UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN F. TAMBURO, d/b/a MAN'S BEST FRIEND SOFTWARE and VERSITY CORPORATION,	)	
Plaintiffs,	)	Case No. 04 C 3317
v.	)	Judge Joan B. Gottschall
STEVEN DWORKIN; KRISTEN HENRY; ROXANNE HAYES; KAREN MILLS; and WILD SYSTEMS PTY. LTD, an Australian corporation,	)	
Defendants.	)	

ORDER

On October 9, 2007, the court dismissed plaintiffs John F. Tamburo, d/b/a Man's Best Friend Software and Versity Corporation's (collectively "Tamburo") sixth amended complaint for lack of personal jurisdiction. Presently before the court is Tamburo's motion to vacate the court's order and to transfer this case to the Southern Division of the Western District of Michigan. For the reasons set forth below, Tamburo's motion to vacate and transfer is denied.

I. ANALYSIS

A district court may transfer a case to another district if it finds that it lacks personal jurisdiction in its own. 28 U.S.C. § 1404(a). Typically, it is the defendant who moves to transfer a case: the plaintiff, after all, is the party who initially selects the forum in which to litigate his claim. Section 1404(a) states that: "[f]or the convenience of parties and witnesses, 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." 28 U.S.C. § 1404(a). The statutory language has generally been interpreted to permit defendants to transfer their suit, with leave of the court, to a more appropriate or convenient forum.

However, in cases where a plaintiff has inadvertently filed suit in a forum where the court lacks personal jurisdiction over the defendants, the court may also transfer the case. Under 28 U.S.C. § 1406(a), "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 Seventh Circuit has observed that if a court can transfer a case from a forum where venue is improper under § 1406(a), then it may also transfer a case on the plaintiff's motion if the forum in which the case was filed lacks personal jurisdiction over the defendants under § 1404(a). *Cote v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1986) ("[I]t seems to us that a transfer under section 1404(a) is proper in the same circumstances that it would be if venue had been improper, notwithstanding the small difference in wording between 1404(a) and 1406(a)").[1]

[1] Tamburo also argues that transfer is proper under 28 U.S.C. § 1631. There has been considerable debate over whether § 1631 applies to cases where personal jurisdiction is lacking. Several courts, particularly the Tenth Circuit, have held that § 1631 applies in cases where either subject matter jurisdiction or personal jurisdiction is lacking. *See, e.g., Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 793 (10th Cir. 1998); *Ross v. Colorado Outward Bound Sch., Inc.*, 822 F.2d 1524, 1527 (10th Cir. 1987). Other courts, however, have held that § 1631 applies only to cure defects of subject matter jurisdiction. *See, e.g., Pedzewick v. Foe*, 963 F.Supp. 48, 50 (D. Mass. 1997); *Levy v. Pyramid Co. of Ithaca*, 687 F. Supp. 48, 51-52 (N.D.N.Y. 1988); *Nose v. Rementer*, 610 F. Supp. 191, 192 n.1 (D. Del. 1985). The Seventh Circuit has yet to provide guidance on this issue, however the court need not address it at present, since it finds that transfer is proper under 28 U.S.C. § 1406(a). *See Carpenter-Lenski v. Ramsey*, No. 99-3367, 2000 WL 287651, at *2 (7th Cir. Mar. 14, 2000). One subsequent case in this district has stated, without citation of precedent or other supporting legal authority, that § 1631 is applicable. *Torco Holdings, Inc. v. P&M Aircraft Co., Inc.*, No. 00 C 322070, 2001 WL 322070, at *2 (N.D. Ill. Mar. 30, 2001). Plaintiffs' assertion that transfers under § 1631 for want of personal jurisdiction have been explicitly held to be permissible in the Sixth Circuit, although correct, is irrelevant, because it is the law of the transferor court that is controlling. *Roman v. Ashcroft*, 340 F.3d 314, 328 (6th Cir. 2003).

Furthermore, the Seventh Circuit, citing *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962), has held that the statute's phrase "in the interests of justice" includes situations in which a plaintiff has mistakenly filed suit in a forum that lacks personal jurisdiction over the defendants, and plaintiff would be time-barred from filing his claims in another forum where jurisdiction exists by the statute of limitations. *Cote*, 796 F.2d at 984-85. In the instant case, Tamburo filed his original complaint on May 11, 2004, and any claims arising from events prior to that filing are now more than likely time-barred, preventing Tamburo from filing in a district court where venue is proper and personal jurisdiction can be established. Furthermore, although the court rejects Tamburo's contention that the court's decision to dismiss for lack of personal jurisdiction was a "close one," issues of federal personal jurisdiction, particularly with respect to internet transactions, are complex, and may appear baffling to pro se litigants lacking the benefit of a legal education.[2] The court, in its broad discretion with respect to this subject, does not believe that Tamburo's pro se mistake of filing his suit in this district was so "elementary" that it merits denial of his motion to transfer. *See Carpenter-Lenski v. Ramsey*, No. 99-3367, 2000 WL 287651, at *3 (7th Cir. Mar. 14, 2000) (district court did not abuse its discretion in denying transfer where plaintiff had disregarded the "elementary" issue of whether personal jurisdiction was proper); *Hapniewski v. City of Chicago Heights*, 883 F.2d 576, 579 (7th Cir. 1989) (plaintiffs pursued their action in federal court in Indiana despite their knowledge that all parties were citizens of Illinois). The court feels, therefore, that the interests of justice favor transferring this case.

[2] Tamburo is currently ably represented by counsel; however in Tamburo's original filing in this case, he represented himself as a pro se litigant.

Venue is proper in the Western District of Michigan with respect to defendant Roxanne Hayes ("Hayes"), who Tamburo alleges is a citizen of Michigan residing in that district. Pl.'s Mem. in Supp. at 1. Moreover, Tamburo alleges that Hayes was an integral member of the alleged internet conspiracy against him. *Id.* at 2. The other defendants are citizens of Colorado, Ohio, and two foreign countries, and the events forming the basis of this suit allegedly took place on various internet chat rooms and users' groups. *Id.* at 4. Venue is therefore proper in the Western District of Michigan. *See* 28 U.S.C. §1391(a)(2-3).

The court must also consider the convenience of the transfer to the parties in the suit. *Bodine Elec. Co. v. Int'l Res. and Dev. Corp.*, No. 92 C 83891993, 1993 WL 278524, at *2 (N.D. Ill. July 23, 1993). In this case, the inconvenience to Tamburo is increased slightly because he will pursue his claim in an adjacent state; however, it is he who is requesting the transfer. The transfer will be conversely slightly more convenient to Hayes, who will litigate in her home district. The difference in inconvenience to the remaining defendants would be nugatory; the court suspects that it makes little difference, *e.g.*, to the Australian defendant whether the litigation is conducted in Chicago or across the lake in Michigan. The court finds, therefore, that the issue of the relative convenience of transfer to the parties is of no significant importance to this decision.

Finally, Tamburo argues that transfer is appropriate because Hayes is subject to personal jurisdiction in the proposed transferee court, and her co-defendants are also subject to personal jurisdiction under a "conspiracy theory of jurisdiction." Under § 1404(a), "a district court may transfer any civil action to any other district or division

where it might have been brought." 28 U.S.C. § 1404(a). The language "where it might have been brought" is generally recognized to mean that the transferee court must be able to exert personal jurisdiction over the defendants. *Torres v. The S.S. Rosario*, 125 F. Supp. 496 (S.D.N.Y. 1954), *mand. denied*, 221 F.2d 319, *cert. denied* 350 U.S. 836. In cases based upon diversity of citizenship, this means that the defendant must be amenable to service of process issued by the transferee court, in this case, the district court in the Western District of Michigan. *Cunningham v. Cunningham*, 477 F. Supp. 632, 634 (N.D. Ill. 1979).

A problem arises, however, when there are multiple defendants, and one or more are not amenable to service by the transferee court, either directly or under the applicable long-arm statute. In such cases, the transferor court lacks the power to transfer the case. *Relf v. Gasch*, 511 F.2d 804, 807-08 (D.C. Cir. 1975); *Gallery House, Inc. v. Yi*, 587 F.Supp. 1036, 1039 (C.D. Ill. 1984) (In case involving multiple defendants, transfer may not be made if one of the defendants is not subject to suit in the transferee's district). Tamburo enlists *Wild v. Subscription Plus, Inc.*, 292 F.3d 529, 530-31 (7th Cir. 2002) in support of his contention that transfer is proper despite the fact that only one of the defendants resides in the Western District of Michigan. Tamburo quotes the language of *Wild* to suggest that transfer is proper, even if one or more defendants cannot be served either directly or via the transferee court's applicable long-arm statute:

> [W]e do not agree … that a transfer is invalid … just because one defendant in a multidefendant case … cannot be served either directly or under a long-arm statute in the transferee district. Were there only one defendant and he or she could not be served there, it would be plain that the suit "could not be brought" there and so transfer would be improper.

Id. (internal citations omitted). Tamburo's reading of *Wild*, however, is highly and self-servingly selective, for the appellate court goes on to say:

> But that leaves the question whether a defendant in a multidefendant suit who cannot be served can be forced to defend in the transferee district or, as most cases hold, must be severed from the rest of the suit and the suit against him either dismissed or … transferred back to the district in which the suit was first filed or to a district in which service upon him is possible …. The argument for the latter course … is that the transfer statutes do not purport to alter the rules governing personal jurisdiction; and of course the outer bounds of those rules are set by the Constitution.

Id. at 531. The appellate court went on to find that the district court's dismissal of the defendant who was not amenable to process in the suit was proper. *Id.* at 531-32.

In short, *Wild* does not support Tamburo's argument that the case can be transferred despite the fact that all save one of the defendants are not amenable to service in the Western District of Michigan. Rather, it supports the notion that the case might be transferred with respect to Hayes alone; the other defendants could be either severed from the case, transferred to a district court in which service against those defendants is possible, or returned to this court, in which the case was initially filed. The latter course of action is not possible because this court has already found that it lacked personal jurisdiction in this case.

However, Tamburo also argues that personal jurisdiction over all of the defendants is proper because Hayes is a citizen of Michigan and the other defendants are liable under a "conspiracy theory of jurisdiction." The Sixth Circuit has neither expressly adopted nor rejected such a theory of jurisdiction, under which the acts of a coconspirator, performed in the forum state in furtherance of the conspiracy, constitute sufficient minimum contacts to establish personal jurisdiction over an absent coconspirator who has no other contact with the forum. *Chrysler Corp. v. Fedders*

Corp., 643 F.2d 1229, 1236-37 (6th Cir. 1981); *but see General Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F.Supp. 656, 665-66 (E.D.Mich. 1996) (adopting the test). However, the court need not agonize long over whether such a theory of jurisdiction is acceptable in the Western District of Michigan, because it has already found that Tamburo's complaint does not allege sufficient facts to support a conspiracy theory of personal jurisdiction over the defendants. *See Tamburo v. Dworkin*, No. 04 C 3317, 2007 WL 3046216, at *8 (N.D. Ill. Oct. 9, 2007). Because Tamburo cannot demonstrate that his suit might have been properly brought against any of the defendants, except Hayes, in the Western District of Michigan, his motion to vacate and transfer is denied.

II. CONCLUSION

For the reasons set forth above, Tamburo's motion to vacate the court's order of dismissal of this case for lack of personal jurisdiction and to transfer this case to the Southern Division of the Western District of Michigan is denied.

ENTER:

/s/
JOAN B. GOTTSCHALL
United States District Judge

DATED: May 9, 2008