

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

VIRGIE ARTHUR
PLAINTIFF

v.

NELDA (ROSE) MILLIGAN TURNER,
and KENNETH TURNER
DEFENDANTS

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Civil Action No. 6:08MC6

**PLAINTIFF’S RESPONSE IN OPPOSITION
TO MOTION TO TRANSFER VENUE**

Virgie Arthur, files this Plaintiff’s Response in Opposition to Motion to Transfer Venue which was filed by Nelda Rose (“Rose”) Turner and Kenneth Turner.

1. In their Motion to Transfer Venue (“Motion”), the Turners erroneously rely on 28 U.S.C. sec. 1404(a) as support for the argument that this Court should transfer this action and Plaintiff’s Motion to Compel Production of Documents (“Motion to Compel”) to Judge Lee Rosenthal’s court in the Southern District of Texas. They have overlooked the part of the statute that provides a civil action may be transferred to “any other district or division *where it might have been brought.*” At no point do the Turners even attempt to show that, as a matter of law, the Motion to Compel might have been brought in the Southern District of Texas, even though the subpoenas issued from the Eastern District.

2. The Turners cite an inapposite case for the argument that “the Southern District is a permissible venue for the issuance of the subpoenas.” *See Mohamed v. Mazda Motor Corp.*, 90 F.Supp.2d 757, 778 (E.D. Tex. 200) (cited by Turners). That case involved the issuance of a subpoena to compel *attendance at trial*, under FED. R. CIV. P. Rule

45(c)(3)(A)(ii), which is a limited exception to the rules that a subpoena should not require a person who is not a party “to travel more than 100 miles from where that person resides,” FED. R. CIV. P. Rule 45(c)(3)(A)(ii), and that the subpoenas in question must be issued “from the Court for the district where the production or inspection is to be made.” FED. R. CIV. P. Rule 45(a)(2)(C). The case cited by the Turners provides no support for the notion that the records-only subpoenas in the present case might have been issued from the Southern District.

3. The Turners argue that Plaintiff’s choice of forum was the Southern District, but they have the analysis all wrong. First, the Turners focus on the wrong action. In so far as Plaintiff’s choice of forum is to be considered, that would be the Eastern District, where the action that the Turners wish to transfer was filed, not the Southern District, as the Turners argue. Second, the Plaintiff did not really have a choice to make. Rule 45 dictates that the subpoenas must issue from the Eastern District and also provides that the subpoenas be enforced there:

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

FED. R. CIV. P. Rule 45(e).

Not only is service of process geographically limited by [FRCP] 45, but enforcement proceedings are too. Rule 45(e) ... provides that failure to comply with a properly issued subpoena “may be deemed a contempt of the court from which the subpoena issued.” Ordinarily, in the case of a subpoena for the production of documents alone, that court would be “the court for the district where the production or inspection is to be made.”

Dynergy Midstream Servs. v. Trammochem, 451 F.3d 89, 95 (2d Cir. 2006) (internal citations omitted).¹

4. Even if the focus of the “choice of forum” analysis were the Southern District, as the Turners argue, the Plaintiff did not choose that forum. She filed suit in state district court in Harris County, Texas. The case was removed to federal district court in the Southern District by the media defendants. The Turners state in their Motion that Plaintiff did not file a Motion for Remand, but that representation to this Court is false. Plaintiff filed a Motion for Remand², and it was argued in the presence of counsel for the Turners on April 18, 2008. Plaintiff withdrew that motion, for judicial economy, because Plaintiff’s motion to add new defendants, including Rose Turner, should have the same practical result of sending the case back to state court, if the motion is granted.

5. Contrary to the representations that the Turners have made to this Court, Judge Rosenthal did not hear the Turners’ motions to quash on the merits. She merely allowed counsel for the Turners to address the court and to argue that she should hear the motions, because counsel had shown up there under the mistaken notion that he was in the right court. It was a courtesy, nothing more. The specious constitutional and privilege issues in the Turners’ motions were not touched by court or counsel. It is disingenuous to argue, as the Turners do, that the matter is under advisement in Judge Rosenthal’s court, when, as a matter of law, she has no authority to quash subpoenas issued in the Eastern District. The Turners still offer no answer to controlling caselaw cited to this Court by plaintiff. *See In re: Clients and Former Clients of Baron and Budd, P.C.*, 478 F.3d 670,

¹ Up to this point, Plaintiff has not requested that this Court hold the Turners in contempt, because Plaintiff assumes that their failure to comply with the subpoenas was on the erroneous advice of counsel. Although reliance on the advice of counsel is not a defense to a charge of contempt, it may be a mitigating factor. *S.E.C. v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 670 (5th Cir. 1981).

² Attached as Exhibit A, Plaintiff’s Motion for Remand without its attachments.

670-71 (5th Cir. 2007) (with exception of MDL cases, only issuing court has authority to rule on subpoena). The Turners do not attempt to distinguish the *Baron and Budd* case or to deal with it in any way, because they cannot. Neither can they bring themselves to admit the obvious -- that they filed their motions to quash in the wrong court.

6. The Turners argue that "all counsel are located in the Southern District," which, if they are referring to all counsel in the main case, is not correct as a matter of fact. One need only look at Exhibit B to the Turners' Motion to see that counsel for Defendant Howard K. Stern office in Atlanta, Dallas, and Palm Beach. The Exhibit shows no Texas counsel for Stern. At any rate, the very cases on which the Turners rely in their Motion hold that convenience of counsel is not a factor to consider in a change-of-venue issue. *In re Volkswagon AG*, 371 F.3d 201, 206 (5th Cir. 2004); *In re Horseshoe Entertainment*, 337 F.3d 429, 434 (5th Cir. 2003). The Turners acknowledge as much in footnote 4 of their Motion, while attempting to equate convenience of counsel with convenience of the parties. They cite no authority for that equation, and the law is contrary to their position.

We also conclude that the Eastern District Court reversibly erred in considering a factor that is not part of the § 1404(a) analysis. Specifically, in its order the district court considers that counsel for both parties are located in Dallas, Texas. The word "counsel" does not appear anywhere in § 1404(a), and the convenience of counsel is not a factor to be assessed in determining whether to transfer a case under § 1404(a). *In re Horseshoe*, 337 F.3d at 434 (finding that the "factor of 'location of counsel' is irrelevant and improper for consideration in determining the question of transfer of venue"). Similar to the facts in *In re Horseshoe*, neither the plaintiffs nor the Eastern District Court favors us with "a citation to any Supreme Court or Circuit Court decision recognizing the appropriateness of this factor nor have they cited any statutory text or any legislative history indicating the intention of Congress that such a factor be considered in deciding a motion to transfer." *Id.* As such, the Eastern District Court's reliance on the location of counsel as a factor to be considered in determining the propriety of a motion to transfer venue was an abuse of discretion.

In re Volkswagen AG, 371 F.3d at 206. The Turners argument is calculated to lead this Court into error.

7. Furthermore, the Turners focus on only a few of the many factors to consider in a venue issue. Even the “convenience” issue is far more complicated than they seem to understand.

The determination of "convenience" turns on a number of private and public interest factors, none of which are given dispositive weight. *Action Indus., Inc. v. U.S. Fidelity & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004) (citing *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 827 (5th Cir. 1986)). The private concerns include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n. 6, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). The public concerns include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law. *Id.*

In re Volkswagen AG, 371 F.3d 201, 203 (5th Cir. 2004). The Turners do not address most of those factors.

8. Neither do the Turners explain how it is inconvenient for them to litigate the issue of the subpoenas in their home district. Filing is done electronically. L.R. CV-5(a). Plaintiff has not requested an oral hearing; the issue can be decided on submission without appearance by counsel in person. L.R. CV-7(g).³

Prayer

Plaintiff prays that the Motion to Transfer Venue be denied.

³ The Turners seem oblivious to the rules, including the one that requires a certificate of conference. L.R. CV-7(h).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 20th of May, 2008, a true and correct copy of the foregoing Plaintiff's Response in Opposition to Motion to Transfer Venue was served upon the following counsel electronically via the CM/ECF system and certified mail, return receipt requested.

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/s/ M. Michael Meyer
M. Michael