UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 11 Cases
SPIEGEL INC., et al.,	)	Case No. 03-11540 (BRL)
Debtors.	)	Jointly Administered

MEMORANDUM DECISION AND ORDER
DENYING MOTION TO TRANSFER VENUE

Before the Court is the motion of Cole Sales Solutions, Inc. ("Cole Sales") to transfer the venue of the proceedings relating to its claims against Eddie Bauer, Inc. ("EBI" or "Eddie Bauer") to the District Court in Minnesota. Also scheduled for today was the motion of the Spiegel Creditor Trust, as successor to Eddie Bauer, for summary judgment, supplementing its fourteenth omnibus objection to seek disallowance of the claim filed by Cole Sales. The summary judgment motion was adjourned, on consent of all parties, to February 22, 2007.

BACKGROUND

On March 28, 2002, Cole Sales filed a lawsuit against Eddie Bauer and Mr. Perinchief asserting counts for tortious usurpation of business expectancy, fraud, unjust enrichment and restitution, promissory estoppel, and an action for accounting. On March 17, 2003, Spiegel and related debtors, including Eddie Bauer, filed petitions under title 11 of.

On September 26, 2003, Cole Sales filed a claim in the Debtors' bankruptcy cases against Eddie Bauer for "$2,500,000.00 and ongoing" (Claim No. 2341) (the "Cole Sales'

Claim"). On September 15, 2004, the Debtors filed their Fourteenth Omnibus Objection to Proofs of Claim (the "Fourteenth Omnibus Objection"). The Cole Sales' Claim was identified as a claim subject to the Fourteenth Omnibus Objection and Cole Sales filed a response to the Fourteenth Omnibus Objection.

On November 7, 2005, Cole Sales and the Creditor Trust agreed to a stipulation that would allow the Parties to "prosecute and defend" the Cole Sales' Claim and the Cole Sales' Litigation in Minnesota. On November 28, 2005, this Court signed an Order allowing the Cole Sales' Litigation to proceed in Minnesota (Case No. 03-11540, ECF Docket No. 4269).

Despite the stipulation and Order, Cole Sales did nothing to advance the litigation in Minnesota. In August 2006, the Creditor Trust filed a motion to modify the prior order that allowed the claim to proceed in the Minnesota District Court and requested disallowance of the Cole Sales Claim. The objection deadline, after the motion was initially adjourned on consent, was September 14, 2006. Cole Sales failed to file an objection.[1] On September 21, 2006, the hearing on the matter was held and the Court orally granted the motion to modify but the Court denied the motion to disallow. An order was entered on September 25, 2006, reinstating matters relating to the Cole Sales Claim exclusively in the Bankruptcy Court.

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[1] Counsel to Cole Sales, Jonathan Parrington, merely sent a letter to the Court dated September 14, 2006 requesting the "Court's advice as to whether or not it necessary for him [Cole Sales] to formerly [sic] move for the Court's permission to proceed with regard to the Spiegel bankruptcy or whether or not the Court will upon filing of the appropriate affidavit, grant Cole Sales Solutions leave to proceed to judgment in the District of Minnesota."

The Order to Modify was not timely appealed and Cole Sales did not request the Court reconsider its prior Order to Modify.

DISCUSSION

Cole Sales requests a change of venue based on the interest of justice and convenience of the parties and the witnesses. The decision to change venue lies within the sound discretion of the court and is based on "an individualized, case-by-case consideration of convenience and fairness." *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1391 (2d Cir. 1990). In the Second Circuit, the district in which the underlying bankruptcy case is pending is presumed to be the appropriate district and that the party moving for change of venue bears the burden of proof and that the burden must be carried by a preponderance of the evidence. *Id.*

"Convenience" generally involves consideration of the location of the parties and their counsel, the location of the proof, and the ability to compel otherwise unwilling witnesses to testify. *See Enron Corp. v. Arora (In re Enron Corp.)*, 317 B.R. 629, 638-39 (Bankr. S.D.N.Y. 2004). The Movant must submit a list of likely witnesses who would be inconvenienced by retaining the case in the chosen venue, together with a general statement of what each witness would say. *Herbert Ltd. P'ship v. Electronic Arts, Inc.*, 325 F. Supp. 2d 282, 286 (S.D.N.Y. 2004); *Pilates, Inc. v. Pilates Inst., Inc.*, 891 F. Supp. 175, 183 (S.D.N.Y. 1995). In addition, the movant must offer proof that the witnesses will not appear willingly in the chosen forum. *Herbert Ltd. P'ship*, 325 F. Supp. 2d at 286. Cole Sales merely states that venue would be more convenient in Minnesota. In

fact, Mr. Cole lives in California, not Minnesota. On the other hand, Spiegel provides a potential witness list that demonstrates Minnesota would actually not be more convenient for witnesses.

The interests of justice include consideration of whether transferring venue would promote the efficient administration of the bankruptcy estate, judicial economy, timeliness, and fairness." *Manville*, 896 F.2d at 1391; *accord In re Enron Corp.*, 317 B.R. 629, 640 (Bankr. S.D.N.Y. 2004). See generally 1 COLLIER ¶ 4.04[4][b], at 4-34 to 4-35. By filing this motion, the Movants have slowed the efficient administration of their claim and of these cases. This issue was previously decided by an order of this Court dated September 25, 2006. The Movants did not formally oppose or appeal that order, and yet now they return to this Court seeking to reverse its effect. Cole Sales had the opportunity to litigate the whole action in Minnesota and failed to do so, then had the opportunity to litigate venue and failed to do so and now seeks to revisit the venue issue so it can return the matter to where it essentially began. Clearly, the efficient administration of the estate and judicial economy point to keeping these matters before this Court.

The Movant points to the "learning curve" because these proceedings involve Minnesota law and suggest that the Minnesota court docket may be more accommodating and result in a quicker determination of the issues. In fact, this Court was prepared to decide the summary judgment motion today, therefore, the learning curve is not a factor. Additionally, should the motion for summary judgment be denied, this Court can

schedule a trial in this matter on the first day the parties are available. It appears the difficulty lies not with the Court's availability, but with the parties being able to coordinate their own availability.

The motion to transfer venue, for the reasons discussed above, is denied.

SO ORDERED.

Dated: January 23, 2007 New York, New York	Hon. Burton R. Lifland United States Bankruptcy Judge