2019 IL App (5th) 170270-U

NO. 5-17-0270

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

REBECCA S. REED and LARRY REED,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	St. Clair County.
	)	
v.	)	No. 16-L-184
	)	
JOHN P. WOMICK and WOMICK LAW FIRM, CHTD.,	)	
	)	Honorable
	)	Christopher T. Kolker,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Overstreet and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant law firm was doing business in St. Clair County for purposes of satisfying the venue statute where it was representing two clients in ongoing litigation in St. Clair County at the time the plaintiffs filed suit. Defendants' *forum non conveniens* motion was timely where the trial court had not set a deadline for filing its answer. Defendants failed to meet their burden of demonstrating that transfer was justified under the doctrine of *forum non conveniens* where the record contained no pertinent information concerning most of the forum factors.

¶ 2 The defendants, John P. Womick and the Womick Law Firm, appeal orders of the trial court denying their motion to transfer the case based on improper venue and their motion to transfer based on *forum non conveniens*. They argue that (1) they were not

"doing business" in St. Clair County for purposes of establishing venue there, and (2) the court abused its discretion in denying their motion based on *forum non conveniens* because their motion was timely filed and the forum factors strongly favored transfer to Williamson, Jackson, Union, or Franklin County. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 22, 2008, Rebecca Reed fractured her tooth when she bit into a chicken quesadilla containing a chicken bone. The quesadilla was manufactured by Excelline Foods, Inc., and purchased from Sam's Club. Reed and her husband, Larry (plaintiffs), retained the services of the defendants. On August 10, 2010, the defendants filed a product liability action on behalf of the plaintiffs in Williamson County, naming as defendants Excelline Foods and Wal-Mart Stores, Inc., the owner of Sam's Club. On April 26, 2011, that action was dismissed, apparently for want of prosecution. The plaintiffs did not learn that their action against Excelline and Wal-Mart was dismissed until March 31, 2014.

¶ 5 On March 30, 2016, the plaintiffs filed the instant lawsuit against the defendants in St. Clair County. The plaintiffs alleged that they contacted the offices of the defendants "on a semi-regular basis" to inquire about the status of their case. Each time they did so, they were informed that the case was proceeding. They alleged that they continued to inquire about the status of their case until March 31, 2014. On that date, the defendants informed the plaintiffs that the case had been dismissed on April 26, 2011, and that it was too late to refile their claim against Excelline Foods and Wal-Mart. The plaintiffs alleged that the defendants failed to act with reasonable diligence in prosecuting their case, failed

to refile the case after it was dismissed, and lied to the plaintiffs concerning the status of the case. They alleged that, as a result of the defendants' conduct, they lost their right to bring a claim against Excelline Foods and Wal-Mart. The plaintiffs asserted claims of legal negligence, breach of contract, breach of fiduciary duty, and fraud.

¶ 6 On May 6, 2016, the defendants filed a motion to transfer the case, alleging that venue was not proper in St. Clair County. They argued that at the time the plaintiffs filed their action, John Womick was not a resident of St. Clair County, the Womick Law Firm did not have an office in St. Clair County, and the firm was not doing business in St. Clair County within the meaning of the venue statute. In a supporting affidavit, Womick stated that he was a resident of Jackson County, and that the Womick Law Firm had offices in Carbondale (Jackson County) and Herrin (Williamson County). He stated that the defendants represented clients "primarily in Jackson, Williamson, and Union" Counties, but also filed cases "in other counties in Illinois." Womick attested that his firm had 300 cases pending on the date the plaintiffs filed suit, only two of which were in St. Clair County. Those cases included a guardianship case, which settled in April 2016, and an ongoing divorce case. Attached to the defendants' motion was a list of open cases. It showed cases pending in Franklin, Jackson, Massac, Randolph, Union, and Williamson Counties. The defendants later filed an amended affidavit in support of the motion to transfer. The differences in the affidavits are not significant for purposes of this appeal.

¶ 7 The plaintiffs filed a response to the defendants' motion to transfer. In it, they highlighted the differences between original and amended affidavits. They argued that the defendants were not being forthright about the extent of their activity in the two St. Clair

County cases that were pending when the plaintiffs filed this suit. Attached was a printout showing activity in the St. Clair County divorce case. It showed that Womick filed motions in the case five times in 2016. On December 6, 2016, the court denied the defendants' motion to transfer.

¶ 8 On January 6, 2017, the defendants filed both a motion to reconsider the court's December 6 ruling and a motion to transfer based on the doctrine of *forum non conveniens*. In the forum motion, the defendants alleged that no part of the transaction occurred in St. Clair County, no employees of the defendants lived in St. Clair County, and there were no sources of evidence in St. Clair County. They further alleged that the "witnesses would be in Jackson, Williamson, and Franklin Counties, but not St. Clair." Later, however, they alleged that "[w]itnesses to the case would be situated only in Union, Jackson, and Williamson County."

¶ 9 The defendants argued that the *forum non conveniens* factors strongly favored transfer. However, their arguments concerning the convenience of their proposed alternative fora were somewhat inconsistent and confusing. For example, the defendants argued that it would be unfair to burden residents of St. Clair County with jury duty "to decide an issue that is primarily based in Williamson, Franklin, or Jackson County." But in the next paragraph, they argued that all of the "relevant factors strongly favor transfer to Union County." The defendants argued that "whatever deference might be provided to the Plaintiff is lost because the Defendants seek [to] transfer the case to the county where the transaction occurred, Union." They further argued that "Union County is where this

localized controversy should be decided in a local forum." In the very next paragraph, however, they concluded by asking the court to transfer the matter to Jackson County.

¶ 10 Significantly, the defendants did not identify any witnesses either party was likely to call, and they did not state what evidence either party anticipated presenting or where any such evidence was located. Moreover, they did not provide any documentation related to any of the forum factors, not even another affidavit from John Womick.

¶ 11 On February 16, 2017, the plaintiffs filed a motion to strike the defendants' motion to reconsider and their motion to transfer based on *forum non conveniens*. In support of their request to strike the forum motion, the plaintiffs argued that the motion was untimely under Illinois Supreme Court Rule 187(a) (eff. Jan. 4, 2013).

¶ 12 On June 14, 2017, the court denied both the motion to reconsider and the motion for transfer based on *forum non conveniens*. The defendants filed a petition for leave to appeal with this court pursuant to Illinois Supreme Court Rule 306(a) (eff. Mar. 8, 2016).

¶ 13 II. DISCUSSION

¶ 14 Before addressing the defendants' contentions, we note that the plaintiffs have not filed a brief with this court. Because the issues before us are relatively simple, we may resolve them without input from the plaintiffs. See *County of McHenry v. Smith*, 2015 IL App (2d) 141165, ¶ 11 (citing *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976)). We turn now to the defendants' contentions.

¶ 15 A. Venue

¶ 16 The defendants first argue that the court erred in denying their motion to transfer based on improper venue and their motion to reconsider that ruling. They acknowledge

that at the time the plaintiffs filed this action, they had two cases pending in St. Clair County. They argue, however, that this was insufficient to establish that they were "doing business" in St. Clair County for purposes of establishing venue there. We disagree.

¶ 17 For purposes of establishing venue, a business entity is a resident of any county in which it has an office "or is doing business." 735 ILCS 5/2-102(a) (West 2014). A defendant is "doing business" in a county within the meaning of the venue statute if the nature of its business activity in the county is such that the defendant is "conducting its usual and customary business within the county in which venue is sought." *Baltimore & Ohio R.R. Co. v. Mosele*, 67 Ill. 2d 321, 329 (1977). This requires "quantitatively more business activity within the county" than is necessary to establish personal jurisdiction over the defendant. *Id*.

¶ 18 To determine whether this requirement is met, courts must consider "the quantity or volume of business activity within a county." *Weaver v. Midwest Towing, Inc.*, 116 Ill. 2d 279, 286 (1987). Courts must also consider the nature of the defendant's business. *Id*. Relevant considerations are the revenue generated from business activity within a county and "the level of business activity that is involved," including the expenditure of funds required and the number of personnel involved. *Id*. The quantity of business within a county must also be considered in terms of the defendant's total volume of business. See *Stambaugh v. International Harvester Co.*, 102 Ill. 2d 250, 258-59 (1984) (finding that the defendant was not doing business in a county for venue purposes where its sales in that county comprised 5/100 of 1% of its total sales volume); *Reynolds v. GMAC*

Financial Services, 344 Ill. App. 3d 843, 848 (2003) (noting the absence of information in the record concerning the total volume of the defendant's business).

¶ 19 It is the burden of the defendants, as the moving party, to demonstrate that venue is not proper. *Weaver*, 116 Ill. 2d at 285; *Reynolds*, 344 Ill. App. 3d at 848. To meet this burden, they "must set out specific facts, not conclusions, and show a clear right to the relief asked for." *Weaver*, 116 Ill. 2d at 285. On appeal, we review the trial court's findings of fact to determine whether they are against the manifest weight of the evidence. However, we review *de novo* the court's conclusion of law. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 154 (2005). Because the defendants are the appellants, we resolve any questions arising from the inadequacy of the record against them. *Weaver*, 116 Ill. 2d at 285.

¶ 20 Here, the defendants presented evidence that on the date the plaintiffs filed this action, they had 300 cases pending in various courts, including only 2 in St. Clair County. The record also contains evidence showing that at least one of those cases—a divorce case that had been pending for nine years—involved a substantial number of court filings. However, the record contains no information concerning the amount of time or number of employees involved in handling cases in St. Clair County in comparison to the cases handled in other counties, and the record contains no information about the revenue generated in the St. Clair County cases or the firm's total revenue. It is thus impossible to assess whether the defendants' business activity in St. Clair County is really so minimal that venue was not proper there.

¶ 21 An additional consideration is worth mentioning. The defendants correctly point out that whether a defendant is doing business in a county for purposes of establishing venue must be measured at the time the suit is filed. *Wilson v. Central Illinois Public Service Co.*, 165 Ill. App. 3d 533, 537 (1988). As we have explained, however, the question must be considered in light of the nature of the defendants' business. See *Weaver*, 116 Ill. 2d at 286. As a law firm specializing in personal injury litigation, how many cases the defendants have pending in various courts at any given time might change from month to month as some cases are concluded and new cases are filed. Thus, the slice-in-time picture presented by the defendants may not be the most accurate way of assessing how much business they do within St. Clair County as a portion of their total volume of business. In any case, even assuming the evidence concerning the defendants' open cases on the day the plaintiffs filed suit presents a complete and accurate picture of the volume of the defendants' business within St. Clair County, we find no error in the trial court's ruling. The record reveals that the defendants were involved in at least one St. Clair County case that required a significant level of activity. Moreover, the record is devoid of any evidence showing that the defendants' St. Clair County cases represented such an insignificant portion of their overall practice that they were not "doing business" there for purposes of venue. The court properly denied the defendants' motion to transfer based on improper venue.

¶ 22 B. Forum

¶ 23 The defendants also contend that the court erred when it denied their motion to transfer based on *forum non conveniens*. There are two components to this argument.

First, the defendants argue that, contrary to the plaintiffs' contention before the trial court, their forum motion was timely because the trial court had not yet imposed a deadline for filing an answer in the matter. Second, the defendants argue that the trial court abused its discretion in denying the motion because the forum factors strongly favored transfer. We consider these arguments in turn.

¶ 24 As we discussed earlier, the plaintiffs filed a motion to strike the defendants' forum motion, arguing that it was not timely filed. Under Illinois Supreme Court Rule 187(a), a motion to transfer based on *forum non conveniens* must be filed within 90 days after the last day for filing an answer. Ill. S. Ct. R. 187(a) (eff. Jan. 4, 2013). In the plaintiffs' motion to strike, they asserted that the defendants' forum motion should have been filed by July 30, 2016.

¶ 25 In arguing that their January 2017 forum motion was timely, the defendants call our attention to *Miller v. Consolidated R. Corp.*, 173 Ill. 2d 252 (1996). That case involved a complicated procedural history. The plaintiff filed an action in Madison County, Illinois, seeking damages for injuries he sustained in the course of his employment with the defendant railroad. *Id.* at 253. The defendant filed a motion to dismiss based on the doctrine of *forum non conveniens*, arguing that the State of Indiana was a more convenient forum. *Id.* at 254. The Madison County court granted the motion on the condition that the defendant waive the statute of limitations if the plaintiff refiled his action within six months. *Id.* (citing Ill. S. Ct. R. 187).

¶ 26 The plaintiff refiled the action in St. Louis, Missouri, and the defendant filed a motion to dismiss based on the statute of limitations. The Missouri court denied the

motion. *Id.* The defendant filed another motion to dismiss based on *forum non conveniens*. *Id*. at 254-55. Before the Missouri court could rule on the forum motion, the plaintiff filed a motion with the Madison County court asking the court to reinstate his lawsuit because the defendant did not waive the statute of limitations, which was a condition of its earlier dismissal order. *Id*. at 255. The defendant filed a motion opposing reinstatement of the case. The trial court denied the defendant's motion and reinstated the case. *Id.*

¶ 27 The defendant then filed another motion to dismiss based on principles of *forum non conveniens*, again arguing that Indiana was a more convenient forum. *Id*. at 256. This time, the defendant relied in part on the plaintiff's testimony in a deposition taken while the case was pending in Missouri. *Id*. The trial court denied this motion, and the defendant appealed that ruling. *Id*. Although the appellate court denied the defendant's petition for leave to appeal, the supreme court granted its subsequent petition for leave to appeal to that court. *Id*.

¶ 28 On appeal, the plaintiff argued that the supreme court should not consider the merits of the defendant's forum argument because the motion was not timely filed. *Id*. at 259. Rule 187(a) provides that a forum motion must be filed "no later than 90 days after the last day allowed for the filing of that party's answer." *Id*. (citing Ill. S. Ct. R. 187(a)). The plaintiff in *Miller* filed his initial suit in May 1993, and the defendant filed its first motion in response in June 1993. *Id.* at 253-54. The action was reinstated in Madison County in March 1995. *Id*. at 255. The defendant filed its second forum motion in Madison County in May 1995. *Id*. at 256. The plaintiff emphasized on appeal that this

was nearly two years after the defendant filed its first responsive pleading. *Id.* at 259. He argued that, as a result, the defendant's second forum motion was not timely filed and was properly denied on that basis. *Id.*

¶ 29 In rejecting this contention, the supreme court first noted that trial courts enjoy "broad discretion" to set or extend deadlines for filing pleadings. *Id.* at 260. The supreme court then noted that the trial court in that case had not set a deadline for the defendant to file its answer and that the defendant had not filed an answer. *Id.* The court therefore found that the 90-day time limit for filing a forum motion had not been triggered. *Id.* at 259-60. As such, the court concluded, the defendant's motion was timely filed. *Id.* at 260.

¶ 30 Here, too, the record indicates that the defendants have not filed an answer and the court has not set a deadline for them to do so. We therefore agree with the defendants that, under *Miller*, their forum motion was timely.

¶ 31 We turn our attention to the merits of the defendants' argument that the court abused its discretion in denying their motion to transfer based on *forum non conveniens*. As noted previously, they argue that the court abused its discretion in ruling as it did because the circumstances of this case strongly favor transfer. We are not persuaded.

¶ 32 *Forum non conveniens* is an equitable doctrine that allows a court to decline jurisdiction over a case if it appears that an alternative forum would be more convenient for all parties and would better serve the interests of justice. *Foster v. Hillsboro Area Hospital, Inc.*, 2016 IL App (5th) 150055, ¶ 55. The doctrine assumes that there is more than one forum with the authority to resolve the case. *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812, ¶ 12. The right of a plaintiff to choose from among these proper fora is

substantial. *Id*. ¶ 18. For this reason, a motion to transfer should only be granted if the defendant shows that (1) the plaintiff's chosen forum is inconvenient for the defendant and (2) the defendant's proposed alternative forum would be more convenient for all parties to the litigation. *Brown v. Cottrell, Inc.*, 374 Ill. App. 3d 525, 528-29 (2007) (citing *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 444 (2006)).

¶ 33 In determining whether a defendant has met this burden, courts must consider and weigh all of the pertinent factors, which include both private-interest factors and public-interest factors. *Id*. at 529. Private-interest factors include (1) the convenience of the parties, (2) the relative ease of access to witnesses and other sources of evidence, and (3) "all other practical considerations that make the trial of a case easy, expeditious, and inexpensive." *Foster*, 2016 IL App (5th) 150055, ¶ 27. Public-interest factors include (1) the interest in deciding localized controversies locally, (2) the unfairness of imposing the burden of jury duty and the expense of a trial on residents of a county with no meaningful connection to a case, and (3) the comparative congestion of court dockets in the plaintiff's chosen forum and the defendant's proposed alternatives. *Brown*, 374 Ill. App. 3d at 529.

¶ 34 The defendant must show that the balance of these factors strongly favors transfer. *Foster*, 2016 IL App (5th) 150055, ¶ 27. In deciding whether the defendant has met this burden, the court must evaluate and balance *all* of the forum factors. *Fennell*, 2012 IL 113812, ¶ 17. If the court places undue emphasis on any one factor, " 'the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so

valuable.' " *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 176 (2003) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50 (1981)).

¶ 35 An additional consideration in all *forum non conveniens* cases is the plaintiff's choice of forum. The plaintiff's choice must always be accorded deference. However, the amount of deference accorded to the plaintiff's choice of forum depends on the circumstances of the case. *Brown*, 374 Ill. App. 3d at 529. When a plaintiff chooses to file an action in his or her home county or in a county where the events at issue in the litigation took place, the plaintiff's choice of forum is entitled to more deference than it is when the plaintiff's choice is neither his or her home county nor the site of any of the events at issue. *Id.* As both this court and our supreme court have repeatedly emphasized, however, *less* deference does not mean *no* deference. *Langenhorst*, 219 Ill. 2d at 448; *Foster*, 2016 IL App (5th) 150055, ¶ 28; *Brown*, 374 Ill. App. 3d at 529.

¶ 36 On appeal, we will not reverse a trial court's decision to grant or deny a forum motion unless we find that the court abused its considerable discretion. We will find an abuse of discretion only if no reasonable person could take the position adopted by the trial court. *Brown*, 374 Ill. App. 3d at 529.

¶ 37 We first consider the private-interest factors. The first of these factors—the convenience of the parties—does appear to favor transfer. John Womick lives in Jackson County, the Womick Law Firm has offices in both Jackson and Williamson Counties, and the plaintiffs live in Franklin County. St. Clair County is further from each of those locations than any of the defendants' four proposed alternatives—Union County, Williamson County, Jackson County, and Franklin County.

¶ 38 However, there is scant evidence in the record concerning either of the other private-interest factors. Although the defendants asserted in their motion that the witnesses who might testify in this case "would be" in Jackson County, Williamson County, and either Franklin County or Union County, they did not identify any witnesses they intended to call. See *Weaver*, 116 Ill. 2d at 289. Similarly, although they asserted that no physical or documentary evidence was located in St. Clair County, they made no allegations concerning what type evidence would be needed or where that evidence was located. We acknowledge that we must look beyond the allegations of the motion and consider whether the record as a whole shows that the forum factors strongly favor transfer. See *Blakey v. Gilbane Building Co.*, 264 Ill. App. 3d 626, 630 (1994). However, nothing in the record indicates what witnesses either party might call to testify, much less where any such witnesses reside. The record does not even indicate who treated Rebecca Reed for her injury or where this treatment took place. Nor is there any indication in the record as to what evidence might be needed or where that evidence is located. Thus, the defendants have not shown that the relative ease of access to witnesses and evidence favors transfer.

¶ 39 The last private-interest factor we consider is the practical considerations that make a trial easy, expeditious, or inexpensive. The possibility of a jury view, if appropriate, is one of the considerations. *Brown*, 374 Ill. App. 3d at 533. The defendants acknowledge that a jury view would not be appropriate in this case, and they do not point to any other pertinent considerations. As such, this factor does not favor any particular forum.

¶ 40 We next consider the public-interest factors. The first of these is the interest in deciding localized controversies locally. Contrary to the defendants' contention, this factor does not appear to favor any potential forum. In analyzing this factor, we must note that this case involves a claim of legal malpractice as well as an underlying product liability claim. To prove damages, the plaintiffs will have to present evidence concerning the underlying claim. It is not entirely clear from the record where Rebecca Reed purchased the chicken quesadilla or where she bit into it, injuring her tooth. As we noted earlier, the defendants alleged in their *forum non conveniens* motion that "the transaction" occurred in Union County. No part of the transaction between the plaintiffs and the defendants took place in Union County. We thus presume that this allegation means that all or part of the transaction at issue in the underlying product liability suit took place there. However, this court has previously found that product liability cases are not inherently local in flavor. See *Brown*, 374 Ill. App. 3d at 534.

¶ 41 Although the dispute between the parties over the defendants' alleged legal malpractice is a type of controversy that is generally more local in flavor than the underlying product liability claim, it does not appear to be centered in any one location either. The underlying suit was filed in Williamson County, and presumably the relevant acts and omissions by the defendants and their employees took place at the Williamson County courthouse and at the defendants' offices, which are located in both Williamson County and Jackson County. The defendants acknowledge that their practice spans multiple Illinois counties, and the record reveals that when the plaintiffs filed this action, the defendants had cases pending in at least seven counties. Moreover, the fact that the

defendants have proposed four alternate fora undermines any claim that the parties' dispute over the defendants' alleged malpractice is particularly local in flavor. We therefore find that this factor does not strongly favor transfer.

¶ 42 The next factor we consider is the unfairness of burdening the residents of St. Clair County with jury duty and the expense of a trial. St. Clair County has little meaningful connection to the dispute at issue. Therefore, this factor does favor transfer.

¶ 43 The last public-interest factor is the relative congestion of the dockets in all of the potential fora. This is not a significant factor, particularly where the defendant fails to show that one proposed forum is likely to resolve the litigation more quickly than any other. *Langenhorst*, 219 Ill. 2d at 451-52; *Brown*, 374 Ill. App. 3d at 535. In this case, the defendants did not supply the court with any information concerning the dockets in St. Clair County or any of their proposed alternative fora. Moreover, they allege that although the volume of cases filed in St. Clair County exceeds the volume of cases in any of the other counties, the courts in those counties do not resolve cases more quickly than St. Clair County courts. Thus, the defendants essentially concede that this factor does not weigh in favor of transfer.

¶ 44 Finally, we must consider the deference to be accorded to the plaintiffs' choice of St. Clair County as a forum. St. Clair County is not their home county, and there is no indication in the record that any portion of the relevant transactions took place in that county. Thus, the plaintiffs' choice is entitled to somewhat less deference than it would be if they had filed their action in their home county or one of the counties where events at issue occurred. However, as we stated previously, less deference does not mean no

deference. See *Langenhorst*, 219 Ill. 2d at 448. Thus, we must give at least some deference to the plaintiffs' choice of St. Clair County. This deference, then, weighs against transfer.

¶ 45 Considering all of the forum factors and viewing the relevant circumstances as a whole, we cannot find that the defendants satisfied their burden of demonstrating that the pertinent factors strongly favored transfer. We acknowledge that, as previously discussed, two of the factors do weigh in favor of transfer. We further acknowledge that it is quite possible that, had the defendants presented the court with additional evidence concerning the remaining factors, they would have carried their burden. However, we do not believe that it would be appropriate for this court to simply assume that the factors on which the defendants failed to present evidence would strongly weigh in favor of transfer. To reverse the trial court's decision on the record before us would require us to overlook the fact that it was the defendants' burden to prove that transfer was appropriate. It would also require us to make a decision based solely on two of the factors, something our supreme court has cautioned us not to do. See *Fennell*, 2012 IL 113812, ¶ 17. We find no abuse of discretion in the trial court's ruling.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we affirm the orders of the trial court denying the defendants' motions to transfer the case.

¶ 48 Affirmed.