

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

ERIC DOLTZ, individually and	:	
derivatively on behalf of Harris	:	
and Associates Grooving, Inc.,	:	
a Florida corporation,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 01-5458
	:	
HARRIS AND ASSOCIATES	:	
GROOVING, INC., a Florida	:	
corporation, and	:	
BRENDA W. HARRIS and	:	
DOUGLAS HARRIS	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

April 5, 2002

Defendants' Motion to dismiss is based upon failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) and upon lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). Alternatively, Defendants seek to transfer the case pursuant to 28 U.S.C. 1406(a) or 28 U.S.C. 1404(a).

I. FACTS

Eric Doltz ("Plaintiff" or "Doltz") was involved with Brenda W. Harris and Douglas Harris (the "Defendants") in the formation of Harris & Associates Grooving, Inc., the Defendant corporation, ("Harris & Associates" or the "Company"). Harris &

Associates is a highway grooving and grinding business. Highway grooving and grinding is a method of putting grooves in pavement to increase the safety and efficiency of the surface. Plaintiff is a former director, vice president and general manager of Harris & Associates and alleges to retain a 49% interest in the Company. Brenda Harris is also a director of the Company as well as its president and secretary. Plaintiff contends that Brenda Harris maintains a 51% ownership interest in the Company. Her husband, Douglas Harris, is also involved in the management of the Company.

Plaintiff asserts that an agreement existed between the parties whereby he would be paid an advance against future profits of the Company on a weekly basis; his expenses would be paid by the Company; and profits would be distributed in accordance with stock ownership. Plaintiff alleges that Defendants have engaged in a scheme to deny him of his entitlement to distributions of the Company and to divert its income to other businesses owned and operated by Defendants. In addition, Plaintiff claims that Defendants have used funds belonging to the Company for their personal benefit, including the payment of personal expenses, extravagant vacations, automobiles, an airplane and real estate.

Plaintiff has never received any distribution of profit from the Company and Defendants have refused to permit Plaintiff

access to the financial records of the Company. Defendants have stopped paying Plaintiff his weekly salary as well as his expenses.

Plaintiff brings the instant action as a shareholders' derivative suit, complaining that, while Brenda Harris was a director of the Company, she negligently, carelessly and intentionally failed to perform her duties so that funds and assets of the Company were mismanaged and wasted. Plaintiff also sues in his individual capacity seeking damages for denial of access to corporate records, breach of contract, violations of the wage payment and collection law, and breach of shareholder agreement.

Harris & Associates was incorporated in the state of Florida. Plaintiff is a Pennsylvania resident and worked from his home office in Pennsylvania while employed with the Company. Defendants are both Florida residents.

II. DISCUSSION

A. Personal Jurisdiction

A federal court exercises personal jurisdiction over a nonresident to the extent allowed under state law. Fed. R. Civ. P. 4(e); Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 436 (3d Cir. 1987). In Pennsylvania, the applicable statute provides that "the jurisdiction of the tribunals of this Commonwealth shall extend to all persons . . .

to the fullest extent allowed under the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 5322.

Personal jurisdiction may be either general or specific. A defendant is subject to general jurisdiction when it has continuous and systematic contacts with the forum state. Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 414-16, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). Specific jurisdiction is established when a non-resident defendant has "purposefully directed" his activities at a resident of the forum and the injury arises from or is related to those activities. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Plaintiff alleges in his complaint and by supporting affidavits that Harris & Associates maintains a place of business in Amity, Berks County, Pennsylvania. Plaintiff further alleges that Defendants negotiated a transaction involving the lease of real property located in Pennsylvania for the use of the Company; wrote paychecks for individuals employed by Harris & Associates who worked and resided in Pennsylvania; verbally communicated with Plaintiff regarding Company matters three to four times per day; sent written communications to the Harris & Associates' Pennsylvania office on a regular basis; visited Pennsylvania at various times regarding the business; bid on six jobs in Pennsylvania and was awarded contracts for two Pennsylvania

locations; and had Harris & Associates prequalified for public bidding purposes in Pennsylvania.¹

Defendants, on the other hand, maintain that they never traveled to or communicated with individuals in Pennsylvania in connection with the business;² do not own any property in Pennsylvania; do not maintain an office or telephone listing in Pennsylvania, and that Harris & Associates is not registered to do business in the Commonwealth.

However, for purposes of deciding a motion to dismiss for lack of personal jurisdiction, the Court must accept as true the allegations of the Complaint and construe disputed facts in Plaintiff's favor. Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir. 1992). Taking into consideration Defendants' alleged contacts through Harris & Associates and Plaintiff's allegations that Defendants mismanaged and wasted corporate assets and did not honor agreements entered into at the time of the formation of the Company, it is appropriate to find that there is a sufficient basis for asserting, at the very least, specific jurisdiction over Defendants.

1. Plaintiff also asserts that Defendants made numerous purchases in Pennsylvania, including the purchase of a truck tractor for use in Company business. Such purchases are insufficiently substantial to support general jurisdiction. See Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 418 ("mere purchases, even if occurring at regular intervals, are not enough to warrant . . . in personam jurisdiction").

2. Defendants concede that Douglas Harris drove through Pennsylvania once and visited four times during his lifetime and that Brenda Harris drove through and visited Pennsylvania once.

As Plaintiff's assertions have demonstrated that Defendants have purposefully established minimum contacts with Pennsylvania, it remains necessary to consider whether the balance of the competing interests and the nature and quality of the Defendants' purposeful contacts would make it "fair play and substantial justice" to subject Defendants to jurisdiction here. See Burger King Corp, 471 U.S. at 476, 105 S. Ct. at 2174, 85 L. Ed. 2d at 528.

Arguing that this Court's exercise of personal jurisdiction would not comport with "fair play and substantial justice," Defendants assert that the Company is a duly organized and existing Florida corporation, having its principal place of business in Florida; the Company has not ever advertised within Pennsylvania and has not availed itself of the privilege of conducting business activities within Pennsylvania; Defendants do not own real estate or property in Pennsylvania; and Defendants have limited contacts with Pennsylvania.

Plaintiff's allegations contradict Defendants' assertions. Furthermore, these simply rehash Defendants' arguments as to why Plaintiff cannot establish the requisite minimum contacts in order to establish personal jurisdiction in this forum and do not address the relevant factors a court needs to consider in evaluating fairness: the burden on the defendant; the forum state's interest in adjudicating the dispute; the

plaintiff's interest in obtaining convenience 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 policies. See id. While Defendants touch upon some of these considerations in their argument to transfer the case to the United States District Court for the Northern District of Florida, these considerations do not overburden Defendants, particularly given that Plaintiff has demonstrated purposefully established contact giving rise to his cause of action. Accordingly, denial of Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) is appropriate.

1. Failure to State a Claim

Defendants next argue that Plaintiff is not a shareholder of Harris & Associates and therefore, cannot properly maintain a shareholder derivative action. Plaintiff's complaint and affidavit assert that he is a 49% owner of the corporation. Again, for purposes of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), all well pleaded facts in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843, 1849, 23 L. Ed. 2d 404 (1969). Thus, because of Plaintiff's alleged ownership interest in Harris & Associates, he may sue derivatively on behalf of the Company. Accordingly,

denial of Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is appropriate.

2. Transfer

Defendants argue that venue is not proper in the Eastern District of Pennsylvania because there is no personal jurisdiction over them and urge the Court to dismiss the matter or transfer the case to the United States District Court for the Northern District of Florida, where venue is proper. However, as it has been determined that a sufficient basis for asserting personal jurisdiction over Defendants exists, Defendants' argument fails.

Finally, Defendants argue that, even if venue properly lies in the Eastern District of Pennsylvania, the case should be transferred to the United States District Court for the Northern District of Florida pursuant to 28 U.S.C. § 1404, which provides:

A court may transfer the venue of a civil action for the convenience of parties and witnesses or in the interests of justice, to any other district where it might have been brought.

Plaintiff concedes that the instant action could have been brought in the Northern District of Florida. In considering whether the proposed forum better serves the convenience of parties and witnesses and interest of justice, courts consider multiple "public" and "private" interest factors. See Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995).

Arguing in favor of transfer, Defendants assert that a substantial part of the events or omissions which gave rise to Plaintiff's claim occurred in Florida; location of physical evidence is in Florida in that Defendants' documents are located there; the case can be tried more inexpensively and expeditiously in Florida; it is burdensome for Defendants, Florida residents, to litigate this case in Pennsylvania; and Pennsylvania does not have a local interest in hearing a case concerning Florida defendants.

In Plaintiff's favor for nontransfer is that Pennsylvania is his original choice of forum; Pennsylvania is strongly linked to the claims of the lawsuit; some of the business records of Harris & Associates are located in Pennsylvania; it is burdensome for Plaintiff, a Pennsylvania resident, to litigate this action in Florida; and it is inconvenient for Plaintiff to produce his witnesses in Florida.

As a general rule, the plaintiff's choice of forum is given significant weight and will not be disturbed unless the other factors weigh substantially in favor of transfer. See Jumara, 55 F.3d at 879. Defendants have not convincingly established that the balance of the interests strongly favors them. Therefore, Plaintiff's choice of forum should prevail. Accordingly, denial of Plaintiff's Motion to Transfer is appropriate.

III. CONCLUSION

For the reasons state above, it is appropriate to deny Defendants' Motion to Dismiss and their Motion to Transfer. Plaintiff's asserted contacts form a sufficient basis for this forum to exercise personal jurisdiction over Defendants. Plaintiff's allegation that he holds a 49% interest in Harris & Associates entitles him to sue derivatively on behalf of the Company. Defendants' have not demonstrated that transfer would enhance the convenience of the parties and the witnesses and be in the interest of justice as to outbalance the significant weight afforded to Plaintiff's choice of forum, Pennsylvania.

An order follows.

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GROOVING, INC., a Florida	:	
corporation, and	:	
BRENDA W. HARRIS and	:	
DOUGLAS HARRIS	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 5th day of April, 2002, upon consideration of Defendants' Motion to Dismiss and to Transfer Case (Docket Nos. 9 and 10) and Plaintiff's response thereto (Docket No. 12) it is hereby **ORDERED** that Defendants' motions are **DENIED**. Defendants shall file and serve an Answer to the Complaint within twenty (20) days of the date of this Order.

BY THE COURT:

RONALD L. BUCKWALTER, J.