

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
LOEWEN GROUP INTERNATIONAL,)	Case No. 99-1244 (PJW)
INC., a Delaware corporation,)	
et al.,)	Jointly Administered
)	
Debtors.)	
)	
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LOEWEN GROUP INTERNATIONAL,)	
INC., a Delaware corporation,)	
et al.,)	
)	
Plaintiffs,)	
)	
vs.)	Adv. Proc. No. A-01-4072
)	
STANLEY C. MORRIS, KATHERINE M.)	
MORRIS, AND GILBERT R. ARTHUR,)	
individuals,)	
)	
Defendants.)	

MEMORANDUM OPINION

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Dated: March 21, 2002

WALSH, J.

Before the court is the motion (Doc. # 5) of Stanley C. Morris, Katherine M. Morris, and Gilbert R. Arthur (collectively, "Defendants") to: (1) dismiss the adversary complaint ("Complaint") of Loewen Group International, Inc. ("LGII" or "Plaintiff") pursuant to Fed. R. of Civ. P. 12(b)(1)¹ on the ground that the court lacks subject matter jurisdiction; (2) dismiss the Complaint pursuant to Fed. R. of Civ. P. 12(b)(3) on the ground that this court constitutes an improper venue; (3) transfer venue of the instant adversary proceeding to the United States District Court for the District of Oregon; or, in the alternative, (4) stay the adversary proceeding pending arbitration on the matter. Defendants also seek dismissal of Count III of the Complaint, entitled "Negligence Per Se," and request reasonable attorneys' fees and costs. For the reasons discussed below, I will deny Defendants' motion to dismiss the Complaint, but grant Defendants' motion to transfer venue of this action to the United States District Court for the District of Oregon.²

¹ Rule 12 of the Federal Rules of Civil Procedure is applicable in the instant adversary proceeding pursuant to Fed. R. Bankr. P. 7012.

² Therefore, the decisions of whether to stay the adversary proceeding pending arbitration, to dismiss Count III of the Complaint, and/or to award or deny reasonable attorneys' fees and costs are reserved for the discretion of the transferee court.

BACKGROUND

LGII and approximately 830 of its direct and indirect subsidiaries and/or affiliates (collectively, "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on June 1, 1999 ("Petition Date").³ Debtors' chapter 11 cases were consolidated for procedural purposes and administered jointly. On December 5, 2001, Debtors' Fourth Amended Joint Plan of Reorganization ("Plan") was confirmed (Doc. # 8671, Case No. 99-1244).⁴

LGII's business operations primarily consist of funeral homes, cemeteries and related businesses. The instant adversary proceeding arises out of LGII's pre-petition purchase of a cemetery in Oregon. Defendants are residents of Oregon who, through their stock ownership in Cemetery Services, Inc. ("CSI")⁵, owned and operated the Forest Lawn Cemetery (the "Site") from March 1993 until March 1996.⁶ (Complaint ¶ 8.) On March 28, 1996, Defendants

³ Some of the Debtors filed for chapter 11 relief subsequent to June 1, 1999.

⁴ Nineteen of the Debtors were not included under the Plan due to unresolved litigation that remained pending at the time the Plan was filed. Four additional Debtors were not included because they had no impaired class voting to accept the Plan. See 11 U.S.C. § 1129(a)(10).

⁵ CSI is a closely-held Oregon corporation.

⁶ The Site, which is located at 400 S.W. Walters Road in Gresham, Oregon, consists of a cemetery, two mausoleums, a maintenance building and a former sales office. (Complaint ¶ 9.)

and LGII entered into a share purchase agreement ("Agreement") pursuant to which LGII agreed to purchase all of the outstanding shares of CSI stock, as well as the Site and additional business assets personally owned by Defendants, for \$1,200,000.00. (Id. at ¶ 10.)

Under the terms of the Agreement, Defendants represented and warranted that CSI "has complied with all applicable federal, state or local statutes, laws and regulations including, without limitation, any applicable building, zoning, or other law, ordinance or regulation". (Agreement at ¶ 5(c).) In addition, Defendants also represented that:

Seller has not caused any hazardous substances (as hereinafter described) to be upon the Real Property and Seller knows of no such substances to be upon the Real Property. In addition:

- (i) there are no underground storage tanks and, to the best of Seller's knowledge, there have never been underground storage tanks on the Property;
 - (ii) to the best of Seller's knowledge, there are no hazardous or toxic materials, substances, pollutants, contaminants or wastes, or any substances regulated as "hazardous", "toxic" or under any similar designation by any local, state, or federal governmental authority, present in the soil, subsoil, or groundwater of, or on, the Real Property, and none of the above have been deposited, discharged, placed or disposed of at, on or near the Real Property;
- * * *
- (iv) to the best of Seller's knowledge, the Total Assets are not affected in any way by any substance deemed hazardous by federal, state or local laws, rules, or regulations.

(Agreement at ¶ 5(g).) In the event of any breach of these representations and/or warranties by Defendants, the parties agreed that Defendants would "indemnify, defend and hold [LGII] harmless from and against any and all losses, damages, expenses, liabilities, claims, or demands (collectively, the "LOSSES") suffered or incurred by [LGII] or Company, directly or indirectly, caused by, resulting from or arising out of" such breach. (Agreement at ¶ 9(a).)

Prior to the execution of the Agreement, and in accordance with the terms thereof, LGII hired Conestoga-Rovers & Associates ("CRA") to conduct an environmental investigation of the Site and prepare a requisite Phase I report. (Complaint ¶ 14.) In conducting its investigation, CRA interviewed employees and former owners of the Site. (Id.) Defendant Arthur allegedly accompanied CRA on the inspection and assured inspectors that no solid wastes or hazardous waste had been disposed of on the Site. (Id.) At the conclusion of the investigation, CRA issued a report in which it recommended that a second investigation be conducted at the Site. (Id. at ¶ 15.) At the conclusion of the second investigation in April 1996, CRA issued another report recommending that no further investigation or remediation be conducted. (Id.)

Thereafter, in July 1998, LGII discovered the presence of solid waste in the subsurface of the Site while performing excavation work. (Complaint ¶ 16.) As a result, LGII commissioned

two additional environmental investigations at the Site which revealed the presence of: (1) a solid waste disposal area near the maintenance building containing approximately 15 cubic yards (24.26 tons) of diesel and heavy oil hydrocarbon-contaminated soil, (2) a subsurface solid waste disposal area consisting of a 30-gallon drum of unknown solvents and approximately 374 cubic yards of solid waste in the subsoil of the cemetery lawn, and (3) a subsurface solid waste disposal area consisting of approximately 1, 500 cubic yards of non-hazardous waste south of the maintenance building. (Id. at ¶ 17.) LGII then excavated, transported and disposed of this solid waste to avoid the possibility of the waste adversely affecting the groundwater in the area. (Id. at ¶ 19.) The remediation was completed in July 2000 at a cost of over \$370,000. (Id. at ¶ 20.)

Subsequently, in May 2001, LGII commenced the instant adversary proceeding against Defendants alleging that: (i) Defendants materially breached section 5(g)(ii) of the Agreement (Id. at ¶¶ 21-27); (ii) Defendants materially breached section 5(c) of the Agreement (Complaint ¶¶ 28-33); and (iii) Defendants' conduct constitutes negligence per se under Oregon Revised Statute § 459.204 (Id. at 34-38).⁷ In addition, the Complaint includes an

⁷ Oregon Revised Statute § 459.205 provides:

(1) Except as provided by ORS 459.215, a disposal site shall not be established, operated, maintained or substantially altered, expanded or improved, and a change shall not be made in the method or type of disposal at a disposal site, until the person owning or

objection to three proofs of claim filed by Defendant Arthur in connection with LGII's purported breach of Arthur's employment agreement.⁸ (Id. at 39-52.) LGII seeks damages in an amount equal to the remediation costs identified in the Complaint and asks that the court disallow and/or reduce the claims asserted by Defendant Arthur. (Id. at 12.) On July 9, 2001, Defendants responded to the Complaint by filing their motion (Doc. # 5) to dismiss, transfer or stay the proceeding pending arbitration.⁹

DISCUSSION

controlling the disposal site obtains a permit therefor from the Department of Environmental Quality as provided in ORS 459.235.

(2) The person who holds or last held the permit issued under subsection (1) of this section, or, if that person fails to comply, then the person owning or controlling a land disposal site that is closed and no longer receiving solid waste must continue or renew the permit required under subsection (1) of this section after the site is closed for the duration of the period in which the department continues to actively supervise the site, even though solid waste is no longer received at the site.

⁸ LGII argues that Arthur's alleged intentional misrepresentations to the CRA investigators and to LGII during the negotiation of the Agreement bar him from collecting additional monies from LGII under either the Agreement or his employment contract. (Complaint ¶ 47.) In addition, LGII alleges that Arthur breached the Agreement by failing to comply with the representation and warranties made therein (id. at ¶ 48), and failed to satisfy his obligations under his employment contract (id. at ¶ 49.)

⁹ The Agreement provides that "[a]ll matters subject to arbitration hereunder, including, without limitation, the interpretation of this arbitration clause and the matters subject to arbitration hereunder, shall be settled in Portland, Oregon, before a single arbitrator". (Agreement at ¶ 9(e).) The Agreement also provides that it is governed by Oregon law (id. at ¶ 13(d)), and that "[a]ny suit or proceeding will be brought in the State of Oregon, that being the place of venue chosen by the parties to this Agreement" (id. at 13(j)).

I. Jurisdiction

Defendants first argue that the Complaint should be dismissed because the court lacks subject matter jurisdiction over the proceeding. (Def.'s Mot. (Doc. # 5) at 2.) I disagree. Bankruptcy courts have jurisdiction to hear "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11". 28 U.S.C. § 157(b)(1). They also have jurisdiction over certain non-core proceedings which are "otherwise related to a case under title 11". 28 U.S.C. § 157(c)(1). 28 U.S.C. § 157(b)(2)¹⁰ sets forth a nonexclusive list of core proceedings.¹¹ In the Third Circuit, a proceeding is considered to be core under § 157 "if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." Torkelsen v. Maggio (In re Guild and Gallery Plus, Inc.), 72 F.3d 1171, 1178 (3d Cir. 1996) (quoting In re Marcus Hook Dev. Park, Inc., 943 F.2d

¹⁰ 28 U.S.C. §§ 101 et seq. is hereinafter referred to as "\$ ___".

¹¹ Relevant to the instant dispute, § 157(b)(2)(B) and (C) provide:
 (2) Core proceedings include, but are not limited to-

* * *

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
 (C) counterclaims by the estate against persons filing claims against the estate;

261, 267 (3d Cir. 1991)). In contrast, proceedings which are not core are still considered to be "related to bankruptcy if *'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy'*". Marcus Hook, 943 F.2d at 264 (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)); In re Donington, Karcher, Salmond, Ronan & Rainone, P.A., 194 B.R. 750, 757 (D.N.J. 1996). Such is the case here.

Contrary to LGII's contention, this action does not constitute a core proceeding.¹² It does not invoke a substantive right provided by title 11, or constitute a proceeding which could only arise in the context of a bankruptcy case. See Torkelsen, 72 F.3d at 1178. The claims asserted herein constitute traditional state law causes of action sounding in contract and tort which arose in connection to Defendants' pre-petition conduct and the representations and warranties made by Defendants in the pre-

¹² In the Complaint, LGII asserts that the Court has jurisdiction pursuant to § 1334 "in that this action is 'related to' the Debtor's bankruptcy proceedings". (Complaint ¶ 1.) However, in its response to Defendants' motion, LGII argues that this action is core pursuant to § 157(b)(2)(B) and (C) because it "acts more like a counterclaim" to the proofs of claim already filed by Defendant Arthur. (Debtors' Resp. (Doc. # 7) at 2.) I find this argument to be unpersuasive. Arthur's proofs of claim and LGII's objection thereto are merely incidental to the main causes of action set forth in the Complaint which, as discussed below, are grounded in contract and tort. In addition, while LGII's claims against all Defendants arise out of Defendants' alleged breach of the pre-petition Agreement, Arthur's proofs of claims and LGII's objections thereto pertain solely to an employment agreement having no bearing upon the principal dispute between the parties. Furthermore, although Arthur has filed proofs of claim in LGII's bankruptcy, Defendants Stanley and Katherine Morris have not.

petition Agreement. They do not flow from or implicate LGII's rights and/or obligations as a chapter 11 debtor and depend in no way on an interpretation under the Bankruptcy Code. Because a ruling on this action depends solely on an interpretation of state law, this action could have been commenced independent of Debtors' bankruptcy. Therefore, although this proceeding is related to LGII's bankruptcy because of its potential effect on the estate, I find that it does not constitute a core proceeding pursuant to § 157 (a), (b). Nevertheless, by reason of 28 U.S.C. § 157(c) (1) this Court has subject matter jurisdiction.¹³

II. Venue

Defendants next argue that the Complaint should be dismissed because this Court constitutes an improper venue pursuant to Fed. R. Civ. P. 12(b) (3). (Def.'s Mot. (Doc. # 5) at 2.) In the alternative, Defendants argue that the action should be transferred the United States District Court for the District of Oregon

¹³ Defendants do not dispute that the claims asserted in the Complaint are non-core. (Def.'s Reply (Doc. # 9) at 2-3.) Rather, they argue that the court lacks jurisdiction because it cannot deny enforcement of the arbitration and forum selection clauses contained in the Agreement. I will address these arguments below. See discussion, infra Part II.

pursuant to 28 U.S.C. §§ 157(a)¹⁴, 1412¹⁵ and Federal Rules of Bankruptcy Procedure 1014¹⁶ and 7087¹⁷. (Id.) Under the facts and circumstances of this action, I find transfer to be the appropriate relief. Therefore, I will deny Defendants' motion to dismiss the proceeding pursuant to Fed. R. Civ. P. 12(b)(3), but grant

¹⁴ Section 157(a) provides:

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

¹⁵ Section 1412 provides:

A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

¹⁶ Fed. R. Bankr. P. 1014 provides:

1) Cases Filed in Proper District. If a petition is filed in a proper district, on timely motion of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be transferred to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

(2) Cases Filed in Improper District. If a petition is filed in an improper district, on timely motion of a party in interest and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.

¹⁷ Fed. R. Bankr. P. 7087 provides:

On motion and after a hearing, the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U.S.C. § 1412, except as provided in Rule 7019(2).

Defendants' motion to transfer venue.

Defendants move to transfer venue pursuant to § 1412 which permits a court to transfer venue of a proceeding such as this one "in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. A determination of whether to transfer venue under § 1412 turns on the same issues as a determination under § 1404(a) which permits a court to transfer a *civil action* "[f]or the convenience of the parties and the witnesses [or] in the interest of justice". 28 U.S.C. § 1404(a); see In re Emerson Radio Corp., 52 F.3d 50, 55 (3d Cir. 1995); Internal Revenue Serv. v. CM Holdings, Inc., 1999 WL 459754, at *2 (D. Del. Jun. 10, 1999). The pertinent factors to be considered in determining whether to transfer venue pursuant to § 1404(a) include: (1) plaintiff's choice of forum, (2) whether the claim arose elsewhere, (3) relative ease of access to sources of proof, (4) the location of books and records and/or the possibility of viewing premises if applicable, (5) the convenience of the parties as indicated by their relative physical and financial condition, (6) the convenience of the witnesses, (7) practical considerations that would make the trial easy, expeditious, or inexpensive, (8) the relative congestion of the courts' dockets, (9) choice of law considerations, (10) the familiarity of the judge with the applicable state law, and (11) the local interest in deciding local controversies at home. See Jumara v. State Farm Ins. Co., 55 F.3d

873, 879-80 (3d Cir. 1995); Brown v. C.D. Smith Drug Co., 1999 WL 709992, at *5-6 (D. Del. Aug. 18, 1999); CM Holdings, 1999 WL 459754 at *2. Here, I find that the factors weigh in favor of transferring venue to the United States District Court for the District of Oregon.

First, although plaintiff's choice of forum is usually entitled to substantial weight in the analysis, deference to a "plaintiff's choice of forum is manifestly inappropriate" where, as here, Plaintiff has executed a contractual forum selection provision. Beck, 1995 WL 394067, at *5 (E.D. Pa. Jun. 29, 1995). Although LGII argues that the forum selection clause contained in the Agreement is unenforceable either in whole or in part, LGII provides neither factual nor legal support for its argument. (Debtors' Resp. (Doc. # 7) at 3.)¹⁸ LGII neither contends that Defendants engaged in fraud or other misconduct in negotiating the forum selection provision, nor argues that Defendants had superior bargaining power. Rather, LGII simply supports its argument by contending that the arbitration clause is invalid because it is overly broad and vague. (Id.). I find this argument to be insufficient to meet Plaintiff's burden. Although it is true that a determination that the arbitration provision is unenforceable

¹⁸ A party objecting to the enforcement of a valid forum selection clause has the burden of showing why enforcement is unreasonable and must establish fraud, use of overreaching bargaining power or other misconduct with respect to the inclusion of the provision. Beck, 1995 WL 394067 at *4.

would render the forum selection provision contained therein ineffective, the Agreement also contains another forum selection provision at ¶ 13(j). LGII sets forth no reason as to why the latter provision may be unenforceable and therefore, I find that little deference should be given to LGII's choice of forum.

With respect to the second, third and fourth factors, not only did all of the claims in this action arise in Oregon, but also, the outcome of this proceeding will likely turn on evidence that may only be obtained and/or produced in Oregon. Substantially all of the negotiations leading up to the Agreement and the closing of the Agreement took place in Oregon. In addition, each claim turns upon the physical condition of real property located in Oregon. Because the claims relate to the remediation of the Site, expert examination of the Site will likely be required. Each of these factors weight in favor of transferring venue to Oregon.

In addition, because experts will likely be called to testify as to the results of their examinations, it will certainly be more convenient for the witnesses if the action is transferred to Oregon where the Site is located.¹⁹ In addition, I find that transferring venue will also be more convenient for the parties because it will be significantly burdensome and expensive for

¹⁹ As a peripheral matter, I think it would be more appropriate for such testimony to be considered by a local judge who is more familiar with the area in question and the rules and regulations pertaining thereto.

Defendants, who are individuals and residents of Oregon, to litigate in Delaware. Given that all of the events leading up to the execution of the Agreement took place in Oregon, at the time the Agreement was entered into, Defendants probably had little or no expectation that litigation arising out of the Agreement would be commenced in Delaware. This is particularly true in light of the fact that the Agreement contains at least one forum selection clause naming Oregon as the proper venue for disputes arising out of the Agreement. Although Plaintiff argues that transfer would be inappropriate in light Debtors' strong ties to Delaware and Debtors' dire financial situation, I find this argument to be unpersuasive. Plaintiff is a Delaware corporation with places of business across the nation. All of the transactions giving rise to the instant action took place in Oregon prior to the Petition Date. The only connection between this proceeding and Delaware is the fact that LGII chose to file for bankruptcy protection here. Prior to doing so, LGII knowingly purchased real property in Oregon and in doing so, executed an Agreement containing a forum selection clause providing that all disputes under the Agreement would be resolved in Oregon. As such, LGII knew and/or should have known that it was subject to the jurisdiction of the Oregon courts, particularly with regard to any disputes arising in connection with the Agreement.

Furthermore, each of the remaining factors to be analyzed

in deciding whether to transfer venue weigh in favor of doing so. LGII acknowledges that the instant dispute is governed by Oregon common law. Therefore, although LGII claims that none of the issues involved are novel or complex, I think it would be more appropriate for a local judge to decide the matter. A federal judge sitting in Oregon is more likely to be familiar with the applicable state law issues than this Court and has a greater interest in deciding issues which may affect the development of Oregon common law. As such, not only do I find it likely that the matter will proceed more easily, efficiently and expeditiously in Oregon, but also, an Oregon court has a greater interest in deciding the matter. In light of these facts, and given the current burden on this Court's docket, I find that Defendants have met their burden of showing that the convenience of the parties and the interests of justice warrant transfer of this proceeding to the United States District Court for the District of Oregon.

CONCLUSION

For the reasons stated above, Defendants' motion (Doc. # 5) to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(3) is denied. Defendants' motion (Doc. # 5) to transfer venue of this proceeding to the United States District Court for the District of Oregon is granted. That portion of Defendants' motion to stay the proceeding pending arbitration, to dismiss Count III of the Complaint entitled "Negligence Per Se", and requesting

reasonable attorneys fees and costs is reserved for consideration by the transferee court.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
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LOEWEN GROUP INTERNATIONAL,)	Case No. 99-1244 (PJW)
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STANLEY C. MORRIS, KATHERINE M.)	
MORRIS, AND GILBERT R. ARTHUR,)	
individuals,)	
)	
Defendants.)	

ORDER

For the reasons set forth in the Court's Memorandum Opinion of this date, it is ORDERED that:

(i) the motion (Doc. # 5) of Stanley C. Morris, Katherine M. Morris, and Gilbert R. Arthur (collectively, "Defendants") to dismiss the adversary complaint ("Complaint") of Loewen Group International, Inc. ("LGII" or "Plaintiff") pursuant to Fed. R. of Civ. P. 12(b)(1) is denied;

(ii) Defendants' motion (Doc. # 5) to dismiss the Complaint pursuant to Fed. R. of Civ. P. 12(b)(3) is denied; and

(iii) Defendants' motion (Doc. # 5), pursuant to 28 U.S.C. § 1412, to transfer venue of the instant adversary proceeding to the United States District Court for the District of Oregon is granted.

Peter J. Walsh
United States Bankruptcy Judge

Dated: March 21, 2002