

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 02-22760-CIV-MOORE/O'SULLIVAN

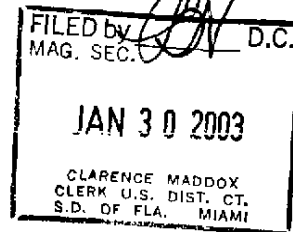
ALAN J. COTTON,

Plaintiff,

v.

FLORIDA DEPARTMENT OF
CORRECTIONS, MICHAEL W. MOORE,
and TIMOTHY MINGO,

Defendants.



REPORT AND RECOMMENDATION

This matter came before the Court on the Defendant's Motion To Transfer Venue (DE # 16, 10/17/02). This motion was referred to the undersigned United States Magistrate Judge by the Honorable K. Michael Moore, United States District Court Judge for the Southern District of Florida pursuant to 28 U.S.C. § 636(b). Having carefully considered the motion, the response and the reply thereto, the court file and the applicable law, the undersigned recommends that the motion be **DENIED** as explained below.

BACKGROUND

The plaintiff, Alan J. Cotton, sued the defendants in this district for violations of 42 U.S.C. §§ 1983 and 2000cc et seq. and related state law claims. "The Defendants contend that venue is proper in the Northern District of Florida as the events giving rise to the claim occurred primarily at the Department of Corrections' headquarters in

A handwritten signature in the bottom right corner of the page.

Tallahassee, Florida.” “Motion to Transfer Venue” at ¶3. Moreover, the defendants contend that not all the defendants reside in this district, at least one, Michael Moore, resides in Tallahassee, Florida. “Motion to Transfer Venue” at ¶4. The defendants request the transfer of venue “in the interest of justice and for the convenience of the parties and witnesses”. “Motion to Transfer Venue” at ¶5. The plaintiff argues that the Court should not transfer venue because the defendant Mingo resides in Miami-Dade County and the place where the rights of the plaintiff are being denied is in Miami-Dade County.

DISCUSSION

Title 28 U.S.C. Section 1404(a) provides that “[f]or the convenience of the parties and witnesses, and in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” The standard for transfer under 28 U.S.C. § 1404(a) leaves much to the broad discretion of the trial court, and once a trial judge decides that transfer of venue is or is not justified, the ruling can be overturned only for clear abuse of discretion. See Brown v. Connecticut Gen. Life Ins. Co., 934 F.2d 1193, 1197 (11th Cir. 1991) (holding that trial court did not abuse discretion in transferring case that would impose financial hardship on a party no matter where heard).

Congress authorized courts to transfer the venue of a case in order to avoid unnecessary inconvenience to the litigants, witnesses, and the public and to conserve time, energy and money. Van Dusen v. Barrack, 376 U.S. 612 (1964). The movant has the burden of proof, and must make a convincing showing of the right to transfer.

Factors Etc. v. Pro Arts, Inc., 579 F.2d 215, 218 (2nd Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), Garay v. BRK Electronics, 755 F. Supp. 1010 (M.D. Fla. 1991).

The question of whether to transfer venue is subject to a two-pronged inquiry. First, the alternative venue must be one in which the action could have originally been brought by the plaintiff. The second prong requires courts to balance private and public factors to determine if transference is justified. See Miot v. Kechijian, 830 F. Supp. 1460, 1465-66 (S.D. Fla. 1993) (denying motion to transfer where above test not met). Defendants moving for transfer have a heightened burden as they must prove with particularity the inconvenience caused by plaintiff's choice of forum. McEvily v. Sunbeam-Oster Co., 878 F. Supp. 337, 345 (D.R.I. 1994). Transfer can only be granted where the balance of the convenience of the parties strongly favors the defendant. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1966) (holding that plaintiff's choice of forum should not be disturbed unless it is "clearly outweighed" by other considerations); Allied Specialty Ins. Inc. v. Ohio Water Parks, Inc., 699 F. Supp. 878, 882 (M.D. Fla. 1988) ("the Court must give considerable weight to plaintiff's choice of forum"). Here, the plaintiff states in his response that the defendants cannot "assert that the Northern District is the exclusive venue in which to bring actions against this defendant." "Plaintiff's Response in Opposition to Defendants' Motion to Transfer Venue" at p. 3. From this assertion, the Court infers that the plaintiff is not disputing the action could have been brought in the Northern District of Florida. Therefore, the undersigned turns immediately to a discussion of the second inquiry.

After determining that the action could be brought in the alternative forum, the next consideration is whether, on balance, the convenience of the parties and witnesses and the interest of justice weighs in favor of this Court retaining this case or transferring it to the Northern District of Florida. Some of the factors the Court considers include specific examples regarding the convenience of the parties and witnesses, the relative ease of access to sources of proof, the availability of process to compel the presence of unwilling witnesses, the cost of obtaining the presence of witnesses, and the public interest. See Jewelmasters, Inc. v. May Dept. Stores Co., 840 F. Supp. 893, 895 (S.D. Fla. 1993), Eye Care Int'l, Inc. v. Underhill, 119 F. Supp.2d 1313, 1317-18 (M.D. Fla. 2000), Miot, 830 F. Supp. at 1460.

In support of its motion to transfer venue, the defendants argue that "venue is proper in the Northern District of Florida as the events giving rise to the claim occurred primarily at the Department of Corrections' headquarters in Tallahassee, Florida." "Motion to Transfer Venue" at ¶3. The undersigned disagrees. The plaintiff, a prisoner in a facility located in Miami-Dade, Florida, is allegedly being denied his desired food choices, in that facility, which is located in the Southern District of Florida.

The defendants also argue that not all of the defendants are located in the Southern District of Florida, and "[a]t least one of them, MICHAEL W. MOORE, resides and maintains his offices in Tallahassee, Florida." "Motion to Transfer Venue" at ¶4. While this is true, at least one of the defendants, Mingo, is located in Miami-Dade, Florida.

Moreover, the defendants argue that "[i]n the interest of justice and for the

convenience of the parties and the witnesses, the Defendants are requesting that this matter be transferred to the United States District Court in and for the Northern District of Florida.” “Motion to Transfer Venue” at ¶15. While the above certainly is true, it is also inherently true that litigation is always inconvenient to some party or witness.

Were this sort of inconvenience sufficient to warrant a transfer, cases would always be transferred to the defendant's home forum. In fact, cases are not routinely transferred; the plaintiff's choice of forum is entitled to great deference, will rarely be disturbed, and may only be disturbed if the balance of interests strongly favors transfer. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); Robinson, 74 F.3d at 260 (holding that plaintiff's choice of forum should not be disturbed unless it is “clearly outweighed” by other considerations). These inconveniences cannot be the predominant factor to consider in determining the forum because the defendant would almost always be allowed to transfer the case to its home forum, thereby turning on its head the traditional notion that the plaintiff's choice of forum should not be lightly disturbed.

The convenience of both party and non-party witnesses is an important factor in determining whether a transfer should be granted. 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure, § 3851. It is only one factor, however, and there are limitations on the use of this factor. It does not stand alone and must be weighed against other relevant factors. When considering this factor, it is not so much the convenience of the witnesses but the possibility of having their testimony at the trial that is important. Id. Thus transfer may be denied when the witnesses, although in another district, are employees of a party and their presence can

be obtained by that party. Furthermore, venue is not determined solely upon the outcome of a contest between the parties as to which of them can present a longer list of possible witnesses located in the respective districts in which each party would like to try the case. The party seeking the transfer should support their claim by clearly specifying the key witnesses to be called and the significance of their testimony. J.I. Kislak Mortgage Corp. v. Connecticut Bank & Trust Co., 604 F. Supp. 346 (S.D. Fla. 1985).

The defendants have not satisfied their burden. The motion does not persuade this Court that the witnesses will be significantly more inconvenienced by trial in this district. It is not clear why the defendants would be unduly inconvenienced by a trial in this district, when both parties agreed in the joint scheduling report that the trial will take just 4 to 5 days.

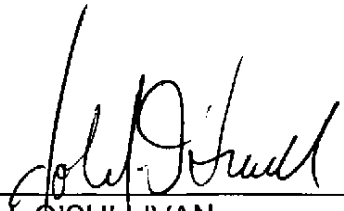
RECOMMENDATION

After weighing the above factors, the Court finds that transfer of this case to the Northern District of Florida would be inappropriate and the Defendant's Motion To Transfer Venue (DE # 16, 10/17/02) should be **DENIED**.

The parties have ten (10) days from the date of receipt of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable K. Michael Moore, United States District Court Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F. 2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958, 109 S.Ct. 397 (1988); RTC v. Hallmark Builders, Inc., 996 F. 2d 1144, 1149

(11th Cir. 1993).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida
this 30 day of January, 2003.



JOHN J. O'SULLIVAN
UNITED STATES MAGISTRATE JUDGE

Copies provided to:

The Honorable K. Michael Moore

All Counsel of Record