

After oral argument on December 20, 2000, I permitted limited discovery, in the form of a single deposition by the plaintiffs, on the issue of venue. Thereafter, prior to the deposition, BCBSA withdrew its motion to dismiss under Rule 12(b)(3) and moved

to dismiss for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6).¹

The plaintiffs have responded with a motion, arguing that BCBSA's filing of a second 12(b) motion, before it had filed an answer to the plaintiffs' complaint, is procedurally prohibited by Rule 12(h)(2).

Rule 12(g) states, in pertinent part, "[i]f a party makes a motion under [Rule 12(b)] but omits therefrom any defense . . . which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense . . . so omitted, except a motion as provided in subdivision (h)(2)." Fed. R. Civ. P. 12(g).

Rule 12(h)(2) expressly provides an exception for a defense raised under Rule 12(b)(6). Rule 12(h)(2) states, in pertinent part, that "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Fed. R. Civ. P. 12(h)(2).

Although Rule 12(h)(2) by its terms limits the occasions when a 12(b)(6) defense can be raised, as the plaintiffs have conceded, district courts have nevertheless applied this rule permissively and have allowed defendants to raise 12(b)(6) defenses in

¹ In withdrawing its 12(b)(3) challenge, BCBSA stated that it had "discovered some previously unknown general business contacts in Virginia's Western District." (Def.'s Mot. Dismiss at 1.)

subsequent motions to dismiss, prior to filing answers to plaintiffs' complaints. *See Coleman v. Pension Benefit Guaranty Corp.*, 196 F.R.D. 193, 196-97 (D.D.C. 2000); *Fed. Express Corp. v. United States Postal Serv.*, 40 F. Supp. 2d 943, 948-49 (W.D. Tenn. 1999); *Mylan Lab., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1059 (D. Md. 1991), *rev'd on other grounds sub nom. Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130 (4th Cir. 1993); *Thorn v. New York City Dep't of Soc. Serv.*, 523 F. Supp. 1193, 1196 n.1 (S.D.N.Y. 1981).

In an effort to comport with the spirit, if not the letter, of Rule 12(h)(2), *see Fed. Express Corp.*, 40 F. Supp. 2d at 949, successive motions have been allowed when: (1) the second motion is not interposed for purposes of delay; (2) its consideration will expedite the disposition of the case on the merits; and (3) the same issues are raised in similar motions timely filed by other parties to the suit. *See Thorn*, 523 F. Supp. at 1196 n.1.

Examining the facts of the instant case in light of this standard, I find that the defendant's second motion satisfies all three prongs of the *Thorn* inquiry.

There is no evidence but that the defendant maintained a good faith belief that its contacts in this district were insufficient to establish proper venue here. When the defendant realized that there was no sufficient basis for such a defense, it withdrew its 12(b)(3) claim and responded with a 12(b)(6) motion, raising similar defenses to

those asserted by the co-defendants in their pending motion to dismiss.

Accordingly, to permit the defendant's second motion to dismiss will not visit that sort of inconvenience or prejudice upon the plaintiffs that is sought to be avoided under the federal rules.

For the aforementioned reasons, it is **ORDERED** as follows:

1. The plaintiffs' Motion to Stay (Doc. 38) is denied;
2. The plaintiffs must file a brief in response to the BCBSA's Rule 12(b)(6)

Motion to Dismiss All Counts Against BCBSA within 20 days after the date of entry of this Order and Opinion;

3. BCBSA may file a reply brief within 10 days after the date of service of the plaintiffs' response; and

4. The court will thereafter determine the pending motions without further submissions or oral argument, unless expressly requested by the court.

ENTER: January 29, 2001

United States District Judge