

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
OMAHA MIDWEST WHOLESALE)	
DISTRIBUTION, INC.,)	CASE NO. BK86-2775
)	
DEBTOR)	A88-005
)	
MERLE NICOLA, Trustee,)	CH. 7
)	
Plaintiff)	
)	
vs.)	
)	
SIGARMS, INC.,)	
)	
Defendant)	

MEMORANDUM

APPEARANCES

Tim Pugh, Attorney for Sigarms, Inc., 1100 One Central Park Plaza,
222 S. 15th St., Omaha, NE 68102
David Meyer, Attorney for Sigarms, Inc., 200 Opitz Blvd., Suite
200, P.O. Box 4966, Woodbridge, VA 22195
Chris Connolly, Attorney for Trustee, 1213 Davenport Street, Suite
200, Omaha, NE 68154

Merle Nicola, Trustee for debtor, Omaha Midwest Wholesale
Distribution, Inc., initiated this adversary action on or about
January 19, 1988, against defendant, Sigarms, Inc., alleging a
preferential transfer under 11 U.S.C. § 547.

On February 22, 1987, Sigarms, Inc., filed its answer to the
complaint, and on March 22, 1988, Sigarms, Inc., filed a motion to
dismiss or alternately transfer for improper venue. A telephonic
hearing on Sigarms, Inc.'s motion was held on April 14, 1988. At
the hearing, the Court raised the question of whether Sigarms,
Inc., had waived its right to plead improper venue and requested
legal arguments from the parties on that issue. The Court has
received and reviewed these arguments as well as those submitted
prior to the hearing.

FILED
DISTRICT OF NEBRASKA
At _____
JUN 17 1988
Judith M. Napier
Clerk, U.S. Bankruptcy Court
By _____ Deputy

This memorandum contains the Court's findings of fact and
conclusions of law pursuant to Bankr. R. 7052.

Motion to dismiss due to improper venue is overruled. Fed. R. Civ. P. 12(h)(1)¹ provides that "[a] defense of lack of jurisdiction over the person, improper venue, ... is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." Fed. R. Civ. P. 12(h)(1) (emphasis added). Fed. R. Civ. P. 15² reads

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

Fed. R. Civ. P. 15(a). Defendant, Sigarms, Inc., did not raise the defense of improper venue in either its answer to the complaint or by motion prior to filing its answer. Further, Sigarms, Inc., did not attempt to amend its answer within twenty days after the answer was served as provided in Fed. R. Civ. P. 15(a).

The Court finds that Sigarms, Inc., has waived its right to assert improper venue. See Bodenhamer Bldg. Corp. v. Architectural Research Corp., 106 F.R.D. 521, 523 (E.D. Mich. 1985). The absence of counsel and the absence of corporate officers during the relevant time period do not provide sufficient justification to permit amendment to Sigarms, Inc.'s, pleading after the expiration of the time provided in Fed. R. Civ. P. 15(a). Further, the substantive issue on which Sigarms, Inc., relies for improper venue, that the challenged transfer was a post-petition acquisition and thus not property of the estate, is a question of fact which cannot be resolved without an evidentiary hearing.

¹Bankr. R. 7012(b) incorporates Fed. R. Civ. P. 12(h) in adversary proceedings.

²Bankr. R. 7015 incorporates Fed. R. Civ. P. 15(a) in adversary proceedings.

Sigarms, Inc.'s, alternative motion requesting transfer based on forum non conveniens is overruled. The factors which the Court must evaluate in determining the appropriateness of a change of venue include:

- 1) the location of Plaintiff and Defendant;
- 2) the ease of access to necessary proof;
- 3) the availability of subpoena power for unwilling witnesses;
- 4) the expense related to obtaining willing witnesses;
- ...
- 8) the economics of the estate administration.

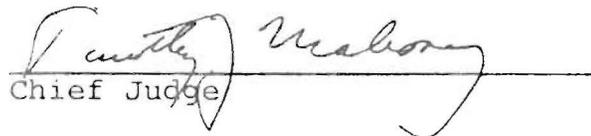
In re F/S Airlease II, Inc., 67 Bankr. 428, 432 (Bankr. W.D. Pa. 1986). The Court finds that debtor and plaintiff are located in Nebraska as are debtor's records. Additionally, the administration of the estate can occur more efficiently and other creditors of the estate are less burdened if this complaint is brought in Nebraska.

The burden of proof rests with Sigarms, Inc., and it has not "clearly and substantially" justified the requested transfer. In re Lionel Corp., 24 Bankr. 141, 143 (Bank. S.D.N.Y. 1982).

Separate journal entry to be entered this date.

DATED: June 14, 1988.

BY THE COURT:


Chief Judge