

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

GINO L. D'AGOSTINI, individually and
derivatively of D-4 Enterprises, Inc.,
PATRICE A. D'AGOSTINI CHILDREN'S
TRUST AGREEMENT, on behalf of the
the Patricia A. D'Agostini Children's
Trust Agreement and derivatively of
D-4 Enterprises, Inc. and MERGE
HOLDINGS, LLC,

Plaintiffs,

vs.

Case No. 2015-908-CB

L. ROBERT D'AGOSTINI, ANTONIO
D'AGOSTINI, L. D'AGOSTINI & SONS
INC., D-4 ENTERPRISES, INC., and
QUADRATE DEVELOPMENT, INC.,

Defendants.

JAMES D'AGOSTINI and ANTONINA
D'AGOSTINI, in her capacity as Trustee
for James A. D'Agostini Children's Trust
dated April 11, 2008,

Plaintiffs,

vs.

Case No. 2015-910-CB

ROBERT D'AGOSTINI, ANTONIO
D'AGOSTINI, L. D'AGOSTINI & SONS,
INC., D-4 ENTERPRISES, INC., and
QUADRATE DEVELOPMENT, LLC,

Defendants.

OPINION AND ORDER

Robert D'Agostini ("Robert") and Antonio D'Agostini ("Anthony") (Robert and Anthony jointly as, "Movants") have jointly moved in both actions to separate and transfer venue of all claims in both above-referenced matters concerning D-4 Enterprises, Inc. ("D-4") to Wayne County. The Plaintiffs in both actions have filed responses requesting that the motions be denied. In addition, Movants have filed reply briefs in support of their motions.

Standard of Review

Venue is controlled by statute in Michigan. *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 624; 752 NW2d 37 (2008). Venue is determined at the time the lawsuit is filed. *Shiroka v Farm Bureau General Ins Co*, 276 Mich App 98, 104; 740 NW2d 316 (2007). Where a defendant challenges venue, the plaintiff has the burden of establishing proper venue. *Provider Creditors Committee v United American Health Care Corp*, 275 Mich App 90, 94; 738 NW2d 770 (2007). The choice of venue must be based on fact, not mere speculation. *Id.* Furthermore, if any one of the defendants satisfies the venue requirements, then venue is proper for all defendants. *Hunter v Doe*, 61 Mich App 465, 467; 233 NW2d 39 (1975).

Arguments and Analysis

In this case, Movants contend that D4 has its principal place of business and registered office in Wayne County and that as a result Wayne County is the exclusive venue for all of Plaintiff's claims against it under Section 489 of the Michigan Business Corporation Act ("BCA"). Section 489 provides, in pertinent part:

- (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation

are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder.

Legislative intent “may reasonably be inferred from the words expressed in the statute, which requires courts to consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme.” *In re AJR*, 496 Mich 346, 353; 852 NW2d 760 (2014) (citations and quotation marks omitted). While MCL 450.1489(1) provides that any action brought under section 489 may be filed with the circuit court in the county the principal place of business or registered office is located, its grant of venue is not exclusive. The word “may”, which is placed directly before the words “bring an action in the circuit court of the county,” is permissive and not mandatory. *Manuel v Gill*, 481 Mich 637, 647; 753 NW2d 48 (2008). Consequently, contrary to Movants’ contention, the Court is convinced that section 489 does not operate to provide that Wayne County is the only possible venue for Plaintiffs’ claims in these matters.

Movants also contend that Plaintiffs’ claims against D-4 should be moved to Wayne County because they filed claims involving D-4 in the Wayne County Circuit Court before Plaintiffs filed their claims in these matters. However, Movants also concede that MCR 2.222(C) affords the Court discretion to retain the entire actions for trial. Indeed, MCR 2.222(C) provides:

(C) Multiple Claims. If multiple claims are joined in an action, and the venue of one or more of them would have been improper if the claims had been brought in separate actions, the defendant may move to separate the claims and to transfer those as to which venue would have been improper. The court has discretion to

- (1) order the transfer of all claims,
- (2) order the separation and transfer moved for, or
- (2) retain the entire action for trial.

While Movants may have filed a short complaint involving some of the same parties as the matter before this Court, the fact remains that the vast majority of the claims involving the parties at issue are properly before this Court. Consequently, the Court is convinced that the interests of the judicial economy, as well as convenience of the parties, are best served by the Court retaining both actions before this Court for trial pursuant to MCR 2.222(C).

Conclusion

Based upon the reasons set forth above, Movants' motion for change of venue is DENIED. This *Opinion and Order* neither resolves the last pending claim nor closes either matter. See MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: April 21, 2015

JCF/sr

Cc: *via e-mail only*

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