

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

OMNIKEM, INC. : CIVIL ACTION  
 :  
 v. :  
 :  
 SHEPHERD TISSUE, INC. : NO. 98-5269

**MEMORANDUM AND ORDER**

HUTTON, J.

April 25, 2000

Presently before this Court are Defendant Shepherd Tissue, Inc.'s ("Defendant") Renewed Motion for to Dismiss or in the Alternative for Change of Venue (Docket No. 14), Plaintiff Omnikem Inc.'s ("Plaintiff's") response thereto (Docket No. 16), Defendant's Motion for Extension of Discovery or in the Alternative for Change of Venue (Docket No. 17), and Plaintiff's response thereto (Docket No. 19). For the reasons that follow, Defendant's motions are denied.

**I. BACKGROUND**

This is a breach of contract action. Plaintiff is a Georgia corporation with its principal place of business in West Chester, Pennsylvania. Plaintiff produces chemical products which are used in the manufacture of tissue paper. Defendant is a Delaware corporation with its place of business in Memphis, Tennessee. Defendant manufactures paper tissue products.

In February 1997, Plaintiff began manufacturing for and

selling to Defendant various chemical products for use in the manufacture of paper tissue products. At all times, the terms of the parties' agreement were set forth on Defendant's purchase order forms. All purchase order forms were faxed from Defendant to Plaintiff.

In February 1998, the parties entered a new agreement whereby Defendant agreed to purchase certain chemical products from Plaintiff. The terms of this agreement were set forth on Defendant's two-page purchase order and was faxed by Defendant to Plaintiff. The purchase order was drafted by Defendant and provided that Plaintiff would be the exclusive supplier of certain products to Defendant. Defendant agreed to purchase 520,000 pounds of product in 5,000 gallon increments. At the time the contract was formed, Plaintiff had already shipped to Defendant 39,200 pounds of product. The parties therefore agreed that this amount would included in their contract, thereby leaving a balance of 480,000 pounds of product that Defendant was contractually obligated to purchase from Plaintiff. In consideration of the parties' agreement, Plaintiff purchased two storage tanks and two transfer pumps for the sum of \$10,618.00. The parties agreed that after Defendant purchased and received all 520,000 pounds of product, ownership of the tanks and pumps would transfer from Plaintiff to Defendant. Plaintiff actually purchased the storage tanks and transfer pumps for \$10,618.00. In furtherance of the

parties' agreement, Plaintiff purchased other equipment, at a cost of approximately \$33,000.00, which was installed at Defendant's plant. Plaintiff delivered product to Defendant in February 1998 and April 1998. Defendant paid Plaintiff for the product delivered.

At times relevant to this controversy, the parties communicated via telephone, facsimile, and the mails. Plaintiff's agents and/or representatives traveled to Tennessee. Defendant's agents or representatives never traveled to Pennsylvania.

In or about May 1998, Defendant breached the parties' contract by ceasing its purchases from Plaintiff. Plaintiff objected and never consented to Defendant's cancellation of the contract. Plaintiff suffered damages as a result of Defendant's breach and brought suit in this Court on the theories of breach of contract, quantum meruit, and detrimental reliance. Defendant now seeks dismissal on the basis of (1) lack of personal jurisdiction and (2) improper venue. In the alternative, Defendant seeks the transfer of this case to the United States District Court for the Western District of Tennessee.

## **II. DISCUSSION**

Each of Defendant's arguments for dismissal and/or transfer are hereafter considered.

**A. Personal Jurisdiction**

Defendant seeks dismissal of the instant lawsuit; Defendant asserts that dismissal is appropriate because this Court does not possess personal jurisdiction over it. While the allegations of the complaint are taken as true, once a defendant asserts a jurisdictional defense, the plaintiff bears the burden of proving, through affidavits or other competent evidence, sufficient contacts with the forum state to establish personal jurisdiction over each defendant. See Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir. 1996); North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 689 (3d Cir. 1990) (per curiam); Provident Nat'l Bank v. California Fed. Savs. Ass'n, 819 F.2d 434 (3d Cir. 1987); Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539, 542 (3d Cir. 1985). Plaintiff must establish those contacts with reasonable particularity. See Mellon Bank (East) PSFS Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992); Provident Nat'l Bank, 819 F.2d at 437.

In a case based upon diversity jurisdiction, Federal Rule of Civil procedure 4(e) gives a "federal court personal jurisdiction over non-resident defendants to the extent permissible under the state law of the jurisdiction where the court sits." Grand Entertainment Group, Ltd. v. StarMedia Sales, Inc., 988 F.2d 476, 481 (3d Cir. 1993); see also North Penn Gas Co., 897 F.2d at 689; Provident Nat'l Bank, 819 F.2d at 436. In exercising personal

jurisdiction, the court must determine whether jurisdiction exists under the forum state's long-arm jurisdiction statute and, if it does, whether the exercise of jurisdiction would violate the due process clause of the Fourteenth Amendment. See Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481, 489-90 (3d Cir. 1985). Pennsylvania merges this two-part inquiry by providing that a court may exercise personal jurisdiction to the full extent permitted by the Constitution. Id. at 490; 42 Pa. Cons. Stat. Ann. § 5322(b).

The law provides two bases for a court to exercise personal jurisdiction over a nonresident corporate defendant--general jurisdiction and specific jurisdiction. See Provident Nat'l Bank, 819 F.2d at 437; 42 Pa. Cons. Stat. Ann. § 5301, 5322. To invoke specific jurisdiction, the plaintiff's cause of action must arise from the defendant's forum related activities. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174 (1985); North Penn Gas, 897 F.2d at 690; Bork v. Mills, 329 A.2d 247, 249 (Pa. 1974). To establish specific jurisdiction, a plaintiff must show that a defendant has sufficient minimum contacts with the forum state "such that [the defendant] should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); see also North Penn Gas, 897 F.2d at 690.

General jurisdiction may be exercised even when the claim arises from the defendant's non-forum related activities. See

Helicopteros Nacionales de Columbia, S.A., 466 U.S. at 414 n.9; Gehling, 773 F.2d at 541. To establish general jurisdiction over a defendant, however, the plaintiff "must show significantly more than minimum contacts." Provident Nat'l Bank, 819 F.2d at 434. See also Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 589 (3d Cir. 1982). The nonresident defendant's contacts with the forum must be "continuous and systematic." Fields v. Ramada Inn, Inc., 816 F. Supp. 1033, 1036 (E.D. Pa. 1993); 42 Pa. Cons. Stat. Ann. § 5301(a)(2)(iii). See also Provident Nat'l Bank, 819 F.2d at 437; Gehling, 773 F.2d at 541; Reliance Steel Prods. Co., 675 F.2d at 589. Contacts are continuous and systematic if they are "extensive and pervasive." Fields, 816 F. Supp. at 1036. See also Reliance Steel, 675 F.2d at 589.

Conspicuously absent from Defendant's Motion and accompanying Memorandum is substantive discussion of the personal jurisdiction issue brought before the Court by Defendant. Indeed, the full extent of Defendant's argument against the exercise of personal jurisdiction is that "[Defendant] does not have sufficient minimum contacts with the State of Pennsylvania which would justify the imposition of in personam jurisdiction over [Defendant] Shepard Tissue in the State or Pennsylvania."<sup>1</sup> (Def.'s Renewed Mot. to

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<sup>1</sup> It is important to note that Defendant cites no legal authority whatsoever, not even the Federal Rule of Civil Procedure under which it files the instant Motion, for its argument that the instant action should be dismissed for lack of personal jurisdiction.

Dismiss at 1). The Supreme Court discussed the "minimum contacts" standard in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), stating that:

[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum state . . . . Thus where the defendant "deliberately" has engaged in significant activities within a State . . . or has created "continuing obligations" between himself and residents of the forum . . . he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id. at 475-76. The Court disagrees with Defendant's unsupported conclusion that there were insufficient minimum contacts between the parties to confer specific jurisdiction upon this Court.

First, there were various communications via telephone and facsimile between Defendant and Plaintiff while Plaintiff was physically located in Pennsylvania. The parties also communicated through the mails. Second, Defendant allegedly entered into and then breached a renewable eighteen month contract with Plaintiff, a corporation with its principal place of business in Pennsylvania. Third, pursuant to said contract, Defendant sent payments to Plaintiff at its Pennsylvania address. Fourth, the parties' contract required Plaintiff to ship to Defendant 520,000 pounds of product that allegedly is vital to Defendant's business operations. The record before the Court therefore demonstrates that the parties were engaged in a substantial business relationship that went

beyond the order and delivery of a generic product. Plaintiff demonstrates that Defendant had sufficient minimum contacts with Pennsylvania such that it could reasonably expect to be haled into court in Pennsylvania.

The second element required to find personal jurisdiction is that "the defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (citations and internal quotations omitted). The court may review several factors which evaluate the respective interests involved, including " 'the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.'" Pennzoil Prods. Co. v. Colelli & Assoc., Inc., 149 F.3d 197, 205 (3d Cir. 1998) (quoting Burger King, 471 U.S. at 477). The defendant who wishes to show an absence of fairness or lack of substantial justice bears a heavy burden. See, e.g., Grand Entertainment Group, Ltd. v. StarMedia Sales, Inc., 988 F.2d 476, 482 (3d Cir. 1993).

Defendant fails to assert any grounds as to how it will be unduly burdened by the Court's exercise of personal jurisdiction over it.

On the other hand, Plaintiff has a clear interest in obtaining relief from Defendant's alleged breach of contract and there is no evidence that Defendant's interest outweighs that of Plaintiff. As Plaintiff's principal place of business is in Pennsylvania, it cannot be disputed that Pennsylvania has an interest in protecting the interests of businesses operating within the Commonwealth. The Court finds that the assertion of personal jurisdiction over Defendant does not offend traditional notions of fair play and substantial justice. Therefore, to the extent that the instant Motion argues that the Court lacks personal jurisdiction over Defendant, said Motion is denied.

**B. Venue**

Defendant seeks dismissal of the instant action due to improper venue. Defendant challenges venue under 28 U.S.C. § 1391, which provides in relevant part:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. S 1391(a).

Venue must be proper for each defendant. See Kunkler v. Palko Management Corp., 992 F. Supp. 780, 781 (E.D. Pa. 1998). A

plaintiff, however, is not required to include in her complaint allegations showing that venue is proper in the district in which the suit has been brought. See Fed. R. Civ. P., Adv. Comm. Notes to Form 2, at p.3 ("Since improper venue is a matter of defense, it is not necessary for plaintiff to include allegations showing the venue to be proper"); 15 Charles Alan Wright et al., Federal Practice and Procedure § 3826 (2d ed. 1986). The movant bears the burden of proving that venue is improper. See Myers v. American Dental Ass'n, 695 F.2d 716, 724 (3d Cir. 1982); Simon v. Ward, 80 F. Supp.2d 464, 468 (E.D. Pa. 2000); Superior Precast, Inc. v. Safeco Ins. Co. of Am., 71 F. Supp.2d 438, 442 (E.D. Pa. 1999). But see Rotondo Weirich Enter., Inc. v. Global Employment Solutions, Inc., 1999 WL 1077078 at \*5 (E.D. Pa. Nov. 29, 1999) ("[T]he Court's decision today does not relieve Plaintiff of the burden of proving those facts necessary to support personal jurisdiction and venue by a preponderance of the evidence . . ."); Britamco Underwriters, Inc. v. Raymond E. Wallace Special Productions, Inc., 56 F. Supp.2d 542, 545 (E.D. Pa. 1999) ("when venue is attacked, it is the plaintiff who bears the burden of showing proper venue"); Nowicki v. United Timber Co., 1999 WL 619648 at \*1 (E.D. Pa. Aug. 12, 1999) ("The plaintiffs have met their burden of demonstrating that venue is proper in the Eastern District of Pennsylvania"); Freedman v. Anderson Group, Inc., 1996 WL 548141 at \*2 (E.D. Pa. Sept. 23, 1996) ("Once a defendant properly raises a jurisdictional

defense ... the plaintiff bears the burden of demonstrating that venue was properly laid in this district."); Gaskin v. Commonwealth of Pennsylvania, 1995 WL 154801 at \*1 (E.D. Pa. Mar. 28, 1995) ("Plaintiffs have the burden of proving that their choice of venue is proper.").

Defendant argues that under § 1391(a)(2), venue in the Eastern District of Pennsylvania is improper as "all acts or omissions alleged in the Complaint necessarily occurred in Memphis, Tennessee."<sup>2</sup> (Def.s' Renewed Mot. to Dismiss at 3 (emphasis added)). As the Third Circuit has discussed, however, acts or omissions must be more than tangentially connected to qualify as substantial under § 1391(a)(2). See Cottman Transmission Sys., Inc., v. Martino, 36 F.3d 291 (3d Cir. 1994). "Substantiality is intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute." Id. at 294. Rather than looking at a defendant's "contacts" with a particular district, the test for determining venue is the location of those "events or omissions giving rise to the claim." Id. The determination of whether an act or omission is substantial turns on the nature of the dispute. Id. at 295. In this context, many of the factors that the Court considers when determining Defendant's "minimum contacts" with Pennsylvania are also relevant to the determination of whether venue is proper in

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<sup>2</sup> It is important to note that Defendant cites no case law in support of its argument that venue in the Eastern District of Pennsylvania is improper.

this District. See BABN Tech. Corp. v. Bruno, 25 F. SUPP.2d 593, 598-99 (E.D. Pa. 1998).

As the preceding discussion of personal jurisdiction indicates, the Court finds that a substantial part of the events or omissions giving rise to the claim occurred in Pennsylvania. Indeed, this is not a case wherein Defendant is haled into a remote district with no real relationship to the dispute. Plaintiff alleges injury to a Pennsylvania corporation as a result of a breach of contract. Accordingly, the Court finds that Plaintiff has sufficiently alleged that a substantial part of the events giving rise to its claims occurred within Pennsylvania and that venue in this district is proper under § 1391(a)(2). See BABN Tech., 25 F. Supp.2d at 596 (holding venue requirements satisfied by facts establishing personal jurisdiction). To the extent the instant Motion seeks dismissal on the basis of improper venue, said Motion is denied.

### **C. Forum Non Conveniens**

Defendant argues that in the alternative to finding improper venue, the Eastern District of Pennsylvania is a forum non conveniens for Defendant and that the instant matter should be transferred to the United States District Court for the Western District of Tennessee pursuant to 28 U.S.C. § 1404. Section 1404 provides, "[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.

In deciding whether to transfer an action, the Court must consider both private and public interests. The private interests include: plaintiff's forum preference as manifested in the original choice; the defendant's preference; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses--but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum). See Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-80 (3d Cir. 1995) (citations and internal quotations omitted). The public interests include: the enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; and the familiarity of the trial judge with the applicable state law in diversity cases. See id. The burden of establishing that the balance of proper interests weighs in favor of transfer rests with the movant. See id. In ruling on a motion to transfer, "plaintiff's choice of venue should not be lightly disturbed." Id. (citation and internal quotation omitted).

Neither the public nor the private interests weigh in favor of either venue. Travel will be necessary whether the case is tried in Pennsylvania or in Tennessee. Relevant documents and the like are located in both Florida and in Tennessee. A judgment in either court will be subject to full faith and credit in either venue. This civil action involves relatively straightforward issues of contract law and does not appear to involve any special issues of state law. The court finds no reason to disturb Plaintiff's choice of the Pennsylvania venue in this civil action.

An appropriate Order follows.

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O R D E R

AND NOW, this 25<sup>th</sup> day of April, 2000, upon consideration of Defendant's Renewed Motion for to Dismiss or in the Alternative for Change of Venue (Docket No. 14), Plaintiff's response thereto (Docket No. 16), Defendant's Motion for Extension of Discovery or in the Alternative for Change of Venue (Docket No. 17), and Plaintiff's response thereto (Docket No. 19), IT IS HEREBY ORDERED that:

(1) Defendant's Renewed Motion for to Dismiss or in the Alternative for Change of Venue (Docket No. 14) is **DENIED**; and

(2) Defendant's Motion for Extension of Discovery or in the Alternative for Change of Venue (Docket No. 17) is **DENIED as moot**.<sup>3</sup>

BY THE COURT:

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HERBERT J. HUTTON, J.

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<sup>3</sup> As the Court previously denied Defendant's Motion for a transfer of venue, said Motion is moot. Additionally, Defendant's Motion for Extension of Discovery is now moot.