UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-60797-WILLIAMS

GRISEL ALONSO,

Plaintiff,

vs.

AEROFUND FINANCIAL, INC.

Defendant.
_____/

ORDER

THIS MATTER is before the Court on Defendant's motion to dismiss the Complaint or, alternatively, to transfer venue to the Northern District of California (DE 9). Plaintiff filed a response in opposition to the motion (DE 14), Defendant filed a reply (DE 17), and Plaintiff filed a sur-reply (DE 22). In the briefs, Plaintiff asks that the Court transfer this case to Judge William P. Dimitrouleas in the Fort Lauderdale division. For the reasons set forth below, the Court grants Defendant's motion to transfer this case to the Northern District of California and denies the relief sought by Plaintiff.

I. BACKGROUND

This case arises out of a series of transactions involving Defendant Aerofund Financial, Inc. ("Aerofund") and a group of entities (the "Elm Entities") that were the subject of an SEC action for fraud and misappropriation of investor funds.[1] The SEC action, which was litigated before Judge William P. Dimitrouleas (Case No. 15-cv-60082-WPD), alleges that the owner of the Elm Entities—Frederic Elm f/k/a Frederic

[1] The entities listed in the complaint are Elm Tree Investment Advisors, LLC; Elm Tree Investment Fund, LP; Elm Tree 'e'Conomy Fund, LP; and Elm Tree Motion Opportunity, LP. (DE 1 ¶ 1).

Elmelah ("Elm")—was engaged in a "Ponzi" scheme, through which he used the Elm Entities to funnel over $2 million into accounts for his personal use. (DE 1 ¶¶ 2-4, 14-23). On January 16, 2015, Judge Dimitrouleas entered an order in the SEC action appointing the Plaintiff in this case, Grisel Alonso, as Receiver for the Elm Entities, on the Government's motion. (DE 1 ¶ 5; DE 1-1). Pursuant to the receivership order, Alonso was authorized to "[t]ake immediate possession of all property, assets and estates of every kind of [the Elm Entities] ... and institute such actions and legal proceedings ... as [he] deems necessary ... against any transfers of money or other proceeds directly or indirectly traceable from investors in [the Elm Entities]". (DE 1 ¶ 7; DE 1-1 at 2).

On April 11, 2016, Alonso initiated this action as receiver for the Elm Entities, alleging that Elm deposited investor funds into comingled business and personal accounts, and then "used the investors' funds to pay third parties, including Aerofund." (DE 1 ¶ 23). Specifically, the complaint alleges that, between November 26, 2013 and December 31, 2014, Elm transferred a total of $70,000 to Aerofund through the Elm Entities. (DE 1 ¶¶ 23-33). According to the Complaint, the transferred funds "were derived from the fraud" and the Elm Entities "did not receive reasonably equivalent value" in exchange for the transfers. (DE 1 ¶¶ 31-32).

In its motion to dismiss, Aerofund asserts that the transfers at issue were "valid and non-fraudulent payments in satisfaction of a Judgment based on a lawful debt." (DE 9-1 at 4). Specifically, Aerofund explains that, on or about August 23, 2011, a financing agreement was executed between Aerofund and Fiberforce Communications

("FFC"). (DE 9-1 at 2). Elm signed the agreement on behalf of FFC, indicating that he was the president of the company. (DE 9-3 at 7). Under the terms of the financing agreement—which contained a California forum selection clause—FFC's obligations were secured by a blanket security interest in FFC collateral and guaranteed by Elm. (DE 9-1 at 2-3). As such, when FFC defaulted on its obligations, Aerofund filed a complaint against FFC and Elm in California State Court and ultimately obtained a judgement in the amount of $127,567.26. (DE 9-1 at 3; DE 10 at 3-13, 27-28, 30-31). The Parties negotiated a settlement agreement—which also contained a California forum selection clause—establishing the manner in which the judgment against FFC and Elm would be satisfied, and, "while the[] payments were not all timely made, payments totaling $130,000 were eventually made, and an Acknowledgement of Satisfaction of Judgment was filed on May 8, 2014." (DE 9-1 at 4; DE 10 at 33). Aerofund therefore argues that, because the payments at issue were made pursuant to the settlement agreement enforcing Aerofund's judgment for breach of Elm's obligations under the financing agreement—and because both agreements contained a California forum selection clause—venue is improper in this district, and the case should be dismissed. In the alternative, Aerofund moves to have the case transferred to California.

II. IMPROPER VENUE

Defendant Aerofund Financial, Inc. first moves to dismiss the Complaint by arguing that venue is improper in this district because of the forum selection clauses in "the underlying agreements in this action," which "require that any action be filed in the

Northern District of California." (DE 9 at 1; DE 9-1 at 1). In support of this contention, Aerofund cites to *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998), for the proposition that "[t]he appropriate mechanism to address a lawsuit filed in an improper venue is a motion to dismiss under Federal Rule of Civil Procedure 12(b)(3)."

Though Aerofund is correct in noting that Federal Rule of Civil Procedure 12(b)(3) addresses dismissals for improper venue, the Supreme Court has held that "[w]hether venue is 'wrong' or 'improper' depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause." *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 577 (2013). As such, a determination of whether venue is proper in this district does not turn on whether there is a different venue chosen in a forum selection clause, or whether that clause is valid or enforceable in this case. Instead, the Court must engage in a separate inquiry governed by 28 U.S.C. § 1391, which states that "[a] civil action may be brought in: . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(b)(2). Applying this standard, and considering that this case arises out of an SEC action brought in the Southern District of Florida based on an order issued by a judge in this district appointing Plaintiff as Receiver, the Court finds that venue is proper in the

Southern District of Florida.[2] Accordingly, Aerofund's motion to dismiss under Rule 12(b)(3) is denied.

III. MOTION TO TRANSFER

In the alternative, Aerofund requests that this case be transferred to California pursuant to 28 U.S.C. § 1404(a). Aerofund does not explicitly make a forum-selection-clause argument with regard to its motion to transfer, instead asserting that the forum-selection clause is a basis for dismissal under Rule 12(b)(3). The Supreme Court, however, has held that the proper procedure for enforcing a forum-selection clause is through a § 1404(a) motion, and so the Court will briefly address Defendant's forum-selection-clause arguments below. *See Atlantic Marine*, 134 S. Ct. at 579 ("Although a forum-selection clause does not render venue in a court 'wrong' or 'improper' within the meaning of § 1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under § 1404(a).").

The majority of Aerofund's motion to dismiss is dedicated to arguing that the forum-selection clauses contained in the financing agreement and the settlement agreement described in Section I, above, are valid and enforceable against the Receiver, acting on behalf of the Elm Entities. The Court does not agree. First, this case relates to the recovery of purportedly tainted funds that are implicated in an SEC action for fraud and misappropriation. Though Aerofund's motion attempts to rebut the Receiver's argument that the transfers constituted "improperly diverted assets" by

[2] Although the Supreme Court in *Atlantic Marine* noted that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*" that analysis is not applicable here because Aerofund is asserting that the proper forum is a different *federal* forum, namely the Northern District of California. (*See* DE 9-1 at 7).

explaining the valid transactions underlying the transfers at issue, the Court does not find that this brings the dispute within the ambit of the forum-selection clause in the financing agreement—which applies to "any suit, action, or proceeding arising out of" the agreement, its interpretation, its performance, or its breach—or the settlement agreement relating to payments on the California state-court judgment—which applies to the construction or enforcement of that agreement. (DE 9-1 at 6-7). Second, the Receiver correctly points out that the receivership entities are not parties to the agreements that contain the forum-selection clause language, and Aerofund has not cited any cases in which a forum-selection clause has been imputed to the receiver for a third-party entity, as is the case here. Additionally, the Court finds that the legal rationale for altering the traditional § 1404(a) analysis in order to give effect to forum-selection clauses as articulated in the case law—*i.e.* that the "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system"—is inapplicable in circumstances where, like here, the party against whom the clause is being enforced did not negotiate or agree to that language. *Atlantic Marine*, 134 S. Ct. at 581 (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988)).

In the absence of a valid and applicable forum-selection clause, the Court must evaluate Aerofund's motion to transfer venue to California under the general standard for transfer under § 1404(a). Pursuant to that statute, a party may move to change venue "to any other district or division where it might have been brought or to any district or division to which all parties have consented" "[f]or the convenience of parties

and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). "The purpose of section 1404(a) is to 'avoid unnecessary inconvenience to the litigants, witnesses, and the public, and to conserve time, energy, and money.'" *Game Controller Tech. v. Sony Comput. Entm't Am. LLC*, 994 F. Supp. 2d 1268, 1271 (S.D. Fla. 2014) (quoting *Cellularvision Tech. & Telecomms. L.P. v. Alltel Corp.*, 508 F. Supp. 2d 1186, 1189 (S.D. Fla. 2007)). Although the movant bears the burden of persuading the trial court that the transfer is appropriate, the Court has broad discretion to determine whether transfer is justified. *Meterlogic, Inc. v. Copier Sols., Inc.*, 185 F. Supp. 2d 1292, 1299 (S.D. Fla. 2002); *see also England v. ITT Thompson Indus., Inc.*, 856 F.2d 1518, 1520 (11th Cir.1988). Ultimately, "[a] motion for change of venue calls on the district court to make an individualized, case-by-case determination based on principles of fairness and convenience." *Carl v. Republic Sec. Bank*, Case No. 01-8981-CIV-HURLEY, 2002 WL 32167730, at *4 (S.D. Fla. Jan. 22, 2002).

In ruling on a motion to transfer, the Court must first determine whether the action might have been brought in the proposed transferee court. *Meterlogic, Inc.*, 185 F. Supp. 2d at 1299. As explained in Section II, above, pursuant to 28 U.S.C. § 1391, venue is proper in any district "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(b)(2). The Southern District of Florida is one such district, because the receiver was appointed in the Southern District of Florida and the underlying SEC action was litigated here. The specific facts relating to this ancillary proceeding, however, relate almost exclusively to California. As Aerofund's motion

explains, the transfers at issue here were made in satisfaction of a California state-court judgment based on the breach of a financing agreement that was executed in California. (DE 9-3 at 7). The settlement agreement governing payment of the judgment also required that the funds be sent to California, where Defendant resides. (DE 9-3 at 21). As such, the Court finds that venue would also be proper in California.

After determining that venue would be proper in the transferee court, the transferor court engages in a balancing test, weighing various private and public interest factors to determine whether transfer is appropriate. *Trafalgar Capital Specialized Inv. Fund (In Liquidation) v. Hartman*, 878 F. Supp. 2d 1274, 1281 (S.D. Fla. 2012). These factors include "1) plaintiff's initial choice of forum; 2) convenience of the parties and witnesses; 3) relative ease of access to sources of proof; 4) availability of compulsory process for witnesses; 5) location of relevant evidence; 6) financial ability to bear the cost of the change; [and] 7) [] all other practical problems that make trial of the case easy, expeditious, and inexpensive." *Republic Sec. Bank*, 2002 WL 32167730, at *5.

Though the Parties have thoroughly briefed the question of whether the forum-selection clauses are applicable to this case and binding on the Receiver, there is nearly no discussion of the private and public interest factors set out above and no articulation of what facts, if any, should guide this Court's determination of whether transfer is appropriate under 28 U.S.C. § 1404(a) absent a binding forum selection clause. (*See* DE 9-2 at 11-12; DE 14 at 12-15; DE 17 at 5; DE 22 at 5-6). Defendant's brief cites to number of California cases and appears to argue for dismissal under the doctrine of *forum non conveniens*, which is not appropriate in this case. *Atlantic Marine*,

134 S. Ct. at 580 ("Section 1404(a) is . . . a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer."); *see also* n.2, *supra*. Plaintiff, too, cites primarily to two cases that are readily distinguishable from the present case in that both relate to dismissal on *forum non conveniens* grounds and involve proposed transfer to a foreign forum. The first case, *Steinberg v. Barclay's Nominees (Branches) Ltd.*, No. 04-60897-CIV, 2007 WL 4287662 (S.D. Fla. Dec. 5, 2007), also involved a delinquent motion to transfer—filed three years after the complaint—and attempted to transfer the case from a Court that was already well-acquainted with the facts of the underlying case and had handled various ancillary actions. As such, the Court does not find the cited cases to be instructive where, as here, the transferor court has no prior experience with the issues, the motion to transfer was filed within six weeks of the Complaint, and the proposed transfer is to another federal forum pursuant to 28 U.S.C. § 1404(a).

In light of the dearth of briefing on this question, the Court has independently reviewed the record and the relevant factors and finds that transferring this case to California would best serve the interests of justice and fairness. Though the Court is sensitive to disturbing the Plaintiff's choice of forum, nearly all of the other factors—particularly the access to witnesses, documents, and other sources of proof—weigh heavily in favor of transfer in this case. All of the factual issues relating to these purportedly fraudulent transfers arise out of events that occurred in California, and the funds at issue were transferred there. By contrast, all of the "facts and occurrences"

that make this district a proper forum for this case—such as the SEC action and the appointment of Plaintiff as Receiver—have already been adjudicated in the case before Judge Dimitrouleas and have been memorialized in his receivership order and in the judgment that was entered over three months before this case was initiated. *See SEC v. Frederic Elm et al.*, Case No. 15-cv-60082-WPD, DE 137 (S.D. Fla. Jan. 29, 2016).

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to transfer venue (DE 9) is **GRANTED**. In the interest of justice and pursuant to 28 U.S.C. § 1404(a), the Clerk is directed to **TRANSFER** the case to the United States District Court for the Northern District of California. Accordingly, the Court denies Plaintiff's request that this case be transferred to Judge Dimitrouleas. The Clerk is directed to **CLOSE** this case, and all pending motions are **DENIED AS MOOT** without prejudice to refile in the appropriate court.

DONE AND ORDERED in chambers in Miami, Florida, this 10 day of February, 2017.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE