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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

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COUNTER COPY - DO NOT REMOVE - Central Division

In re	:	
	:	
MRS. J. G. MCDONALD'S	:	Bankruptcy No. B-78-00739
CHOCOLATE COMPANY	:	
	:	
Bankrupt	:	
	:	
M. BYRON FISHER, Trustee	:	
	:	
Plaintiff	:	MEMORANDUM DECISION AND ORDER
	:	
vs	:	
	:	
RICHARD SMITH	:	
	:	
Defendant	:	

Glen E. Clark, Stephen T. Preston representing the trustee, M. Byron Fisher. Blaine R. Ferguson representing the defendant, Richard Smith.

On February 11, 1980, the trustee filed a complaint against the defendant, Richard Smith, under sections 67(d) and 60(b) of the Bankruptcy Act, 11 U.S.C. §§107(d) and 96(b). At the time of the alleged transfers the defendant was an employee of the bankrupt corporation, and the challenged transfers consisted of payments made by the corporation of the defendant's expenses incurred on a company charge card and the payment of compensation for vacation time and for a bonus. These alleged preferences are in the combined amount of \$9,839. Defendant replied by a motion to dismiss based on a claim of improper venue and lack of personal jurisdiction. This motion was denied at the pre-trial conference on April 1, 1980.

A motion for transfer of the adversary proceeding was thereafter filed under Rule 782, Fed.R. Bankr.P., on April 22, 1980. Response and reply memoranda were duly filed and the matter was submitted for decision on May 14, 1980. On May 20, 1980, the plaintiff filed a petition for oral argument. On the same day, the defendant filed an objection to that petition alleging noncompliance with the local rules of this Court in that plaintiff did not timely file this request.

The Court is of the opinion that this objection is well-taken and that the request for oral argument must be denied. By terms of Local Rule 5(g), a request for oral argument must be indicated "under the title of the motion or responses thereto." This rule is interpreted by the Court to require the request for oral argument to be made before the time the motion is submitted to the Court for decision. Unless a request for oral argument is made with the motion or with responding memoranda of the respondent or movant, oral argument is "deemed . . . waived." In the proceeding before the Court, the request for oral argument was made almost a week after the motion was submitted for decision to the Court. It is untimely and the Court proceeds to rule on the motion without hearing oral argument from the parties.

The criteria to be applied in the Court's exercise of discretion under Rule 782, Fed.R. Bankr.P., to transfer an adversary proceeding have been carefully laid out in Cole Associates, Inc. v. Howes Jewelers et al., C.P. Nos. 80-0017, 80-0016, and 80-0019 (D. Utah June 23, 1980). Although that decision was rendered under 28 U.S.C. §1475 (transfer of venue under the new Code), the reasoning is equally applicable to this case. The factors set out in Cole Associates, derived from cases decided under 28 U.S.C. §1404(a) (transfer of venue in the District Courts) and under Rules 116(b) (transfer of venue of a bankruptcy case) and 782 (transfer of venue of an adversary proceeding), Fed.R. Bankr.P., establish guidelines within which the Court can determine whether a transfer of venue would be "in the interest of justice and for the convenience of the parties." General factors to be considered are: "the relative ease of access to the sources of proof; the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses; the enforceability of a judgment if obtained; the applicability of a particular state law and the local interest in applying that

law through courts within the state; the responsibilities and difficulties of court administration; the relative advantages and obstacles to fair trial; and other practical matters which encourage the efficient and inexpensive trial of the case." Cole Associates, Inc. v. Howes Jewelers et al., supra at 5. Factors specifically relevant to the transfer of venue in bankruptcy proceedings include: "the proximity of creditors of every kind to the Court; the proximity of the debtor to the Court, the proximity of witnesses necessary to the administration of the estate; the location of the assets; the economic administration of the estate; and the necessity for ancillary administration" in a liquidation proceeding. Id at 5.

The defendant argues that the criteria established for transfers of venue in bankruptcy cases, i.e., the proximity of the debtor, creditors, and witnesses necessary to administration to the Court, the location of assets, and the economic administration of the estate, are applicable only to transfers of venue of entire bankruptcy cases under Rule 116, Fed.R. Bankr.P., and not to transfers of adversary proceedings under Rule 782, Fed.R. Bankr.P. While the defendant's arguments emphasizing the inherent differences between these two types of transfers are convincing, it seems to the Court that these arguments go more properly not to the criteria which should be applied, but rather to the weight to be given each factor in determining the ultimate outcome. Thus, the proximity of creditors and of witnesses necessary to the administration of the estate are not as important in deciding whether to transfer an adversary proceeding as they are in the transfer of an entire bankruptcy case. The tests of "in the interest of justice and for the convenience of the parties" are found in both Rule 116, Fed.R. Bankr.P., and Rule 782, Fed.R. Bankr.P., and similar criteria will logically be weighed in the Court's determination of "justice"

and "convenience" under both rules. See The Uhlmann Offices, Inc. v. Harfield-Zodys, Inc., 1 B.C.D. 1230 (S.D.N.Y. 1975), and cases cited. The inherent differences in the two types of transfer proceedings will be taken into consideration in the balancing process.

Many of the cases supporting the application of additional criteria in transfers of venue in bankruptcy cases, including cases cited by the plaintiff, arise in the context of chapter proceedings. As with the differences between transfers under Rule 116 and transfers under Rule 782, the fact that this motion arises in a liquidation proceeding ordinarily will not change the criteria to be applied, but will merely alter the predominance given to certain factors. In Cole Associates, Inc. v. Howes Jewelers et al., supra, the Court was concerned with a Chapter 11 debtor still in the process of attempting a successful reorganization. In that case, the Court emphasized the importance of the economic administration of the estate in a motion to transfer venue brought in a reorganization proceeding. Although this factor must also be taken into consideration in a liquidation proceeding, its importance is lessened as the Court is concerned only with supervising the collection and distribution of the debtor's assets and not with attempting to aid both the interests of the debtor and his creditors by providing opportunity for the debtor to construct a successful reorganization.

Proper analysis of the applicable criteria depends, of course, upon the burden of proof which must be carried in a motion to transfer venue. As stated in Cole Associates, Inc. v. Howes Jewelers et al., supra at 6, "the burden of proof lies with the party requesting the change of venue, and that . . . burden must be carried by a preponderance of the evidence." In assessing this burden, however, careful consideration must be given to the comment made in the Advisory Committee's Notes to Rule 782, Fed.R. Bankr.P.:

In view of the extension of the territorial limits of effective service by Rule 704(f), it behooves courts of bankruptcy to accord a liberal construction to this Rule 782 in order to minimize hardship to parties served in a part of the country remote from the district where the court of bankruptcy is sitting.

Furthermore, the Advisory Committee's Notes to Rule 704(f) which established nationwide service of process, states, in referring to Rule 782 transfers of adversary proceedings:

[A] court should be particularly hospitable to a motion for transfer when the defendant resides or has his principal place of business at a substantial distance from the district where the case is pending.

In applying the criteria and the burden of proof set out, the court is of the opinion that defendant's motion to transfer venue to the Bankruptcy Court for the Northern District of Georgia, Atlanta Division, must be granted.

Both parties have properly established by affidavit the necessity of calling witnesses to testify in their behalf who reside near their place of residence. The defendant lists twelve witnesses, who reside in the Southeastern part of the country, as necessary to establish his case. The trustee lists ten witnesses to be called who either reside in or near Salt Lake City. Likewise, the records of the two parties are located at their respective places of residence. Thus, a trial of the case in either district will result in inconvenience and greater expense for one of the parties. No allegations have been made concerning any difficulty in obtaining the attendance of witnesses. The balancing of these factors, then, provides little guidance to the court other than as a basis upon which to measure the relative hardship to the parties.

The legal issues involved are questions of federal law brought under the Bankruptcy Act. There exists no apparent legal state interest. Any judgment obtained must be enforced in the Bankruptcy Court in Georgia and assets subject to the judgment, if obtained, will likewise be located where the

defendant resides. The proximity of creditors and of witnesses necessary to the administration of the estate appears to the Court to bear little weight on the question of transfer in this particular proceeding. The creditors as a whole have no direct interest in this suit except as is represented by the trustee in obtaining additional assets for disbursement.

Consideration of the economic administration of the estate, although entitled to weight, is not of compelling importance as it may be in a reorganization proceeding where the debtor is struggling to continue to operate its business and thereby pay back its creditors. Rather, this factor goes more to consideration of the relative hardships to be suffered by the parties, for the cost incurred by the estate in pursuing the action affects the amount left for distribution to creditors.

No single factor outlined above appears to the Court to be determinative of the issue of the propriety of a transfer of venue. Taken as a whole, however, the equities weigh in favor of the defendant. He has little or no contact with this district. According to his affidavit, he is a small businessman whose presence is necessary to the running of his business. Furthermore, he is presently required to defend another suit brought in Georgia. Taking into consideration the origin and types of transfers challenged, the Court holds that the defendant has carried his burden of proof in showing that the "interest[s] of justice" and the relative "convenience of the parties" require the granting of his motion to transfer venue. This holding is consistent with the intent of the Advisory Committee comments to Rules 782 and 704(f), Fed.R. Bankr.P. The offsetting hardship to creditors in a possibly smaller recovery does not overshadow the personal hardship incumbent upon the defendant if venue is not transferred.

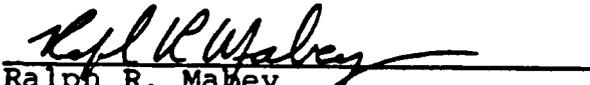
The foregoing transfer affects only the transfer of the adversary proceeding. The proceeding on the trustee's

objection to the defendant's claim cannot be transferred, but must be pursued in this Court as part of the general administration of the estate. No rule allows for the transfer of pieces of the general administration such as a hearing on the allowability of certain claims. Defendant must therefore decide whether to pursue his claim in this Court. The hardship in this retention is not as great as in a full-blown adversary proceeding where the defendant is forced to defend himself against liability. A hearing on an objection to claim is only a summary proceeding, and the defendant has his choice as to whether he wishes to pursue his claim.

ORDER

Defendant's motion is granted. The Clerk of the Court shall transfer all records of this proceeding to the Bankruptcy Court for the District of Georgia, Atlantic Division.

DATED this 10 day of July, 1980.


Ralph R. Mabey
United States Bankruptcy Judge

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