

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

KINERGY CORPORATION

PLAINTIFF

v.

CIVIL ACTION NO. 3:99CV-407-S

CONVEYOR DYNAMICS CORPORATION, et al.

DEFENDANTS

MEMORANDUM OPINION

This matter is before the court on motion of the plaintiff, Kinergy Corporation (“Kinergy”), to alter or amend the court’s Order of December 4, 2000, and to transfer this action to the United States District Court for the Eastern District of Missouri (DN 39).

The court previously ordered this action dismissed on the ground that personal jurisdiction was lacking over the defendants, Conveyor Dynamics Corporation and Didion Manufacturing Company (“CDC” and “Didion”, respectively). Kinergy was afforded a period of discovery and was allowed to rebrief the issue in an attempt to establish the jurisdictional requisites. The evidence being insufficient, the court issued a supplemental Memorandum Opinion and reinstated its order of dismissal. Kinergy then filed a motion to alter or amend the judgment, seeking transfer of the action to the Eastern District of Missouri in lieu of dismissal. Kinergy has asserted that amendment of the court’s order and transfer of the action are procedurally permissible under Fed.R.Civ.P. 59, and warranted in the interest of justice under 28 U.S.C. § 1406.

The court has discretion whether to alter or amend a judgment under Rule 59(e). *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367374 (6th Cir. 1998)(decision to alter or amend a judgment under Rule 59(e) reviewed for abuse of discretion).

28 U.S.C. § 1406(a) states:

The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

The United States Supreme Court held in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465-66, 82 S.Ct. 913, 915, 8 L.Ed.2d 39 (1962) that a district court could transfer a case for improper venue even if it lacked personal jurisdiction over the defendants, noting that

Nothing in that language [of section 1406(a)] indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendants. And we cannot agree that such a restrictive interpretation can be supported by its legislative history...The problem which gave rise to the enactment of the section was that of avoiding the injustice which has often resulted to plaintiffs from dismissal of their actions...Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiffs' losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be "found" or that they "transact...business" in the Eastern District of Pennsylvania...The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not.

Following the lead of a number of other courts, the United States Court of Appeals for the Sixth Circuit took the *Goldlawr* decision a step further in *Taylor v. Love*, 415 F.2d 1118, 1120 (6th Cir.), *cert. denied*, 397 U.S. 1023, 90 S.Ct. 1257, 25 L.Ed.2d 533 (1970) holding that transfer under § 1406(a) would be proper where venue was 'wrong' only because of lack of personal jurisdiction:

"Looking to the language of § 1406, the statute is couched in terms of 'laying venue in the wrong division or district.' The statute does not refer to 'wrong' venue, but rather to venue laid in a 'wrong division or district.' We conclude that a district is 'wrong' within the meaning of § 1406 whenever there exists an 'obstacle [to]...an expeditious and orderly adjudication' on the merits. Inability to perfect service of process on a defendant in an otherwise correct venue is such an obstacle.' *Dubin v. United States, supra* at 815...The Supreme Court in *Goldlawr* held that congressional intent in adopting § 1406(a) included a recognition that 'the interest of justice' may require the transfer of a complaint so that a plaintiff would not be penalized by 'justice-defeating technicalities.' *Goldlawr, Inc. v. Heiman, supra*, 369 U.S. at 467, 82 S.Ct. 913.

See also, Martin v. Stokes, 623 F.2d 469, 473-74 (6th Cir. 1980):

Since *Goldlawr*, the Courts of Appeal have uniformly held that an action brought in a district court where venue is proper but where personal jurisdiction is lacking

may be transferred to a proper forum...The law in this Circuit, therefore, is that § 1406(a) provides the basis for any transfer made for the purpose of avoiding an obstacle to adjudication on the merits in the district court where the action was originally brought. That defect may be either improper venue or lack of personal jurisdiction.

Kinergy has not sought to revisit the merits of the court's determination that personal jurisdiction is lacking over the defendants in this action. Rather it has moved for amendment of the court's disposition of the action. Kinergy urges that it may be subject to a statute of limitations challenge under Missouri's Trade Secrets Act if this action is dismissed and it is forced to refile in Missouri. We see no reason that this court should not, in its discretion, amend its order and transfer the action to the Eastern District of Missouri. The action would be refiled in that forum, in any event. In keeping with the interest sought to be protected by § 1406(a), the court is inclined to transfer the action in order to preserve Kinergy's claims which were timely filed here.

CDC and Didion object to the transfer principally on the ground that Kinergy should have raised the matter of transfer prior to the court's dismissal of the action. While it might have been a more expeditious use of the court's time for Kinergy to have moved in the alternative for transfer, and thereby putting all issues before the court at one time, we do not find that this is a reason to deny the relief sought by Kinergy under Rule 59. The court concludes that the interests of justice weigh in favor of transfer, despite the request for such a disposition at this late date.

For the reasons set forth hereinabove the motion of Kinergy will be granted and the previous orders of this court will be amended in accordance with this opinion. A separate order will be entered this date.

This ____ day of _____, 2001.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record