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DES MOINES, IOWA
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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ALISON MURRELL,	*	
	*	4-00-CV-90499
Plaintiff,	*	
	*	
v.	*	
	*	
	*	
MOUNT SAINT CLARE COLLEGE,	*	MEMORANDUM OPINION
	*	AND ORDER
Defendant.	*	
	*	

Before the Court is Defendant's Motion to Change Venue From Des Moines to Davenport (Clerk's # 7) and Plaintiff's Motion for the Entry of Default (Clerk's # 10). For the following reasons, the Court will grant Defendant's motion to transfer and deny Plaintiff's motion for a default judgement.

I. Discussion

Plaintiff's, Ms. Murrell ("Murrell"), lawsuit stems from an alleged sexual assault occurring on Defendant's, Mount Saint Clare College ("College"), property. Murrell's Complaint contains the following four causes of action: breach of implied and express contract (count one), intentional misrepresentation (count two), negligence (count three), and recklessness and gross negligence (count four). The College is a citizen of Iowa. Murrell is a citizen of Missouri. And Murrell's lawsuit alleges an amount in controversy over the statutory minimum. The Court therefore has diversity jurisdiction over this dispute. *See* 28 U.S.C. § 1332 (West 2000).

Copies to Counsel: OCT 30 2000
By:
ORIGINAL
Pleading # 14

A. Motion to Change Venue

The College asks the Court to transfer this case to the Davenport Division. Section 1404 states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404 (West 2000). So in deciding whether to transfer a case pursuant to § 1404, the Court considers the convenience of the parties, the convenience of the witnesses, and the interest of justice. *See* 28 U.S.C. § 1404; *Dairy Indus. Supply Assoc. v La Buy*, 207 F.2d 554, 557-558 (7th Cir. 1953). The last factor, "the interest of justice," is the most important. *See I-T-E Circuit Breaker Co. v. Regan*, 348 F.2d 403, 405 (8th Cir. 1965) (noting that witness and party convenience are actually relevant only insofar as they further the end of justice).

The decision to transfer under § 1404 is within the sound discretion of the Court. *See New York, C. & St. L. R. Co. v Vardaman*, 181 F.2d 769, 770 (8th Cir. 1950); *Drudge v. Overland Plazas Co.*, 531 F. Supp. 210, 211 (S.D. Iowa 1981) (noting that a "[c]hange of venue under 28 U.S.C. § 1404(a) is a matter within the discretion of the district court"). Transfer determinations turn on the particular facts of the case and all circumstances must be considered. *See Terra Int'l v. Mississippi Chem. Corp.*, 119 F.3d 688 (8th Cir. 1997). But the Court must give weight to Plaintiff's choice of forum. *See Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339 (8th Cir. 1983). Accordingly, the College has the burden to prove, by a preponderance of the evidence, that a transfer is proper. *See Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d 172 (2nd Cir. 2000).

The facts in this case suggest transfer under § 1404 is appropriate. Both parties agree that most witnesses, including the relevant medical and police personnel, reside in the Davenport area. *See Glickenhaus v Lytton Financial Corp.*, 205 F. Supp. 102 (D. Del. 1962) (noting

location of officials is a highly relevant factor). And the events are alleged to occur exclusively in the Davenport area. Witness convenience goes a long way to furthering the ends of justice, and is a significant factor in determining whether a transfer is appropriate. *See American Standard, Inc. v. Bendix Corp.*, 487 F. Supp. 254, 262 (W.D. Mo. 1980). Convenience and justice militate in favor of choosing the venue in which the events were alleged to occur. *See Richer v Chicago, R. I. & P. R. Co.*, 80 F Supp 971 (C.D. Mo. 1948). Further, the presumption in favor of protecting a plaintiff's choice of forum is rebuked when neither the plaintiff nor the defendant reside in the chosen forum, and none of the alleged activities took place there. *See Kellner v. Saye*, 306 F. Supp. 1041 (D. Neb. 1969). Therefore, the Court will transfer this case to the Davenport Division of the Southern District of Iowa.

B. Entry of Default

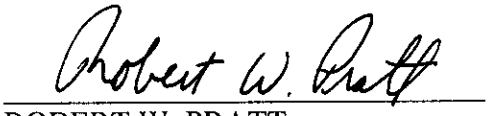
Murrell asks this Court to enter a default judgement. Federal Rule of Civil Procedure 55 allows courts to issue default judgements against parties who intentionally delay judicial proceedings. *See Ackra Direct Mktg. Corp. v Fingerhut Corp.*, 86 F.3d 852 (8th Cir. 1998). It is an extreme remedy, reserved for exceptional circumstances. *See id.* Entry of default is appropriate only when the non-moving party "has failed to plead or otherwise defended as provided by the these rules." Fed. R. Civ. P. 55. One missed deadline does not amount to the type dilatory tactics Rule 55 was designed to prevent. *See Ackra Direct*, 86 F.3d 852, 856 (noting that a "default judgment is not an appropriate sanction for a 'marginal failure to comply with time requirements.'") (citation omitted). The Court does not think that the Defendant's failure to file a timely answer or responsive pleading as required by Rule 12 justifies an entry of default.

II. Conclusion

Defendant's Motion to Change Venue From Des Moines to Davenport Division is **granted** and Plaintiff's Motion for Entry of Default is **denied**. Defendant has 10 days from the date of this order to file an answer or responsive pleading as required by Federal Rule of Civil Procedure 12.

IT IS SO ORDERED.

Dated this 30th day of October, 2000.



ROBERT W. PRATT
U.S. DISTRICT JUDGE