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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

EVELYN ANDERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 87-0236-R
FEDERAL NATIONAL MORTGAGE ASSOCIATION, et al.,	)	
	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE TO TRANSFER

I. Introduction

Defendants Federal National Mortgage Association, Perpetual Savings Bank, F.S.B., Home Unity Savings & Loan Association, Yankee Bank for Finance and Savings, F.S.B., Comfed Savings Bank, First Federal Savings & Loan Association of South Carolina, and First Federal Savings & Loan Association of Seminole, collectively referred to as Investors, filed a Motion to Dismiss or in the Alternative to Transfer, with supporting memorandum. In response, plaintiffs filed "Plaintiffs' Memorandum Opposing Motion to Either Dismiss or in the Alternative, Transfer to Norfolk Division" (Plaintiffs' Memorandum). This memorandum is submitted by Investors in reply.

Investors moved to dismiss or transfer this action to the Norfolk Division because plaintiffs filed this action in a division in which venue is improper and because the greater convenience of the logical Norfolk forum make transfer there appropriate and desirable. Ignoring Investors' demonstration of the impropriety of divisional venue in Richmond, plaintiffs base their claim that venue is proper on speculation as

1. **Venue Is Improper Because No Named Plaintiff's Cause Of Action Arose In The Richmond Division**

Plaintiffs contend that unnamed putative plaintiff class members reside in Richmond, that Richmond Equity Corporation made loans secured by real property in Richmond and that therefore causes of action of unnamed putative plaintiffs may have arisen in Richmond, making venue proper here pursuant to Eastern District Rule 4(a). Even if residency determined where the cause of action arose, which it does not, the Court should look to the residency of named plaintiffs, not potential plaintiffs, for venue purposes. Venue cannot properly be based on the causes of action of unnamed plaintiffs. "The general rule is that only the residence of the named parties is relevant for determining whether venue is proper. . . ." Wright, Miller & Kane, 7A Federal Practice & Procedure Civil 2d § 1757 (1986); accord United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1129 (2d Cir. 1974), cert. denied 421 U.S. 921 (1975). Because no named plaintiff's cause of action arose in the Richmond Division, venue is not proper in the Richmond Division as a division wherein plaintiffs' cause of action arose.

It is especially appropriate to confine the venue inquiry to the claims of the named plaintiffs since a class should not be certified in this action. As Judge Doumar stated in the Order of November 14, 1986, dismissing the predecessor to this action without prejudice:

> There is no common theme among the injuries suffered by the various plaintiffs. Each claimant would require a unique determination of both damages and liability. Thus, even if a class action were allowed, that would not necessarily simplify judicial resolution of this case, and might render it more complicated.

Ark. 1971), the plaintiffs sought to enjoin the making of any contract or the doing of any work in connection with the construction of a dam across a river located entirely within the Western District of the state of Arkansas. Defendants, in their Motion to dismiss for improper venue in the Eastern District of Arkansas, contended that because real property was "involved" in the action, the plaintiffs could not predicate venue on their residence. Thus, the court had occasion to determine what was meant by an action "in which real property is involved." The court held that the action did not put in issue the title to or possession of real property, or any interest in real property and that therefore it was not an action involving real property.

Similarly, in State of Delaware v. Bender, 370 F. Supp. 1193 (D. Del. 1974) the court was called upon to construe the identical clause in a case in which the issue was the validity of a bridge permit. The court held that "[w]hile the decision [on the validity of the bridge permit] may determine whether or in what manner the Sharptown bridge will be constructed, real estate will be involved only peripherally. This was not the type of involvement that § 1391(e)(4) was intended to cover." 370 F. Supp. at 1200. The Court quoted with approval the following statement on the issue from Natural Resources Defense Counsel v. Tennessee Valley Authority, 340 F. Supp. 400, 406, rev'd on other grounds, 459 F.2d 255 (2d Cir. 1972):

> Gravity being what it is, the vast bulk of human activities take place on the face of the earth. Consequently, almost any dispute over public or private decisions will in some way "involve real property," taken literally. The touchstone for applying § 1391(e)(4) cannot sensibly be whether real property is marginally affected by the case at issue. Rather, the action must center directly on the real property, as with actions concerning the right, title or interest in real property.

This action centers on lending disclosure requirements under federal and state law and involves the meaning and effect of those requirements with respect to

because Landbank had offices throughout Virginia and because approximately 1,000 addresses on the mailing list are in the Richmond Division,[2/] Investors are doing business in the Richmond Division. Plaintiffs' efforts, though inventive, do not logically support this conclusion.[3/]

More importantly, plaintiffs' interpretation of Eastern District Rule 4 is incorrect. In their memorandum in support of this motion, Investors demonstrated that divisional venue is proper only where all non-resident defendant corporations do business. Plaintiffs must prove that each Investor does business in this division, yet plaintiffs do not even make the attempt. Plaintiffs' affidavits mention only FNMA by name, and those affidavits in no way attempt to establish with particularity the propriety of venue as to any Investor but FNMA. Plaintiffs also ignore the distinctions between resident and non-resident corporate defendants made by Eastern District Rule 4. Under Eastern District Rule 4, a Virginia corporation may be sued only where

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2/ In addition to these 1000, Mr. Rubinstein conveniently assumes that addresses he could not locate in his atlas are in the Richmond Division. Affidavit of David Rubinstein, ¶7.

3/ Neither the conclusory allegations nor the record support the contention that Investors are doing business in Richmond Division. This conclusion is based on several premises, none of which the current record supports and none of which plaintiffs' affidavits address.

First, the assumption that a Landbank borrower in the Richmond Division borrowed from a Landbank office in this division has no support in the record. Second. the assumption that every Investor's portfolios includes some Landbank loans made in this division has no support in the record. Third, the assumption that Investors are collecting monthly payments, maintaining security interests, or foreclosing on defaulting borrowers in Richmond has no support in the record. Moreover the question whether these activities, in sufficient numbers, constitute doing business in this division is utterly unexplored by plaintiffs. Given plaintiffs' burden to prove venue, Hodson v. A. H. Robins Co., 528 F.Supp 809, 812 (E.D. Va. 1981), aff'd 715 F.2d 142 (4th Cir. 1983) their reliance on speculation and assumption is inadequate. A firmer foundation for venue is required.

justify the "transfer." This rule eliminates the incentive plaintiff otherwise might have to forum shop within the district by removing any advantage plaintiff achieves by filing in the improper division.

Second, even if divisional venue were proper, plaintiffs' choice of forum deserves no deference because plaintiffs initially filed suit in Norfolk, and only on finding themselves "unfortunately" dismissed from the Norfolk courts chose a different, less convenient forum. Plaintiffs' Memorandum, p.4. Plaintiffs charge that Investors have "disingenuously characterized[d]" plaintiffs' filing suit originally in Norfolk as expressing an "overriding preference" for Norfolk. Plaintiffs' Memo, p. 11. Investors have done nothing of the sort. Instead, Investors have pointed out that the consequence of plaintiff's initial choice is to preclude them from denying the convenience of Norfolk. Investors are perfectly aware that plaintiffs now prefer not to be in United States District Court in Norfolk.

Plaintiffs also try to analogize Investors' having filed AmericanTrust F.S.B. v. Lloyds of London in Richmond to plaintiffs' filing their action in Richmond. Plaintiffs' Memo, p. 4. No such analogy can be drawn. Leaving aside the differences in the parties and the issues in the two cases, certain Investors and others filed AmericanTrust in Richmond, never having filed elsewhere. Plaintiffs initiated their action in Norfolk, for whatever reasons; it was only after the Norfolk Court cast doubt on the maintainability of this action as a class action and expressed reservations about a federal court hearing the expansive state law claims that plaintiffs found Richmond to be the more convenient forum.

Thus, plaintiffs' choice of the Richmond Division is entitled to little deference. Further, plaintiffs have not refuted Investors' demonstration that Norfolk is the more convenient forum. Plaintiffs merely speculate that Richmond is no less convenient

2. The Pendency of AmericanTrust F.S.B. v. Lloyds of London Does Not Favor Retention In This Division

Glossing over the substantial and significant differences between AmericanTrust and this case, plaintiffs contend that this case should be retained in this division notwithstanding the impropriety of divisional venue here. Neither time nor money would be saved by retention of this case in this division. Moreover, the presence of the related Landbank bankruptcy in Norfolk, which plaintiffs contend initially led plaintiffs to file there, makes transfer to Norfolk appropriate.

The plaintiffs' claims against the insurers in AmericanTrust involve the duty owed by the defendant insurers to the plaintiffs and the failure to discharge that duty with respect to Landbank originated loans. This case, in contrast, centers on plaintiffs' claims of statutory lending disclosure requirements under Virginia's usury and consumer protection laws and the federal Truth in Lending statute and the extent to which disclosure requirements apply to holders who did not originate the loans in question. In addition to the difference in the issues, the parties in the two cases are also different. Some, but not all, Investors here are also plaintiffs in AmericanTrust, and defendants in AmericanTrust are of course not parties to this action.

Given the differences between AmericanTrust and this case, the benefits that might accrue from handling related cases in the same forum do not exist. That AmericanTrust is in a comparatively advanced stage buttresses this conclusion. Hence, retention of this case in Richmond is not supported by the rule in American Home Assurance Co. v. Insular Underwriters Corp., 327 F.Supp. 717 (S.D.N.Y. 1971). Nor will judicial economy be served by retaining this case.

appropriate, and convenient forum for this action. Therefore Investors respectfully request this Court to dismiss this action or transfer it to Norfolk.

Respectfully submitted,

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Card 1a — ...son (Evelyn) v. Federal National Mortgage Association No. 87-0236-R (E.D. Va. June 23, 1987)
Contents:
(Accession No. 1010090)
42,568A Class Action Complaint (69pp.); 42,568B Memorandum in Support of Motion to Dismiss or in the Alternative to Transfer (43pp.); 42,568C Plaintiffs' Memorandum Opposing Motion to Either Dismiss or in the Alternative,

42,568 Card 1b — Transfer to Norfolk Division (43pp.); 42,568D Answer and Counterclaim by Perpetual Savings Bank, FSB (17pp.); 42,568E Answer by Home Unity Savings and Loan Association (13pp.); 42,568F Answer and Counterclaim of First Federal Savings and Loan Association of Seminole (13pp.); 42,568G Answer and Counterclaim of First Federal Savings and Loan Association of South Carolina (18pp.); 42,568H Answer and

42,568 Card 1c — Counterclaim by Yankee Bank for Finance and Savings, FSB (15pp.); 42,568-I Answer and Counterclaim of Comfed Savings Bank (14pp.); 42,568J Answer and Counterclaim of Federal National Mortgage Association (18pp.); 42,568K Memorandum in Support of Motion to Dismiss (47pp.); 42,568L Reply Memorandum in Support of Motion to Dismiss or in the Alternative to Transfer (14pp.); 42,568M Plaintiffs'

42,568 Card 1d — Memorandum Opposing Motion to Dismiss (103pp.); 42,568N Answer and Counterclaim of Southeast Mortgage Corporation (15pp.); 42,568-O Order (2pp.) 10/87

li-court/date: 42,568-O (E.D. Va. 6/23/87)

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...nderson (Evelyn) v. Federal National Mortgage Association No. 87-0236-R (E.D. Va. Nov. 25, 1987)
Contents:
(Accession No. 1010424) 42,568P Plaintiffs' Motion to Certify Class Action (13pp.); 42,568Q Plaintiffs' Memorandum in Support of Motion for Class Certification (63pp.); 42,568R Plaintiffs' Motion for Preliminary Injunction (25pp.); 42,568S Plaintiffs' Memorandum in Support of Motion for Preliminary

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to Motion of Yankee Bank for Summary Judgment, and for Other Relief (15pp.); 42,568Z-2 Affidavit of Ian DeWaal in Opposition to Motion of Yankee Bank for Summary Judgment, and for Other Relief, Including Leave in the Alternative to Intervene Party-Plaintiff Against Yankee Bank (5pp.); 42,568Z-3 Memorandum in Opposition to Plaintiffs' Motion to Certify Questions to Supreme Court of Virginia and to Reconsider Dismissal (11pp.); 42,568Z-4

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Injunction (48pp.); 42,568T Plaintiffs' Motion to Certify Questions to Supreme Court of Virginia and to Reconsider Order of Dismissal (6pp.); 42,568U Plaintiffs' Memorandum Supporting Motion to Certify Question to Supreme Court of Virginia and to Reconsider Dismissal (11pp.); 42,568V Memorandum in Support of Motion for Summary Judgment (5pp.); 42,568W Memorandum in Opposition to Motion to Certify Class Action (30pp.); 42,568X Memorandum in

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Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction (35pp.); 42,568Z-5 Plaintiffs' Reply Memorandum in Support of Motion to Certify Class Action (31pp.); 42,568Z-6 Plaintiffs' Reply Memorandum in Support of Motion to Certify Questions to the Supreme Court of Virginia and to Reconsider Dismissal (20pp.); 42,568Z-7 Memorandum & Order (14pp.). 11/87

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Opposition to Motion for Preliminary Inounction (24pp.); 42,568Y Plaintiffs' Response Opposing Motion of Yankee Bank for Summary Judgment, and for Other Relief, Including Leave in the Alternative to Intervene Party-Plaintiff Against Yankee Bank (8pp.); 42,568Z Memorandum in Support of Plaintiffs' Response Opposing Motion of Yankee Bank for Summary Judgment, and for Other

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Previously reported at 21 Clearinghouse Rev. 506 (Oct. 1987).
li-court/date: 42,568Z-7 (E.D. Va. 11/25/87)