

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

NORTHWESTERN HUMAN SERVICES, :	
INC., NORTHWESTERN :	October Term 2004
INTRASYSTEMS, INC., and :	
NORTHWESTERN INTRASYSTEMS, :	
INC. TRUST DATED APRIL 1, 1994 :	No. 1936
:	
Plaintiffs, :	
v. :	Commerce Program
:	
JOHN L. MCKEEVER, III, MCKEEVER, :	
BURKE & GRANT, PROVIDENT :	Control Nos. 031874, 032043,
MUTUAL LIFE INSURANCE :	040700
COMPANY, and PROVIDENT MUTUAL :	
INSURANCE AND FINANCIAL :	
SERVICES COMPANY :	
:	
Defendants. :	

ORDER

AND NOW, this 12th day of September, 2005, upon consideration of the Preliminary Objections of Defendants John L. McKeever, III, and McKeever, Burke & Grant to the Amended Complaint of Plaintiffs Northwestern Human Services, Inc., Northwestern Intrasystems, Inc., and Northwestern Intrasystems, Inc. Trust dated April 1, 1994 (Control No. 031874) and the responses thereto, the Preliminary Objections of Defendants Provident Mutual Life Insurance Company and Provident Mutual Insurance and Financial Services Company to the Amended Complaint of Plaintiffs (Control No. 032043), and the Preliminary Objections of Plaintiffs to the Preliminary Objections of Defendants Provident Mutual Life Insurance Company and Provident Mutual Insurance and Financial Services Company (Control No. 040700) and the responses thereto, and in accordance with the attached memorandum, it is hereby **ORDERED** and **DECREED** as follows:

- 1) The Preliminary Objections of Defendants John L. McKeever, III, and McKeever, Burke & Grant to the Amended Complaint of Plaintiffs are **SUSTAINED**. The claims in the Amended Complaint against these Defendants (Counts I, II, III, V, VI, VII, VIII, IX, and X against John L. McKeever, III, and Counts II, III, V, VI, VII, VIII, and IX against McKeever, Burke & Grant) are **TRANSFERRED** to Montgomery County, with costs to be borne by Plaintiffs;
- 2) The Preliminary Objections of Defendants Provident Mutual Life Insurance Company and Provident Mutual Insurance and Financial Services Company to the Amended Complaint of Plaintiffs are **SUSTAINED**. Counts II, III, IV, VI, VII, VIII, and IX of the Amended Complaint against these Defendants are **DISMISSED**; and
- 3) The Preliminary Objections of Plaintiffs to the Preliminary Objections of Defendants Provident Mutual Life Insurance Company and Provident Mutual Insurance and Financial Services Company are **OVERRULED**.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

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INSURANCE AND FINANCIAL :	
SERVICES COMPANY :	
:	
Defendants. :	

MEMORANDUM

Presently before the court are the Preliminary Objections of Defendants John L. McKeever, III (“McKeever”), and McKeever, Burke & Grant (“MBG”) to the Amended Complaint of Plaintiffs Northwestern Human Services, Inc. (“NHS”), Northwestern Intracsystems, Inc., and Northwestern Intracsystems, Inc. Trust dated April 1, 1994 (together, “Plaintiffs”), the Preliminary Objections of Defendants Provident Mutual Life Insurance Company and Provident Mutual Insurance and Financial Services Company (together, “Provident”) to the Amended Complaint of Plaintiffs, and the Preliminary Objections of Plaintiffs to the Preliminary Objections of Provident.

BACKGROUND

In January 2003, Plaintiffs filed a civil RICO and state law action in the United States District Court for the Eastern District of Pennsylvania against McKeever, MBG,

Provident, Plaintiffs' former CEO, and others. The core allegation in that matter was the looting of Plaintiffs by their former CEO with the assistance of the other defendants in accomplishing that task. The federal claims against McKeever, MBG, and Provident were dismissed and the federal court refused to exercise jurisdiction over the state law claims. Plaintiffs originally transferred to this court only the state law claims against McKeever and MBG. An Amended Complaint was filed, bringing claims against McKeever, MBG, and Provident. Subsequently, the state law claims against Provident were transferred to this court.

DISCUSSION

Preliminary Objections of McKeever and MBG

Pursuant to Pa. R.C.P. 1028(a)(1), Defendants McKeever and MBG assert that there is no venue in Philadelphia County for the claims against them. Under the Rules of Civil Procedure, actions against an individual must comply with Pa. R.C.P. 1006(a) and those against a corporation with Pa. R.C.P. 2179(a). Under both Rules, venue exists in a county where a transaction or occurrence took place out of which the cause of action arose. Pa. R.C.P. 1006(a)(1), 2179(a)(4).

Craig v. W.J. Thiele & Sons, Inc., 395 Pa. 129, 134, 149 A.2d 35, 37 (1959), established that a “part of a transaction” is neither a “transaction” nor an “occurrence” and cannot create venue against a defendant. Although Craig was decided in the context of a breach of contract claim, its holding has been extended to other causes of action. See, e.g., Harris v. Brill, 844 A.2d 567 (Pa. Super. 2004) (wrongful use of civil proceedings); Sunderland v. Barlow Homebuilders, Inc., 791 A.2d 384 (Pa. Super. 2002) (wrongful death); Estate of Werner v. Werner, 781 A.2d 188 (Pa. Super. 2001) (civil

conspiracy); Stein v. Crown Am. Realty Trust, 54 Pa. D&C.4th 383 (Phila. Comm. Pls. 2001) (unjust enrichment).

Plaintiffs contend there are several “transactions or occurrences” out of which the causes of action in the Amended Complaint arose that establish venue over McKeever and MBG in Philadelphia County. According to Plaintiffs, McKeever deceived the NHS board by not revealing his conflicts of interest to this body and, since several meetings of the board were held in Philadelphia County, it follows that McKeever’s deceit establishes venue in this county. Pls. Mem. in Opp’n, at 7. A meeting is neither a transaction nor an occurrence for purposes of venue, Werner, at 191-92, especially in this instance when neither Defendant was a member of the NHS board, McKeever Aff., at ¶8, attended any board meeting in Philadelphia, Pls. Ex. B, nor was discussed at these meetings, Pls. Ex. B. If, as Plaintiffs suggest, venue could be established in such circumstances, then forum shopping would be unavoidable. Compare, Craig, at 134, at 37 (forum shopping generated “if the law were to permit suit to be commenced ... in any county where any facet of a complex transaction occurred.”). Although Plaintiffs assert that “NHS’ physical presence in Philadelphia makes Philadelphia the locus of economic harm,” Pls. Mem., at 8, this statement contradicts the Amended Complaint, Am. Compl., ¶9. Moreover, as these properties are not the subject matter of an action for equitable relief, their location is irrelevant for determining of venue. Pa. R.C.P. 1006(a)(2); Pa. R.C.P. 2179(a)(5).

Plaintiffs fail to support the remaining proffered links between McKeever and MBG and Philadelphia County. The Medicaid fraud does not involve these Defendants. Am. Compl., ¶¶46-55. On its face, the Amended Complaint indicates that “some” negotiations and/or drafting of the Revised Compensation Agreement took place in

Philadelphia County, Am. Compl., ¶31, which reveals that these activities are mere parts of a transaction and cannot support venue in the county, Craig, at 134, at 37. Finally, there is no evidence that McKeever attended Compensation Committee meetings in Philadelphia, McKeever Aff., at ¶8, despite Plaintiffs' attempt to hold him responsible for the "conduct of the Compensation Committee, which met in Philadelphia," Pls. Mem., at 8. As none of the connections creates venue in Philadelphia County, in accordance with Pa. R.C.P. 1006(e), this action shall be transferred to Montgomery County.¹

Preliminary Objections of Provident

Citing Pa. R.C.P. 1028(a)(2), Provident contends that the Amended Complaint fails to conform to law or rule of court. In particular, Provident asserts that Plaintiffs did not comport with the requirements of 42 Pa. C.S.A. §5103 and the decisions interpreting this statute. Plaintiffs argue that Provident has raised a statute of limitations defense, which it considers inappropriate for this stage of the proceedings, and that they have met the requirements of the statute.

Section 5103 applies to cases filed in federal district court which are dismissed for lack of jurisdiction. Agostino Ferrari, S.P.A. v. Antonacci, 456 Pa. Super 54, 58, 689 A.2d 320, 322 (1997). This Section enables a party to transfer the case to state court while maintaining its federal filing date for purposes of the statute of limitations. Kelly v. Hazelton Gen. Hosp., 837 A.2d 490, 493 (Pa. Super. 2003). To determine whether Plaintiffs complied with Section 5103, the court must examine whether the Plaintiffs took

¹ Each Plaintiff has a principal place of business in Montgomery County. Am. Compl., ¶¶9-11. Defendant McKeever lives and works in Montgomery County. McKeever Aff., at ¶¶3, 4. Defendant MBG is based in Montgomery County. McKeever Aff., at ¶5.

the appropriate steps to transfer the action from the federal court to this court, not the statute of limitations. Ferrari, at 57, at 322.

Several documents and communications are central to evaluating Plaintiffs' compliance with Section 5103. On September 24, 2004, Judge Rufe of the United States District Court for the Eastern District of Pennsylvania declined to exercise supplemental jurisdiction over the state law claims against McKeever, MBG, and Provident, resulting in dismissal of those claims. Defs. Prelim. Obj., Ex. 1. On October 14, 2004, counsel for Plaintiffs sent a letter to counsel for Provident memorializing discussions between the parties that indicated that no transfer of Plaintiffs' state law claims against Provident would occur for forty-five days to enable the parties to settle their dispute. Defs. Mem. in Opp'n, Ex. 1, at Ex. A. On October 15, 2004, acting pursuant to 42 Pa. C.S.A. §5103, Plaintiffs filed a praecipe to transfer the state law claims against McKeever and MBG to this court. Defs. Prelim. Obj., Ex. 2. On November 3, 2004, Plaintiffs and Provident formalized an agreement concerning potential settlement and transfer of the state law claims of Plaintiffs against Provident (the "Standstill Agreement"). Pls. Mem. in Supp., Ex. A. On January 27, 2005, Plaintiffs filed an Amended Complaint asserting claims against McKeever, MBG, and Provident. Defs. Prelim. Obj., Ex. 3. On February 28, 2005, Provident filed Preliminary Objections to the Amended Complaint. On March 9, 2005, acting pursuant to 42 Pa. C.S.A. §5103, Plaintiffs filed a praecipe to transfer the state law claims against Provident to this court. Defs. Mem. in Opp'n, Ex. 1.

Prior to the Superior Court's decision in Williams v. F.L. Smithe Machine Company, Inc., 395 Pa. Super. 511, 516, 577 A.2d 907, 910 (1990), there was a "dearth of case law interpreting the provisions" of Section 5103. Currently, following the decisions in Williams, Collins v. Greene County Memorial Hospital, 419 Pa. Super 519,

615 A.2d 760 (1992), and Ferrari, there is “no precedential void,” Kelly, at 495, in interpreting this statute. In addition to the material requirements contained in 42 Pa. C.S.A. §5103(b)(2), the “stringent caselaw” requires parties seeking to transfer state law claims dismissed in federal court on jurisdictional grounds to comply with the judicially-crafted “promptness requirement.” Kelly, at 491, at 495.

In the absence of the Standstill Agreement, Plaintiffs would have failed to comply with the promptness requirement. The gap between Judge Rufe’s decision and Plaintiffs’ praecipe to transfer the state law claims against Provident is approximately five and one-half months. By comparison, Plaintiffs filed the praecipe to transfer the state law claims against McKeever and MBG within three weeks of Judge Rufe’s decision. In addition, in Collins, the most comparable case to the current matter, a transfer delay of less than seven months was considered too lengthy and resulted in dismissal. Although the praecipe to transfer the claims against McKeever and MBG purported to inform the court and Provident that the claims against Provident may be transferred to this court in the future, such notice cannot be used to “abuse” the protection of 42 Pa. C.S.A. §5103, Collins, at 525, at 763.

According to the Standstill Agreement, Plaintiffs and Provident sought to “reach a general settlement of the claims ... by November 30, 2004.” Pls. Mem. in Opp’n, Ex.A, at ¶1. If the parties failed to reach a final settlement agreement by November 30, 2004, or another, later date following a written extension of the standstill period, the Standstill Agreement allowed Plaintiffs “to transfer the state law claims to an appropriate state court within 30 calendar days following the end of that period.” Pls. Mem. in Opp’n, Ex.A, at ¶4. The Standstill Agreement prevents Provident from using the standstill

period to challenge Plaintiffs' transfer of the state law claims. Pls. Mem. in Opp'n, Ex.A, at ¶4.

Plaintiffs contend that they complied with the promptness requirement as modified by the Standstill Agreement. According to Plaintiffs, paragraph 4 of the Standstill Agreement enables them to transfer the state law claims against Provident no earlier than January 1, 2005. This reading of the Standstill Agreement is incorrect. Instead, Plaintiffs must file "*within 30 calendar days*" of November 30, 2004, Pls. Mem. in Opp'n, Ex.A, at ¶4 (emphasis added), which is December 30, 2004. Plaintiffs waited ninety-nine calendar days to file their praecipe to transfer the claims against Provident. Furthermore, as Plaintiffs' reading of the Standstill Agreement creates an open-ended period in which to transfer state law claims, it effectively eviscerates the promptness requirement and "undermines the speedy and efficient processes of justice," Collins, at 525, at 763. Plaintiffs also contend that the Amended Complaint was filed within the safe harbor period created by the Standstill Agreement, inferring that Provident was provided notice of the claims against it and included in this matter. Since the Amended Complaint is improper under Section 5103, see Williams, at 517, 910 ("The litigant shall not file new pleadings in state court."); Ferrarri, at 56, at 322 (upholding lower court ruling that "new pleadings should not have been filed in the state court"), it cannot affect Plaintiffs' litigation against Provident in this manner. Finally, Plaintiffs attempt to demonstrate their compliance with Section 5103 by noting that they filed their praecipe to transfer the state law claims against Provident less than two weeks after Provident filed its Preliminary Objections. Pls. Mem. in Opp'n, at 5 ("On February 28, 2005, Provident filed its Preliminary Objections *observing that NHS had not actually transferred the claims, and so NHS filed a Praecipe to Transfer applicable to Provident on March 9,*

2005.”) (emphasis added). Against the background of the timely praecipe to transfer the state law claims against McKeever and MBG and the Standstill Agreement, which created a time restriction on the transfer of the state law claims against Provident, Plaintiffs’ statement diminishes the Preliminary Objections into a mere signaling device, which simply provided Plaintiffs with notice to file the praecipe to transfer. Such indifference to the procedural requirements of Section 5103 cannot be condoned. See Kelly, at 496. Therefore, Plaintiffs fail to meet the promptness requirement of 42 Pa. C.S.A. §5103 and the claims against Provident in this action shall be dismissed.

BY THE COURT,

HOWLAND W. ABRAMSON, J.