

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

824 MARKET STREET
WILMINGTON, DE 19801
(302) 252-2925

April 13, 2004

Jared G. Parker
Stinson Morrison Hecker LLP
1850 North Central Avenue
Suite 2100
Phoenix, AZ 85004-4584

John P. Dillman
Linebarger Goggan Blair &
Sampson, LLP
P.O. Box 3064
Houston, Texas 77253-3064

Laura Davis Jones
James O'Neill
Michael P. Migliore
Pachulski, Stang, Ziehl,
Young, Jones & Weintraub P.C.
919 North Market Street
16th Floor
P.O. Box 8705
Wilmington, DE 19899-8705

Theodore J. Tacconelli
Ferry, Joseph & Pearce, P.A.
824 Market Street, Suite 904
Wilmington, DE 19899

Counsel for Defendant,
Southwest Airport Services,
Inc.

Counsel for the Estate-
Plaintiff

**Re: TWA Inc. Post Confirmation Estate v. Southwest Airport
Services, Inc., a/k/a Southwest Services
Adv. Proc. No. 02-07084**

Dear Counsel:

This ruling is with respect to the motion (Doc. # 3) to dismiss filed by defendant Southwest Airport Services, Inc. , a/k/a Southwest Services ("Defendant"). By its complaint, the TWA Inc. Post Confirmation Estate ("TWA") seeks to recover alleged preferential transfers. For the reasons set forth below, the Court

will deny the Defendant's motion.

On January 10, 2001 the Debtor and twenty-six of its subsidiaries filed voluntary petitions for relief in this Court under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 et. seq. (the "Bankruptcy Code").¹ The plan was confirmed on June 14, 2002 and all rights and assets of the Debtor were transferred to TWA on June 25, 2002.

TWA filed a complaint on December 15, 2002 to avoid and recover the alleged preferential transfers under §§ 547(b) and 550(a). The attachment to the complaint detailed two payments made to the Defendant: (1) a check dated November 14, 2000 in the amount of \$1,200.00 for an invoice issued on November 13, 2000 and (2) a November 13, 2000 check for \$4,200.00 for the payment of six invoices dated from June 19, 2000 to September 13, 2000. The total amount TWA is seeking to recover is \$5,400.00.

Under Fed. R. Civ. P. 12(b)(3), a defendant can move to dismiss a complaint based on improper venue. "[T]he movant has the burden of proving the affirmative defense asserted by it." Myers v. Am. Dental Ass'n, 695 F.2d 716, 724 (3d Cir. 1983). But see Bayview Plaza Assocs., L.P. v. Town of N.E., Md. (In re Bayview Plaza Assocs., L.P.), 209 B.R. 840, 843 (Bankr. D. Del. 1997) ("Where a defendant raises the defense of improper venue, the

¹ Individual sections of the Bankruptcy Code will be cited herein as "§ ____".

plaintiff has the burden of proving that venue is proper."). This Rule is made applicable to a contested matter in a bankruptcy proceeding pursuant to Rule 7012(b).²

Defendant claims that venue is not proper under 28 U.S.C. § 1409 and proposes that the proper venue is the United States District Court for the Southern District of Texas, Houston Division, because the action "may only be commenced in the District Court for the District in which the Debtor would have been able to commence such an action had bankruptcy not been filed." (Doc. # 3 at 1-2). Section 1409 states in relevant part:

(a) Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.

* * *

(c) Except as provided in subsection (b) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544(b) of title 11 in the district court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced.

28 U.S.C.A. § 1409 (1997) (emphasis added).

The Defendant misconstrues § 1409. This adversary proceeding arises under title 11 and § 1409(a) clearly applies. Since the Debtor's Chapter 11 case was filed in this Court, venue for this

² Rule 7012(b) states "Rule 12(b)-(h) F.R. Civ. P. applies in adversary proceedings." Fed. R. Bankr. P. 7012(b).

adversary proceeding is properly here. See Hechinger Liquidation Trust v. Fox (In re Hechinger Inv. Co.) 296 B.R. 323, 325 (Bankr. D. Del. 2003) (“[V]enue is proper in the district where the bankruptcy case is pending.”).

The Defendant’s motion to dismiss includes a motion for sanctions. The Defendant alleged that TWA filed its complaint “to recover nonrecoverable transfers, was brought to harass and cause needless increase in the cost of litigation.” (Doc. # 3 at 5-6). Specifically, the Defendant claims that one transfer was made the day after the invoice was issued, constituting a contemporaneous exchange for value and, therefore, it was not recoverable.

First, additional facts are needed with regard to the transfer made the date after the invoice. Second, even if that transfer is found to be a contemporaneous exchange, TWA’s complaint seeks to recover other alleged preferential transfers. Third, the Defendant has not provided any evidence that TWA was attempting to harass the Defendant or increase litigation costs. For these reasons, the Defendant’s motion to dismiss is denied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Peter J. Walsh", with a long horizontal flourish extending to the right.

Peter J. Walsh

PJW:ipm

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:) Chapter 11
)
TWA INC. POST CONFIRMATION) Case No. 01-0056 (PJW)
ESTATE,)
) Jointly Administered
Debtor.)
_____)
)
TWA INC. POST CONFIRMATION)
ESTATE,)
)
Plaintiff,)
)
v.) Adv. Proc. No. 02-07084 (PJW)
)
SOUTHWEST AIRPORT SERVICES,)
INC., a/k/a SOUTHWEST SERVICES,)
)
Defendant.)

ORDER

For the reasons set forth in the Court's Letter Opinion of this date, the motion to dismiss (Doc. # 3) filed by defendant, Southwest Airport Services, Inc., is **DENIED**.



Peter J. Walsh
United States Bankruptcy Judge

Dated: April 13, 2004