

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

FILED
MAY 11 2010

MOLLY LIVINGSTON
Clerk of Clinton Co. Circuit Court

WILLIAM KEMPER, et al.,)
)
Plaintiffs,)
)
v.)
)
PRIME TANNING CORP., et al.,)
)
Defendants.)

Case No. 09CN-CV00333

**DEFENDANT NATIONAL BEEF LEATHERS, LLC'S
RESPONSE TO PLAINTIFFS' SUPPLEMENTAL SUGGESTIONS REGARDING
CHANGE OF VENUE PURSUANT TO MO. CT. RULE 51.03 AND SUGGESTIONS IN
OPPOSITION TO DEFENDANTS' PROPOSED WITHDRAWAL OF THEIR MOTION
TO CHANGE VENUE**

Defendant National Beef Leathers, LLC ("NBL") hereby responds to Plaintiffs' Supplemental Suggestions Regarding Change Of Venue Pursuant To Mo. Ct. Rule 51.03 And Suggestions In Opposition To Defendants' Proposed Withdrawal Of Their Motion To Change Venue as follows:

Introduction

Plaintiffs argue that the applications for change of venue as a matter of right (the "Applications") filed by NBL and Defendants Prime Tanning Corp. and Prime Tanning Co., Inc. (collectively, the "Prime Defendants") became effective upon filing and that Plaintiffs will be prejudiced if the Court does not act on those Applications. Plaintiffs then suggest that the Court establish venue in this case in Jackson, Jasper, or Greene County. For the reasons discussed below, Plaintiffs' positions are unsound.

As To Defendants' Withdrawals of Applications for Change of Venue

Nothing in the Missouri Rules of Civil Procedure prohibits a party from withdrawing an

application to change venue. Plaintiffs cite no statute or case law stating otherwise. Instead, Plaintiffs simply assert that this case should be "deemed" to be already transferred from Clinton County. This argument is wholly without merit. The Applications have not yet been acted upon by the Court. Consequently, venue remains at this time in Clinton County, where all parties have continued to file numerous briefs and other documents with this Court under the original Clinton County case number. Because a change of venue has not yet been effected, there is nothing procedurally improper in NBL and the Prime Defendants withdrawing their Applications (the "Withdrawals").

There also is nothing unique about subsequently withdrawing a filed motion. See, e.g., Cross v. Drury Inns, Inc., 32 S.W.3d 632, 636 (Mo. Ct. App. E.D. 2000) ("When a movant needs to supplement the [summary judgment] motion with new facts, the movant should withdraw the original motion and file a new or amended motion incorporating the additional evidence."); State v. Sanning, 271 S.W.3d 56, 58 (Mo. Ct. App. E.D. 2008) (upholding the defendant's right to withdraw a motion for new trial); State ex rel. Hilker v. Sweeney, 877 S.W.2d 624, 626 (Mo. 1994) (mentioning with approval the withdrawal of a motion for leave to amend pleadings).¹

Plaintiffs' contention that State v. Smith, 293 S.W.3d 149 (Mo. Ct. App. 2009), and State ex rel. Dilliner v. Cummins, 92 S.W.2d 605 (Mo. 1936), have no relevance here based on Plaintiffs' assertion that those cases addressed current and former criminal change of venue rules carries no weight. First, Cummins was not a criminal case. Rather, that case involved an election dispute and the then-applicable civil venue statute. Second, although Cummins was a civil case, the court there cited to several criminal cases in which Missouri courts allowed defendants to withdraw applications for change of venue, 92 S.W.2d at 607-608, to support the

¹ Indeed, in Missouri plaintiffs can dismiss an entire case without prejudice at any time before it is finally submitted to a jury. See Mo. Rev. Stat. § 510.130.

proposition that “[t]he right to a change of venue is not a constitutional right, but is a mere statutory privilege which the parties may waive either before or after the change has been granted.” Id. at 607 [emphasis added].² Thus, the relevant teaching of Smith and Cummins for this case is that a party certainly may withdraw its application to change venue before the court has ruled on it.

Moreover, Plaintiffs have no valid basis to assert reliance on Defendants’ Applications. Generally, parties are responsible for invoking their own procedural protections. See McCracken v. Wal-Mart Stores East, LP, 298 S.W.3d 473, 477-478 (Mo. 2009). Accordingly, a party waives its right to a change of venue if it does not timely file an application, just as a party waives other procedural positions such as lack of personal jurisdiction and insufficient service of process if not timely raised. See Mo. R. Civ. P. 51.03(a); 55.27(g). Here, Plaintiffs chose not to file a timely application for change of venue. As they have no right to rely on Defendants’ Applications, they cannot claim undue prejudice by its withdrawal.

As to Alternative Venue Arguments

For the reasons discussed above, Plaintiffs’ repetition of their substantive positions on alternative venues is moot. However, if the Court chooses to address alternative venues notwithstanding Defendants’ withdrawals of their Applications, NBL joins the suggestion by Defendants Burns & McDonnell Engineering Company, Inc. and Elementis LTP L.P. that the venue of this action be transferred to Barton, Greene, or Lawrence County for further proceedings.

² In Cummins, Dilliner contested the result of an election and applied for change of venue, which was ordered. Dilliner’s opponent appeared and successfully moved for remand to the original venue on the grounds that the statute governing election disputes did not authorize venue changes. However, Judge Cummins refused to honor the remand because he believed he was without authority to do so following his order sustaining Dilliner’s application for a change of venue. Dilliner then sought to withdraw his application, but Judge Cummins was unmoved. The Supreme Court of Missouri, though, issued a writ of mandamus directing Judge Cummins to honor the withdrawal of the application for change of venue and to exercise his jurisdiction over the matter.

Conclusion

In summary, there is no procedural rule or precedent that prohibits NBL and the Prime Defendants from withdrawing their Applications for change of venue; Plaintiffs failed to timely submit their own application for change of venue; and Plaintiffs have provided no authority to justify their supposed reliance on Defendants' Applications. Accordingly, this Court should consider Defendants' Applications to have been withdrawn upon the filing of their Withdrawals.

Date: May 11, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **DEFENDANT NATIONAL BEEF LEATHERS, LLC'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL SUGGESTIONS REGARDING CHANGE OF VENUE PURSUANT TO MO. CT. RULE 51.03 AND SUGGESTIONS IN OPPOSITION TO DEFENDANTS' PROPOSED WITHDRAWAL OF THEIR MOTION TO CHANGE VENUE** has been deposited in the U.S. Mail, first class postage prepaid, this 11th day of May, 2010, to the following:

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