

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STEPHEN G. ATKINSON, M.D. P.C.,)
)
 Plaintiffs,)
)
 vs.)
)
 EASYWAY PROFESSIONAL, INC, et al.)
)
 Defendants.)
)
)
)

Case No. **CV 2009 5343**

**ORDER DENYING MOTION FOR
CHANGE OF VENUE BY
DEFENDANTS RICHARD
FAHNESTOCK AND JOYCE
FAHNESTOCK d/b/a MEDICAL
SOFTWARE, ETC.**

I. INTRODUCTION AND BACKGROUND.

In October 1999, plaintiff Dr. Stephen Atkinson (Atkinson) purchased medical billing software (Easyway Office Management Software) from defendant Medical Software Etc. (MSE). In 2003, defendant Eric Ruud (Ruud) formed defendant Easyway Professional, Inc. (EPI), a Nevada Corporation, and created a new billing software, EWPro. EPI is the producer and creator of EWPro, and MSE is an approved vendor and sells and maintains EWPro. Atkinson purchased EWPro in late 2003 from MSE. Atkinson moved his practice from Kootenai County, Idaho, to King County, Washington, in June 2001. In September 2001, defendants Richard and Joyce Fahnestock (Fahnestock) d/b/a MSE moved to Ada County, Idaho, from Kootenai County, Idaho.

In 2007, the Health Insurance Portability and Accountability Act (HIPAA) was revised to require a specific billing format different from the one used in EWPro. The change required billing formats to change from the National Standard Format to the

ASC X12N 837 Standard 4010A1 by late 2008. Atkinson never received the necessary software update from defendants and purchased another electronic billing software program containing the ANSI format to comply with HIPAA on June 1, 2009. Atkinson complains in his lawsuit he was unable to bill for services rendered between April 7, 2009, and June 10, 2009, as a result.

Atkinson moved this Court for an Order of Default against defendant EPI. On July 8, 2009, Atkinson filed his Complaint. Fahnestocks d/b/a MSE filed their notice of appearance on August 3, 2009. Eric Ruud (Ruud) answered the complaint *pro se* on August 3, 2009. Despite answering *pro se*, it appears Ruud's intent was to answer on behalf of himself and Defendants Jane Doe Ruud and EPI. At the conclusion of oral argument on October 8, 2009, this Court granted Atkinson's motion for default against EPI, having noted the proof of service in the Court file.

Defendants Fahnestocks move this Court for an Order changing venue to Ada County, Idaho. Fahnestocks argue none of the EWPro sale was negotiated, consummated, or performed in Kootenai County, no parties to the action are located in Kootenai County, and no relevant events occurred in Kootenai County. The Court took the matter of Fahnestocks' motion to change venue to Ada County under advisement at the conclusion of the October 8, 2009, oral argument.

II. STANDARD OF REVIEW.

The Idaho Supreme Court and the Idaho Court of Appeals agree that the decision as to whether to enter default judgment is a matter of discretion for the trial court. *Mastrangelo v. Sandstrom, Inc.*, 137 Idaho 844, 849-850, 55 P.3d 298, 303-304 (2002); *Johnson v. State*, 112 Idaho 1112, 1114, 739 P.2d 411, 413 (Ct.App. 1987) (comparing I.R.C.P. 55 to Fed.R.Civ.P. 55); *see also Clear Springs Trout Co. v.*

Anthony, 123 Idaho 141, 143, 845 P.2d 559, 561 (1992). Similarly, the decision to grant or deny a motion for change of venue is also addressed to the discretion of the trial court. *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 358-59, 986 P.2d 1019, 1024-25 (Ct.App. 1999).

III. ANALYSIS OF FAHNESTOCKS' MOTION TO CHANGE VENUE.

Idaho Code § 5-404 provides in relevant part:

In all other cases the action must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action;... and provided, further, that all actions against any corporation organized under the laws of the state of Idaho, suit or action shall be commenced and tried in any county of this state where the defendant has its principal place of business or in the county in which the cause of action arose.

The district court must evaluate the nature of a plaintiff's claim and make a determination as to whether the action is local under I.C. § 5-401 (venue in actions related to real property) or transitory under I.C. § 5-404 (venue determined by residence) as a threshold matter. *Jarvis v. Hamilton*, 73 Idaho 131, 246 P.2d 216 (1952).

Venue in transitory actions such as the instant case is generally not determined according to the joinder of parties and the nature of claims asserted, but according to the residence of the defendant at the time the action is commenced.

Pintlar Corp. v. Bunker Ltd. Partnership, 117 Idaho 152, 155, 786 P.2d 543, 546 (1990).

For purposes of determining venue, a corporation must be regarded as a resident of the county where it maintains its principal place of business. *Banning v. Minidonka Irrigation Dist.*, 89 Idaho 506, 406 P.2d 802 (1965). Idaho courts have also recognized, for purposes of venue, breach of contract actions arise in the county where the contract was made, where it was breached or where the damage occurred. *Corder v. Idaho Farmway, Inc.* 133 Idaho 353, 358, 986 P.2d 1019, 1024 (Ct.App. 1999).

Defendants Fahnestock argue no party to the action resides in or has a principal place of business in Kootenai County; EPI is a Nevada corporation, therefore only its principal place of business should be considered; no part of the EWPro sale, installation, maintenance or claimed problems occurred in or by anyone residing in Kootenai County; and venue should be changed to Ada County in the interests of justice. Memorandum in Support of Motion to Change to Venue, pp. 4-6. In response, Atkinson argues the contractual relationship between the parties was originally formed in Kootenai County and MSE continues to register its place of business in Hayden, Kootenai County, Idaho. Response Memorandum in Opposition to Motion to Change Venue, p. 2.

Here, Fahnestocks d/b/a MSE resided in Ada County at the time this action was commenced. Regarding MSE as a business entity, venue is proper where MSE has its primary place of business or where the cause of action arose. As exhibits to the Affidavit of Counsel in Support of Motion to Change Venue, Fahnestocks provide extensive information as to the incorporation of EPI. However, having not appeared or answered (*See supra*), EPI's principal place of business, incorporation, and subsequent dissolution are of no import to the instant motion to change venue. All the Court has before it in this regard is MSE's Certificate of Assumed Business Name, listing a Hayden, Idaho, address. See Exhibit A to the Affidavit of Kammi M. Smith.

The contract entered into between the parties is not before the Court. It is also unclear at this juncture whether the 2003 change to EWPro amounts to an entirely different contract between the parties or simply a modification of an earlier contract. To the extent the original 1999 contract is at issue, Kootenai County is likely the proper venue as it does appear that is the location where the contract was made. To the

extent the 2003 shift to EWPro is an entirely new contract, it is unclear where any such contract was entered into. It does appear likely that any such contract was not formed or breached in Kootenai County. It appears no damage occurred in Kootenai County. Additionally, the interests of justice only mitigate in favor of changing venue to Ada County if no portion of the contract between the parties required venue be had in Kootenai County. In transitory actions with multiple defendants, venue may be based in the county of the residence of any one of them against whom substantial relief is sought. *Pintlar*, 117 Idaho 152, 156, 786 P.2d 543, 547. No specific witnesses have been identified, nor has any impact on their ability to appear been presented. Thus, at this time, interests of justice do not mandate changing venue.

As noted *supra*, for venue purposes in a breach of contract action, the cause of action is held to have arisen where the contract was made, the contract was breached or where the damage occurred. *Corder v. Idaho Framway, Inc.*, 133 Idaho 353, 358, 986 P.2d 1019, 1024 (Ct.App. 1999). In *Banning v. Minidoka Irrigation Dist.*, the Idaho Supreme Court wrote:

Our venue statutes are couched in mandatory language. *Bentley v. Lucky Friday Extension Mining Co.*, 70 Idaho 511, 223 P.2d 947 (1950); *McCarty v. Herrick*, 41 Idaho 529, 240 P. 192 (1925). Determination of venue is within the discretion of the court only in cases where conflicting issues of fact must be resolved, such as the actual residence of a defendant, *Jarvis v. Hamilton*, 73 Idaho 131, 246 P.2d 216, 33 A.L.R.2d 910 (1952); convenience of witnesses, *Stephen (sic) v. Hoffman*, 86 Idaho 304, 386 P.2d 56 (1963); *Spaulding v. Hoops*, 49 Idaho 289, 287 P. 947 (1930); or impartial trial, *Gibbert v. Washington Water Power Co.*, 19 Idaho 637, 115 P. 924 (1911).

89 Idaho 506, 512, 406 P.2d 802, 804. At issue for this Court is not whether the contract at issue was formed in 1999, when Atkinson initially purchased Easyway Office Management Software, or in 2003 when Atkinson purchased EWPro, but more broadly whether a conflicting issue of fact remains to still be resolved. Clearly, at the time of the

breach and at the time of any purported damages occurring, no party was residing in Kootenai County. At oral argument on the motion, Fahnestocks argued how the parties originally formed any relationship is not of import, but that the sale at issue took place in 2003 when all parties to the action had no longer resided in Kootenai County in over two years. Atkinson argued: (1) MSE, through the Fahnestocks, availed itself to Kootenai County by conducting business there, (2) venue is proper in Kootenai County because the paperwork filed by MSE with the Secretary of State lists a Kootenai County address, and (3) the relationship between the parties arose in Kootenai County. Most importantly, Atkinson argues the 2003 transaction was merely purchase of an upgrade to the software originally purchased in 1999 and no new contract between the parties came into existence in 2003. In his Complaint, Atkinson describes the 1999 contract:

On or about October 27, 1999, while operating his practice in Kootenai County, Idaho, Dr. Atkinson purchased EWPro from Medical Software Etc. for electronic billing of claims. The original cost of the software program was approximately \$8,000 including hardware and software. This original purchase price was paid to Medical Software Etc.

On an annual basis, Medical Software Etc. invoiced Dr. Atkinson in an amount of \$1,295.00 for "EWPro annual maintenance." Dr. Atkinson paid this invoiced amount on an annual basis.

Complaint, pp. 3-4. Atkinson does not distinguish between the original EW Office Management Software purchase and the later EWPro software purchase. On the other hand, Fahnestocks argue in their memorandum in support of motion to change venue:

In 2003, Easyway Professional created a new medical billing software program known as "EWPro." EWPro served a similar function as the Easyway Office software, but was a different product. Among the more visible differences was that it was a Windows based system, rather than DOS based.

In late 2003, Fahnestock sold EWPro to Dr. Atkinson to replace the Easyway Office software his office had used since 1999. In 2003, no party was located in Kootenai County. None of the EWPro sale was negotiated, consummated, or performed in Kootenai County.

Memorandum in Support of Motion to Change Venue, p. 3.

Attached to the Affidavit of Joyce Fahnestock is an August 1, 2003, Statement for the purchase of EWPro. In that document, Fahnestock's address is listed in Eagle, Idaho, and Atkinson's in Enumclaw, Washington. Affidavit of Joyce Fahnestock in Support of Motion to Change Venue, Exhibit 2. The statement is for the purchase of EWPro software, purchase of EWPro "Elect Mod", installation of software, an additional workstation sequel license and sales tax. *Id.* The invoice also reflects two downward adjustments in the price "Per Joyce". *Id.* The determination of whether the 2003 purchase amounts to a mere software upgrade or an entirely new contract remains a question of fact. As such, the decision to change venue, or not, to Ada County remains a matter committed to the Court's discretion. Where an action may be brought in two or more counties, venue is at the election of the plaintiff, "subject, however, to the power of the court to change the place of trial as provided in this code." I.C §§ 5-404, 5-406." *Banning*, 89 Idaho 506, 511, 406 P.2d 802, 804. Here, Atkinson, the plaintiff, has elected to bring his claim in Kootenai County. At this time, there is no evidence before the Court that: (a) Kootenai County is not the proper county; (b) no impartial trial can be had in Kootenai County; or (c) that convenience of the witnesses or the ends of justice would be promoted by changing venue to Ada County. See I.R.C.P. 40(e)(1).

IV. CONCLUSION.

For the reasons stated above, the Court in the exercise of its discretion must deny the motion for change of venue.

V. ORDER.

IT IS HEREBY ORDERED that defendants' Fahnestocks' Motion for Change of Venue is DENIED.

Entered this 20th day of October, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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Jeanne Clausen, Deputy Clerk