by the new agreement. Second Agreement at ¶ 1. As a result of the acquisition, MacGinnitie received approximately $3.8 million in cash and stock, in total compensation. Additionally, the Second Agreement included a non-qualified option for fifteen thousand shares of HRH common stock, a raise in MacGinnitie's base salary to $350,000, and, beginning in April 2003, a quarterly retention bonus of $100,000. The Employment Agreement forbid MacGinnitie to, *inter alia*, solicit the employees of Hobbs/HRH, or solicit the clients or business of Hobbs/HRH for a period of two years following the end of his employment.

MacGinnitie left HRH in September 2003. In June 2004, he filed suit against HRH in the Superior Court of Gwinnett County, Georgia (the "Georgia Action"). MacGinnitie sought preliminary and permanent injunctive relief to prevent HRH from

enforcing the terms of the Agreements. In July 2004, HRH removed the Georgia Action to the United States District Court for the Northern District of Georgia in Atlanta, Georgia. HRH then attempted to transfer the case to Connecticut, but the District Court for the Northern District of Georgia denied that motion on August 18, 2004.

On August 25, 2004, HRH filed the case at bar in Connecticut Superior Court (the "Connecticut Action"). HRH alleges MacGinnitie has breached the provisions of the Agreements concerning non-solicitation and unauthorized disclosure of confidential information and misappropriated trade secrets.[2] MacGinnitie removed the case to this court on September 15, 2004. HRH moved for remand on September 29, 2004, and MacGinnitie moved to dismiss, or in the alternative, transfer the case to the United States District Court for the Northern District of Georgia on October 18, 2004.

II. DISCUSSION

a. Motion to Remand

HRH moves to remand based not on MacGinnitie's failure satisfy the requirements of federal diversity jurisdiction, but based on what HRH argues is MacGinnitie's express waiver of his right to remove. HRH argues that a forum selection clause found in the Employment Agreement is clear, that MacGinnitie is a sophisticated party, and that he was lavishly compensated for waiving his removal right. According to HRH, "[t]he Consent to Jurisdiction Clause can only be read as an unconditional promise to accept Plaintiffs' choice of the State Court." Mem. Supp. Mot. to Remand at 7.

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[2]At that time, HRH also applied for a temporary restraining order.

The court agrees with HRH on one point: the Consent to Jurisdiction Clause is clear. In pertinent part, it reads: "I agree that all actions, suits, and proceedings arising out of or based upon this agreement or the subject matter hereof *may* be brought and maintained in the federal *and* state courts of the State of Connecticut." Employment Agreement at ¶ 20 (emphasis added). The explicit language of the contract states that MacGinnitie agreed to the jurisdiction of the state and federal courts of Connecticut. It makes no express mention of removal or waiver of removal, nor does it list the courts of Connecticut as the only place an action may be brought.

HRH is correct that forum selection clauses negotiated at arm's length by sophisticated parties must be enforced by federal courts, see New Moon Shipping Co., Ltd. v. Man B & W Diesal AG, 121 F.3d 24, 29 (2d Cir. 1997), and that "[a] forum selection clause may act as a waiver of [a] defendant's right to remove an action to federal court." See Phillips v. Solomon Health Serv., LLC, Civ. No. 3:99-cv-1961 (CFD), 2000 U.S. Dist. LEXIS 20310, at *6 (D.Conn. 2000) (quoting John's Insulation, Inc. v. Siska Constr. Co., Inc., 671 F.Supp. 289, 294 (S.D.N.Y. 1987)). However, that waiver "must be clear and unequivocal." Id.

First, it must be noted that consenting to jurisdiction in a given state or district is not co-extensive with selecting those courts as the sole forum for actions arising out of a contract. However, to the extent that this consent to jurisdiction clause can be characterized as a forum selection clause, it does not "clearly and unequivocally" waive either MacGinnitie's ability to file suit elsewhere, or his right to remove from a Connecticut state court to a District of Connecticut federal court. Paragraph 20 says actions "*may* be brought and maintained in the federal *and* state courts of the State of

Connecticut . . . ." Employment Agreement at ¶ 20 (emphasis added). It does not say that actions *must* be brought in Connecticut. Nor does it say that actions may be brought in either state *or* federal court.

Perhaps even more compelling to this conclusion is Clause (B). In that section of the Employment Agreement, MacGinnitie agreed to waive "by way of motion, as a defense or otherwise," the argument that a case should be transferred "to any court other than one of the above-named courts, ..." Id. Removal is akin to a transfer. The parties, while restricting the right to seek transfer, did not so waive the right to "transfer" between the federal and state courts in Connecticut.

Paragraph 20 is a permissive forum selection clause. The fact that both state and federal courts are granted jurisdiction argues strongly that a waiver of removal rights was not contemplated by the Employment Agreement. To the extent there is any ambiguity, this ambiguity must weigh against the waiver of a party's right to remove from a Connecticut state court to a federal court in Connecticut. See, e.g., Phillips, at *6. Therefore, HRH's motion to remand is denied.

b. MacGinnitie's Motion to Dismiss or Transfer

MacGinnitie requests the court to dismiss, or, in the alternative, to transfer this case to the Northern District of Georgia because, he argues, the Georgia Action was filed first, and any proceedings undertaken in this court would be repetitive and duplicative. MacGinnitie argues that Connecticut is not the preferred location for this suit because neither party is a citizen of Connecticut, no prospective witnesses live in Connecticut, and none of the documentary evidence to be discovered is located in Connecticut. Additionally, Second Circuit case law concerning conservation of judicial

resources weighs against maintaining the Connecticut Action, according to MacGinnitie.

HRH responds that the claims brought in Connecticut were not compulsory counterclaims to the Georgia Action and that the Georgia court cannot impose the relief sought by HRH in Connecticut. Additionally, HRH argues that, under the terms of the Agreements, MacGinnitie waived the right to request a transfer. HRH also points out that it has seven offices and approximately 13,000 clients in Connecticut, creating a substantial relationship between the suit and the state. Finally, HRH argues that a Connecticut court is best situated to decide HRH's Connecticut trade secrets claim.

1. First-to-File Rule

The Second Circuit follows the first-to-file rule. See First Nat'l Bank & Trust Co. v. Simmons, 878 F.2d 76, 80 (2d Cir. 1989). "[W]here there are two competing lawsuits, the first suit should have priority, absent the showing of balance of convenience . . . or . . . special circumstances . . . giving priority to the second." Adam v. Jacobs, 950 F.2d 89, 92 (2d Cir. 1991) (quoting Simmons, 878 F.2d at 79.). District courts must show deference to the first filing, as such "[d]eference . . . 'embodies considerations of judicial administration and conservation of resources.'" Id. "[T]here is a strong presumption in favor of the first-filed suit." Alden Corp. v. Eazypower Corp., 294 F.Supp.2d 233, 235 (D.Conn. 2003). In fact, a district court may abuse its discretion by refusing to appropriately deal with a duplicative suit. See Jacobs, 950 F.2d at 92. Thus, when a district court encounters a duplicative suit, it should dismiss, stay, or transfer that suit to the jurisdiction of the first-filed suit, absent a finding of special circumstances or a balance of convenience favoring the second suit. See Eazypower, 294 F.Supp.2d at 235 (citing Simmons, 878 F.2d at 77, 79).

A. The Actions Are Duplicative

The court must answer a threshold question: are the actions duplicative? See id. Claims are duplicative if they arise from the same "nucleus" of fact. See id. at 236. If the action is duplicative, the court must follow the first-to-file rule absent the balance of convenience or special circumstances giving priority to the second-filed suit. See Simmons, 878 F.2d at 79.

There is no dispute that the Georgia Action is the first-filed suit in this case. In that suit, MacGinnitie seeks rescission of the Agreements based on Georgia public policy. HRH's claims in the instant case are for breach of contract and violation of the Connecticut Uniform Trade Secrets Act, CONN. GEN. STAT. §§ 35-50 *et seq* ("CUTSA"), based on MacGinnitie's business-related activities since leaving HRH's employ.

The claims in the Connecticut and Georgia Actions arise out of the same nucleus of facts. A claim for breach of contract and an action to rescind that contract are logically based on the same nucleus of fact: the enforceability of the contract. Also, HRH's CUTSA claims concern whether MacGinnitie is unfairly competing with HRH in his new employment situation by using or divulging HRH's trade secrets. MacGinnitie's claims in the Georgia Action are based on the same nucleus of facts, *i.e.*, the appropriateness of his current business activities. Therefore, the Connecticut and Georgia Actions are duplicative, and the court must follow the first-to-file rule and defer to the Georgia Action, unless HRH can show special circumstances or that the balance of convenience weighs in favor of the Connecticut Action.

B. Balance of Convenience

HRH has not shown that the balance of convenience weighs toward maintaining the Connecticut Action. The balance of convenience points to Georgia as the appropriate forum. MacGinnitie is, and has been, a resident of Georgia at all times relevant to this case. Additionally, as MacGinnitie points out, virtually all witnesses, documents, and other sources of proof are likely to be found in Georgia, as that is where he currently works and where he did all of his work for Hobbs and HRH. See Mem. Supp. Mot. to Dismiss or Transfer at 11. Also, MacGinnitie is an individual, and while it does not appear he is lacking in means, the hardship of having to travel to litigate naturally weighs more heavily on him than on a corporate plaintiff.[3] HRH argues that it has several offices, employees, and many clients in Connecticut. However, it does not point to any specific witnesses, documents, or proof located in Connecticut to support the importance of this information. Therefore, it is insufficient to tip the balance of convenience in its favor. The balance of convenience favors the Georgia Action.[4]

C. Special Circumstances

HRH has shown special circumstances, however. First, MacGinnitie promised in his employment agreement with HRH not to move to transfer a case filed in

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[3]In balancing the "ability to travel", the court also notes that HRH is based in Richmond, Virginia, and therefore will be forced to travel in any case.

[4]HRH also argues that the first-to-file doctrine is trumped in this case by MacGinnitie having forum-shopped in choosing the Georgia district court to file his case. The court finds no evidence of forum shopping, especially taking into consideration the fact that MacGinnitie is a Georgia resident, the fact that MacGinnitie worked for Hobbs in Georgia, and the permissive nature of the Consent to Jurisdiction clause. Therefore, the court will not depart from the first-to-file rule on this basis.

Connecticut. See Employment Agreement at ¶ 20. Policy reasons underpinning the law of transfer (*e.g.*, convenience) have been, in effect, waived by MacGinnitie. See 28 U.S.C. § 1404(a).

Second, HRH argues that the Georgia court may not grant equitable relief outside of Georgia's borders because of Eleventh Circuit precedent as announced in Keener v. Convergys Corp., 342 F.3d 1264 (11th Cir. 2003). See Mem. Opp. Mot. to Dismiss or Transfer at 19-21. Keener involved an employment contract which specified that Ohio law should govern its interpretation. See 342 F.3d at 1266. After certifying a question to the Georgia Supreme Court concerning Georgia conflicts of law provisions, the Eleventh Circuit held that if a contract violated Georgia's public policy, district courts are required to use Georgia law to interpret them, even if the parties contracted to use another state's law. See id. at 1268. The district court found that the non-competition agreement (the "NCA") in question violated Georgia public policy and interpreted it according to Georgia law, even though the parties had contracted to use Ohio law. See id. Because Georgia law applies strict scrutiny to restrictive covenants in employment contracts, and does not use the "blue pencil" doctrine of severability, the court found that the NCA was unenforceable as overbroad. See id. However, because considerations of Georgia public policy made the NCA unenforceable, the Eleventh Circuit held that the district court's injunction against Convergys attempting to enforce the NCA must be limited geographically to Georgia. See id. at 1270. Similarly, a ruling in the Georgia action may provide HRH with relief enforceable only in Georgia.

The court finds that these two circumstances create "special circumstances" which justify deviating from the first-to-file Rule. Given that HRH has filed a

counterclaim in the Georgia Action, the court will dismiss this action with the right in HRH to reopen if that motion is filed within 30 days of the entry of a final judgment or dismissal of the Georgia Action and upon a showing that it did not obtain all the relief it would have been entitled to if this action had proceeded in this District.

III. CONCLUSION

For the reasons stated above, HRH's motion to remand [Dkt. No. 15] is **DENIED**. MacGinnitie's motion to transfer [Dkt. No. 23] is **DENIED.** MacGinnitie's motion to dismiss [Dkt. No. 23] is **GRANTED**. The case is **ADMINISTRATIVELY DISMISSED**. HRH is granted the right to reopen the case upon motion within **thirty (30) days** of the entry of a final judgment or dismissal of the Georgia Action and upon a showing that it did not obtain all the relief it would have been entitled to if this action had proceeded in this District. HRH's request for a temporary restraining order [Dkt. No. 6] is **DENIED** as moot. The clerk is ordered to close the case.

SO ORDERED.

At Bridgeport, Connecticut, this 14th day of February, 2005.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge