

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

DEBORAH LEWIS-UGDAH AND)
DEVIN UGDAH)
) CIVIL ACTION
 v.)
)
HBE CORPORATION, d/b/a ADAM'S)
MARK SAN ANTONIO-RIVERWALK) No. 00-3884
AND SEVEN SEVENTEEN HB SAN)
ANTONIO CORPORATION)

MEMORANDUM

Padova, J.

December , 2000

Plaintiffs, Deborah Lewis-Ugdah and Devin Ugdah, bring this action against Defendants, HBE Corporation d/b/a Adam's Mark San Antonio Riverwalk ("HBE") and its subsidiary, Seven Seventeen HB San Antonio Corporation ("Seven Seventeen"), for injuries sustained in a slip and fall accident which occurred in a hotel owned and operated by Seven Seventeen. Before the Court is Defendants' Motion to Strike and/or Dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), 12(b)(6), 12(e) and 12(f). In the alternative, Defendants move to transfer the action to the United States District Court for the Southern District of Texas. For the reasons that follow, the Court denies Defendants' Motion to Dismiss, but grants Defendants' Motion to transfer this action to the Southern District of Texas.

I. BACKGROUND

Plaintiffs' Complaint alleges the following facts. On or about July 19, 1998, Plaintiff Deborah Lewis-Ugdah stayed at the Adams Mark Hotel in San Antonio, Texas, while attending a conference. She slipped and fell in the bathtub at the hotel, sustaining serious injuries. Lewis-Ugdah claims the fall was the result of the defective condition of the bathtub. Plaintiff Devin Ugdah, Lewis-Ugdah's husband, also brings a claim for loss of consortium.

Plaintiffs filed the instant Complaint in the Philadelphia Court of Common Pleas on July 14, 2000, naming Seven Seventeen and HBE as defendants. On July 31, 2000, Defendants removed the action to the United States District Court for the Eastern District of Pennsylvania.

II. DISCUSSION

Defendants move for dismissal or, in the alternative, transfer to the United States District Court for the Southern District of Texas. First, Defendants contend that the Court lacks personal jurisdiction over Defendant Seven Seventeen. Second, Defendants contend that venue in the United States District Court for the Eastern District of Pennsylvania is improper, because the Court lacks personal jurisdiction over both Defendants, and no part of the claims occurred in Pennsylvania. Defendants also move to dismiss all claims against HBE Corporation, as well as the

punitive damages claim against both Defendants, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief may be granted. For the following reasons, the Court concludes that it lacks personal jurisdiction over Defendant Seven Seventeen and venue is improper, and therefore transfers the action to the United States District Court for the Southern District of Texas.¹

A. Personal Jurisdiction

Lack of personal jurisdiction is a waivable defense; therefore, a defendant must raise the issue on a timely motion to dismiss pursuant to Federal Rule of Civil Procedure 12. See Fed. R. Civ. P. 12(h)(1); Singer v. Commissioner of Internal Revenue Service, No. Civ. A. 99-2783, 2000 WL 14874, at *2 (E.D. Pa. Jan. 10, 2000). Though Plaintiffs contend that Defendant Seven Seventeen has waived the defense of lack of personal jurisdiction by removing the case to this Court, such removal does not constitute such a waiver. See Morris & Co. v. Skandinavia Ins. Co., 279 U.S. 405, 409 (1929). Furthermore, Seven Seventeen's assertion of the lack of personal jurisdiction defense is timely under the applicable rule.² The Court, therefore, will consider

¹Having determined that transfer of this case is appropriate, the Court need not determine the disposition of Defendants' Motions pursuant to Rule 12(b)(6).

²Federal Rule of Civil Procedure 81(c) provides the following timeline under which removing defendants may assert defenses or obligations:

Defendants' Motion to Dismiss for lack of personal jurisdiction over Defendant Seven Seventeen on the merits.³

When a defendant raises the defense of lack of personal jurisdiction, the plaintiff bears the burden of producing sufficient facts to establish that jurisdiction is proper. Mellon Bank (East) PSFS, Nat'l Assoc. v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). To establish the propriety of jurisdiction, the plaintiff must present a prima facie case for the exercise of personal jurisdiction by establishing with reasonable particularity sufficient contacts between the defendant and the forum state. Id. at 1223 (citing Provident Nat'l Bank v. California Fed. Sav. & Loan Assoc., 819 F.2d 434, 437 (3d Cir. 1987)). Resolution of a motion challenging personal jurisdiction

In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. Fed. R. Civ. P. 81(c). Defendants' Motion is timely under Rule 81(c). Defendants' Motion was filed on August 7, 2000, five days (exclusive of Saturdays and Sundays under Fed. R. Civ. P. 6(a)) after filing of the Notice of Removal on July 31, 2000.

³Defendants have not asserted in any of their moving papers that the Court lacks personal jurisdiction over Defendant HBE Corporation. The Court therefore confines its discussion of personal jurisdiction to Defendant Seven Seventeen, and renders no opinion with respect personal jurisdiction over HBE.

requires a determination of factual issues outside the pleadings. Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66 (3d Cir. 1984). The plaintiff, therefore, must go beyond the bare allegations of the pleadings and make an affirmative proof through sworn affidavits or other competent evidence. Id. at 66-67 n.9; Singer, 2000 WL 14874, at *2.

A federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state. Fed. R. Civ. P. 4(e). The Pennsylvania Long-Arm Statute provides in relevant part:

the jurisdiction of the tribunals of this Commonwealth shall extend . . . to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

42 Pa. Cons. Stat. Ann. § 5322(b)(West 2000). The Fourteenth Amendment of the United States Constitution limits the reach of long-arm statutes such that a court may not assert personal jurisdiction over a nonresident defendant who does not have certain minimum contacts with the forum such that the maintenance of suit against him offends traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Provident Nat'l Bank, 819 F.2d at 436-37.

Pennsylvania's long-arm statute provides for both general and specific jurisdiction over nonresident defendants. 42 Pa. Cons. Stat. Ann. §§ 5301, 5322 (West 2000). General jurisdiction

arises when the plaintiff's cause of action arises from the defendant's non-forum related activities. Vetrotext Certainteed Corp. v. Consolidated Fiber Glass Prod. Co., 75 F.3d 147, 151 n.3 (3d Cir. 1996). Specific personal jurisdiction arises when the defendant engages in particular or infrequent contacts with the forum state that are related to the plaintiff's claim. Pennzoil Products Co. v. Colelli & Assoc., Inc., 149 F.3d 197, 200 (3d Cir. 1998). The sole issue raised here is whether the Court has general personal jurisdiction over the Defendants. The facts alleged do not support assertion of specific personal jurisdiction in Pennsylvania over Defendants.

To assert general jurisdiction over a nonresident, a plaintiff must establish that the defendant's contacts with the forum state are so "continuous and substantial" that the defendant should reasonably expect to be haled into court therein on any cause of action. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-416 (1984); Provident Nat'l Bank, 819 F.2d at 437. Furthermore, the defendant must have purposefully availed itself of the benefits and protections of the laws of the forum state. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

Plaintiffs assert that Seven Seventeen has contacts sufficient to subject it to personal jurisdiction in the Eastern District of Pennsylvania. Plaintiffs note that Seven Seventeen is

a wholly owned subsidiary of HBE; HBE in turn owns an Adams Mark Hotel on City Line Avenue in Philadelphia, Pennsylvania.⁴

Furthermore, Plaintiffs note that Seven Seventeen hosted a national conference attracting Pennsylvania attendees and Seven Seventeen does business with the Adams Mark Hotel in Philadelphia.

Plaintiffs' arguments regarding personal jurisdiction are without merit. Neither the connection to HBE nor Seven Seventeen's purported contacts with Pennsylvania are sufficient to support assertion of general jurisdiction.⁵

The presence of a related corporation in Philadelphia is not, by itself, sufficient basis for asserting personal jurisdiction over Seven Seventeen. Generally, "[a] foreign

⁴The affidavit of Robert Koester, general counsel for HBE Corporation, clarifies that the Adams Mark Hotel in Philadelphia is owned and operated by two distinct corporations, Seven Seventeen HB Philadelphia Corporation No. 1 and Seven Seventeen HB Philadelphia Corporation No. 2. (Reply Ex. A ¶8 (Koester Aff.)).

⁵By way of supporting documentation, Plaintiffs have provided several pages printed from the HBE Corporation website. (Resp. Ex. A.) This documentation is not very helpful to the Court's inquiry as to personal jurisdiction over Defendant Seven Seventeen, as it does not establish either the relationship among the different corporate entities, or the extent of Seven Seventeen's contacts with Pennsylvania.

Defendants, in contrast, have provided an affidavit of Robert Koester, general counsel for HBE since 1988, asserting that Seven Seventeen HB San Antonio is a separate corporate entity from HBE, and speaking directly to the issue of Pennsylvania's personal jurisdiction over Seven Seventeen. (Reply Ex. A (Koester Aff.)).

corporation is not subject to the jurisdiction of the forum state merely because of its ownership of the shares of stock of a subsidiary doing business in the state." Lucas v. Gulf & Western Industries, Inc., 666 F.2d 800, 806 (3d Cir. 1981) (quoting 2 Moore's Federal Practice § 4.25[6] (1981)). Exception to this rule is had only when one of three circumstances is present: (1) the independence of the two corporate entities has been disregarded; (2) the parent corporation exercises control over the subsidiary such that the two should be considered one company; or (3) the subsidiary performs important functions that otherwise the parent would have to perform on its own. Brooks v. Bacardi Rum Corp., 943 F. Supp. 559, 562-63 (E.D. Pa. 1996). Plaintiffs have not demonstrated that any of these exceptions apply.

Absent one of the above exceptions, the activities of a related corporation in the jurisdiction are relevant factors for determining personal jurisdiction only when those actions are taken for the benefit of the defendant. Gavigan v. Walt Disney World, Inc., 646 F. Supp. 786, 789 n.5 (E.D. Pa. 1986). Here, there are no allegations that the related corporation undertook any activity in this jurisdiction on behalf of Defendants and, therefore, its presence here is irrelevant to the determination of personal jurisdiction.

Finally, Plaintiffs contend that Seven Seventeen advertised

and attracted Pennsylvania attendees to the conference it hosted in San Antonio. Advertising of a certain quality and quantity can be a basis for asserting personal jurisdiction over a defendant. Gavigan, 646 F. Supp. at 789. However, Plaintiffs have failed to show that these contacts were "continuous and substantial" or that Defendant purposefully availed itself of the privilege of doing business here. Furthermore, Plaintiffs have not shown any legal benefit or protection of the laws of Pennsylvania related to these alleged advertisements. Without more, the alleged advertisements do not constitute "continuous and substantial" contacts with the forum state. Snider v. Slatkin, 105 F. Supp. 2d 428, 432 (E.D. Pa. 2000). The same deficiency exists with respect to Plaintiffs' assertion that the Defendant "attracted" the business of Pennsylvania attendees of the conference. Id.

The Court therefore concludes that it lacks general jurisdiction over Defendant Seven Seventeen.⁶ The Court will discuss whether to dismiss or transfer the case to the Southern District of Texas in the context of Defendants' Motion to Dismiss

⁶Neither would these advertisements or contacts be sufficient to create specific jurisdiction, particularly since Plaintiff has failed to allege, let alone introduce any evidence to support, that the advertisements and contacts are related to Plaintiff's claim. See Steward v. Opryland Hotel, Civ. Act. No. 94-3466, 1994 U.S. Dist. LEXIS 16998, at *6 (E.D. Pa. Nov. 21, 1994).

or Transfer for improper venue.⁷

B. Improper Venue

Improper venue may be raised as a defense pursuant to Fed. R. Civ. P. 12(b)(3). The propriety of venue in this case is governed by 28 U.S.C. § 1391(a), which provides in pertinent part:

A civil action founded only on diversity of citizenship may . . . 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 any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Id.

The Court concludes that the Eastern District of Pennsylvania is an improper venue for this case. Section 1391(a)(1), which permits the action in a judicial district where any of the defendants resides, provided all the defendants reside in the same state, does not apply here. A corporate defendant is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. 28 U.S.C.A. § 1391(c)(West 1993). Seven Seventeen is deemed not to

⁷If a court lacks personal jurisdiction over the defendant, it may transfer the case to the appropriate court rather than dismissing it outright. Young v. Sullwold, Civ. Act. No. 00-2923, 2000 U.S. Dist. LEXIS 14047, at *10 (E.D. Pa. Sept. 28, 2000) (citing Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467 (1962)).

reside in Pennsylvania, because it is not subject to personal jurisdiction of Pennsylvania. See Young v. Sullwold, Civ. A. No. 00-2923, 2000 U.S. Dist. LEXIS 14047, at *7 (E.D. Pa. Sept. 28, 2000). Thus § 1391(a)(1) does not provide proper venue for the action.

Under § 1391(a)(2), venue lies in the district where a substantial part of the events giving rise to the claim arose. According to the papers, all of the events giving rise to the claims here arose in Texas, rather than Pennsylvania. (Compl. ¶¶7-9, 15-16; Defs.' Mot. ¶21.) Therefore, § 1391(a)(2) does not provide proper venue for the action.

Finally, § 1391(a)(3) provides venue in a district in which any defendant is subject to personal jurisdiction at the time the action commenced, if there is no district in which the action may otherwise be brought. The Southern District of Texas would be a proper forum under § 1391(a)(2), and both parties agree that the Southern District of Texas would be a proper venue for the action. (Defs.' Mot. ¶22; Resp. ¶23.) Therefore, § 1391(a)(3) does not provide proper venue for the action in the Eastern District of Pennsylvania.

Having concluded that venue in this district is improper, the Court may either dismiss the case or, if it be in the interests of justice, transfer the case to a district where venue

is proper, pursuant to 28 U.S.C. § 1406(a).⁸ 28 U.S.C.A. § 1406(a) (1993). This decision lies in the Court's discretion. Holland v. King Knob Coal Co., Inc., 87 F. Supp. 2d 433, 440 (W.D. Pa. 2000). The Court has the authority to transfer venue even if it lacks personal jurisdiction over the defendant. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467 (1962); United States v. Berkowitz, 328 F.2d 358, 361 (3d Cir. 1964).

Section 1406(a) permits transfer only to a district in which the action could have been brought. Grissinger v. Young, Civ. A. No. 98-1710, 1998 U.S. Dist. LEXIS 9898, at *7 (E.D. Pa. July 2, 1998). Here, the parties agree that the United States District Court for the Southern District of Texas is a proper forum for the case. (Defs.' Mot. ¶22; Resp. ¶23.) Furthermore, that court has personal jurisdiction over Defendant Seven Seventeen, which is a Texas Corporation with its principal place of business in San Antonio, Texas. (Reply Ex. A.¶4 (Koester Aff.)). In the interests of allowing this case to be decided in its proper forum

⁸In the alternative, Defendants move for the Court to transfer the case to the United States District Court for the Southern District of Texas under 28 U.S.C. § 1404. Section 1404(a) provides for the transfer of a case for the convenience of the parties where both the original and the requested venue are proper, whereas § 1406(a) provides for the transfer or dismissal of a case where the original venue is improper. Because the Court concludes that the Eastern District of Pennsylvania is an improper venue, § 1406(a) is the appropriate provision to apply. Jumara v. State Farm Ins. Co., 55 F.3d 873, 878 (3d Cir. 1995). In light of this determination, the Court need not consider whether transfer would be appropriate for the convenience of the parties under §1404(a).

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ORDER

AND NOW, this day of December, 2000, upon
consideration of Defendants' Motion to Strike and/or Dismiss
Plaintiffs' Complaint (Doc. No. 2) and any responses thereto, **IT**
IS HEREBY ORDERED that:

1. Defendants' Motion to Strike and/or Dismiss Plaintiff's
Complaint is **DENIED**.
2. Defendants' Alternative Motion to Transfer this action
to the United States District Court for the Southern
District of Texas is **GRANTED**.
3. All pending motions are dismissed as moot.
4. This case shall be **closed** for statistical purposes.

BY THE COURT:

John R. Padova, J.