

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4178

IN RE: IRWIN DAVLIN, ET AL.,
Petitioners.

No. 92-4439

FIDELCOR BUSINESS CREDIT CORP.,
Plaintiff-Appellee,

versus

IRWIN H. DAVLIN,
Defendant-Appellant.

STANDARD FITTINGS CO., ET AL.,
Plaintiffs-Appellants,

versus

FIDELCOR BUSINESS CREDIT CORP., ET AL.,
Defendants,

FIDELCOR BUSINESS CREDIT CORP.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(CA-88-1003 c/w 89-0966)

(February 8, 1993)

Before GARZA, Reynaldo G., HIGGINBOTHAM, and DeMOSS, Circuit
Judges.

PER CURIAM:*

Irwin Davlin, and various companies in which he is the primary stockholder, appeal the transfer under 28 U.S.C. § 1404(a) of this case to the United States District Court for the Southern District of New York. The parties contend over the effects of a contractual provision selecting a forum as well as an authorization to sue clause contained in the papers evidencing their financial arrangements. Fidelcor Business Credit Corporation sued Davlin in Louisiana upon his guaranty of the obligations of Standard Fittings Company. Davlin and his companies counterclaimed and the litigation grew substantially. Fidelcor, convinced that the dispute had now triggered the provision of the security agreement selecting New York as the sole forum for litigation directly or indirectly related to the security agreement, moved to transfer the case to New York. Judge Hunter, before whom the case was then pending, initially denied the motion. Later at a pretrial conference, Davlin's counsel suggested the application of New York law as to various prior rulings that had applied Louisiana law. Judge Hunter then suggested that Fidelcor reurge its motion to transfer. Judge Hunter then transferred the case to Judge Haik who granted the motion. After entering findings in support of his

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

decision in response to the direction of this court, Judge Haik reaffirmed his transfer order. This appeal followed.

This is a close case. While as a trial judge we may not have ordered the transfer, we are persuaded that the decision to do so was in the final analysis, a judgment call. We have hesitated because we are not told whether the case is to be tried to the bench or to a jury although in practical terms this will impact the relative convenience of the parties. Nor are we told about the relative time to trial of possible trial sites. The district court could have viewed the trial site as inevitably visiting added inconvenience and expense to the visiting party, whether in New York or Louisiana. In this context the forum selection clause tilts the case for New York, at least enough that we are not prepared to upset it on appeal. Implicit in this view is our rejection of the contention that Fidelcor waived its rights under the forum clause of the Security Agreement either by its suit in Louisiana or by not timely urging transfer. First, this case changed, as we observed, after it was filed in Louisiana. Second, the forum clause of the Security Agreement was not initially implicated. In short, having heard oral argument and weighed the concerns, we are persuaded that we ought not overturn the decision of the trial court.

AFFIRMED.