

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

NELSON SHANKS ,	:	CIVIL ACTION
	:	
PLAINTIFF ,	:	
	:	
V.	:	
	:	
LESLIE and ABIGAIL WEXNER, h/w,	:	
JEFFERY E. ESPSTEIN, individually,	:	
and d/b/a J. EPSTEIN AND COMPANY, INC.,	:	
and GHISLAINE MAXWELL,	:	
	:	
DEFENDANTS.	:	NO. 02-7671

OPINION

Newcomer, S.J.

March , 2003

**I. Introduction**

This case arises out of a contract dispute.<sup>1</sup> The Plaintiff claims that the Defendants contracted with him to paint a family portrait of Abigail Wexner and her three children. The Plaintiff alleges that the Defendants breached this contract by refusing to pay for the portrait after it was delivered. Currently before the Court is the Defendants' Motion to Dismiss for Lack of Personal Jurisdiction. For the following reasons the Motion will be denied.

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<sup>1</sup>The Defendants deny that a contract was ever formed. For purposes of this Motion only we will accept that there was a contract between the two parties.

## II. Legal Standard for Personal Jurisdiction

As a federal court sitting in diversity, our personal jurisdiction inquiry is two-fold. First, we must decide whether the Pennsylvania Long Arm Statute authorizes jurisdiction over the Defendants, and second, we must decide whether exercising jurisdiction over these Defendants satisfies the Due Process Clause of the Constitution. Vetrotex Certainteed Corp. v. Consolidated Fiber and Glass Products Co., 25 F.3d 147, 151 (3d Cir. 1996). Because the Pennsylvania Long Arm Statute is coextensive with the Due Process Clause, however, the decisive issue is whether exercising personal jurisdiction over the Defendants offends due process. 42 PA. CONS. STAT. ANN. § 5322(b)(West 2003).

There are two requirements to satisfy due process in the personal jurisdiction context. First a party must have minimum contacts with Pennsylvania sufficient to show that the party has purposely availed itself to the laws of this forum. IMO Indus. v. Kiekert AG, 155 F.3d 254 (3d Cir. 1998). When determining whether these minimum contacts are present, it is the quality and not necessarily the quantity of contacts that is determinative. Hanson v. Denckla, 357 U.S. 235, 253 (1958). Further, because the Plaintiff claims that specific jurisdiction exists in this case, the relevant contacts are those that gave

rise to the cause of action.<sup>2</sup> If minimum contacts exist, the Court must decide whether forcing the out-of-state defendants to submit to jurisdiction in Pennsylvania conforms with traditional notions of fair play and substantial justice. Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 481 (3d Cir.1993)(citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). In making this determination we should consider the following: 1) the interests of the forum state; 2) the plaintiff's interest in obtaining relief; 3) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and 4) the shared interest of the several States in furthering fundamental substantive social policies. Mesalic v. Fiberfloat Corp., 897 F.2d 696, 701 (3d Cir.1990)(citing Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113 (1987)).

## **II. Procedure for Determining Minimum Contacts**

When a Defendant moves for dismissal under 12(b)(2) for lack of personal jurisdiction the burden shifts to the party seeking to impose jurisdiction. Provident Nat. Bank v.

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<sup>2</sup>The Plaintiff makes two claims in this case, breach of contract and promissory estoppel. The Court will not engage in a specific jurisdiction analysis for each of the Plaintiff's two claims. Both claims center on essentially the same events and circumstances, and therefore, the considerations for jurisdictional purposes are identical. See Remick v. Manferdy, 238 F.3d 248, 255 (2001)(claim specific analysis is only required when there are different jurisdictional considerations).

California Fed. Sav. & Loan Ass'n, 819 F.2d 434 (3d Cir. 1987).

In response to a 12(b)(2) motion, a party must make a prima facie showing that minimum contacts warranting personal jurisdiction exist.<sup>3</sup> Mellon Bank (East) PSFS Nat. Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992).

The law in the Third Circuit, however, is not clear as to what a Court should consider in deciding whether the Plaintiff has met this burden. Two lines of cases differ as to whether affirmative proof of minimum contacts is required, or if the Plaintiff can merely rely on contacts alleged in his pleadings. Several cases have stated that a plaintiff cannot rely on the bare pleadings alone, but must sustain his burden of proof by establishing with reasonable particularity sufficient contacts through sworn affidavits or other competent evidence. Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66 and n. 9 (3d Cir. 1984); National Paintball Supply, Inc. v. Cossio, 996 F.Supp. 459 (E.D.Pa. 1998); Rose v. Granite City Police Dept., 813 F.Supp. 319, 321 (E.D.Pa. 1993). Following these cases, a court would not accept the allegations of jurisdictional facts in a complaint as true without some affirmative proof. See Time

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<sup>3</sup> The Court notes that although a Plaintiff need only make a prima facie showing of jurisdiction to defeat a motion under Fed. R. Civ. P. 12(b)(2), a Plaintiff has to establish personal jurisdiction by a preponderance of the evidence at trial. Carteret Saving Bank v. Shushan, 954 F.2d 141, 146 (3d Cir. 1992). The Defendants need not do anything to preserve their right to raise personal jurisdiction again at trial.

Share Vacation Club, 735 F.2d 61, 66 at nt. 9. ("Once [a Rule 12(b)(2) motion] is made, plaintiff must respond with actual proofs, not mere allegations.") However, several other cases have held the contrary, finding that a court should accept the allegations in a complaint as true. Carteret Saving Bank v. Shushan, 954 F.2d 141, 142 at nt. 1(3d Cir. 1992); Oxford First Corp. v. PNC Liquidating Corp., 372 F.Supp. 191, 192-93 & n. 2(E.D.Pa. 174); See, also, Behagen v. Amateur Basketball Ass'n of U.S.A., 744 F.2d 731, 733 (10th Cir.1984).<sup>4</sup>

These precedents give little guidance in a case, such as this one, where the exhibits submitted by the Plaintiff may not be sufficient to support jurisdiction on their own, but if considered in conjunction with assertions made in the Complaint would satisfy the minimum contacts requirement. If the Court were to follow the Time Share approach of requiring competent evidence of all jurisdictional facts, this Court would have to dismiss the Plaintiff's case. If the Court followed the

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<sup>4</sup>Despite the apparent contradictory nature of these precedents, several cases have claimed that a District Court should both require proof of jurisdictional facts, and accept all factual allegations in the complaint as true. See Feinberg v. Central Asia Capital Corp., 936 F.Supp. 250, 254 (E.D.Pa. 1996)(stating that "Plaintiff must go beyond the pleadings and make an affirmative proof" and later citing Carteret for the proposition that the Court should accept Plaintiff's allegations as true); Poole v. Sasson, 122 Fed.Supp.2d 556, 557 (E.D.Pa. 2000)("Although all allegations in the Complaint are taken as true, a plaintiff may not solely rely on bare pleadings to satisfy his jurisdictional burden"). This Court will decline to follow this approach because of its contradictory nature and the lack of guidance it will give to future litigants.

procedure of Carteret of accepting factual allegations in the Complaint, than jurisdiction has been established.

Because the Defendants did not attempt to controvert any of the allegations in the Plaintiff's Complaint, this Court finds that the most fair procedure is to accept them as true for the purpose of this Motion. This approach is followed in several other circuits. Brown v. Flowers Industries, Inc., 688 F.2d 328, 332 (5th Cir. 1982); Turnock v. Cope, 816 F.2d 332, 333 (7th Cir. 1987); Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305, 1307 (4th Cir. 1986); Behagen v. Amateur Basketball Ass'n of U.S.A., 744 F.2d 731, 733 (10th Cir. 1984); Jet Charter Service, Inc. v. Koeck, 907 F.2d 1110, 1111 (11th Cir. 1990). While this procedure places a burden on the party challenging jurisdiction to at least question the allegations of jurisdictional facts, this burden is consistent with the other requirements placed on Defendants bringing a 12(b)(2) motion. When a complaint is filed there is no affirmative duty to plead personal jurisdiction because it is assumed that personal jurisdiction exists. Stirling Homex Corp. v. Homasote Co., 437 F.2d 87, 88 (2d Cir. 1971). It is incumbent on a party to raise the lack of personal jurisdiction. See Zelson v. Thomforde, 412 F.2d 56 (3d Cir. 1969)(district court cannot raise personal jurisdiction sua sponte). Further, if a party wishes to challenge personal jurisdiction of a Court he must do so at the responsive pleading

stage or he will have waived his objection. FED. R. CIV. P. 12(h)(1)(personal jurisdiction is waived if not raised). It logically follows that a party must respond to the allegations upon which the power of a court is premised and that any failure to do so will result in the party admitting those facts for the purpose of the 12(b)(2) Motion. This procedure also strikes a balance between the two contradictory lines of cases cited above. It still requires the Plaintiff to do more than simply rely on bare pleadings, albeit only when those pleadings are challenged. It also gives the substantial deference to pleadings that is required by other 12(b) motions and was advocated by the Carteret line of cases. See Oxford First Corp. v. PNC Liquidating Corp., 372 F.Supp. 191, 192-93 & n. 2 (E.D.Pa.1974) (relying on the case law in other 12(b) motions to support the procedure of accepting as true all jurisdictional facts).

### **III. Jurisdictional Facts**

Considering the above analysis the Court will accept the facts as pleaded in the Plaintiff's Complaint and accompanying exhibits.<sup>5</sup> These allegations show that the Defendant has the following relevant contacts with Pennsylvania: 1) a fax sent

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<sup>5</sup>Some of the contacts asserted in the Plaintiff's brief were not made by the Defendants personally but by other parties. The Plaintiff has alleged in his complaint that these parties were acting as the agents of the Defendants. Accordingly, these contacts will be imputed to the Defendants. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 419 (9th Cir. 1977).

from the Defendants to the Plaintiff seeking to set up a meeting between Mrs. Wexner and the Plaintiff in New York City; 2) a fax sent from the Defendants to the Plaintiff detailing his itinerary for his trip to Ohio to meet with and photograph the subjects of the portrait; 3) a letter from the Plaintiff to Ms. Wexner thanking her for her hospitality during his stay in Ohio; 4) a fax from the Defendants to the Plaintiff including the measurements of Ms. Wexner and her children, which were to be used to make mannequins in preparation for the portrait; 5) a letter from Defendant Maxwell to the Plaintiff confirming the price of the portrait; 6) a letter to Defendant Maxwell from the Plaintiff regarding a proposed frame for the painting; 7) a courier hired by the Defendants who traveled to Pennsylvania and picked up the painting; and, 8) an invoice sent from the Plaintiff to the Wexners. The Defendants also admit that the Defendants initiated the relationship by contacting the Plaintiff in Pennsylvania.

#### **IV. Analysis of minimum contacts**

Based on the above facts it is clear that the Defendants did have sufficient minimum contacts to justify personal jurisdiction. The Defendants reached out to a Pennsylvania resident to have him paint the portrait. Jurisdiction is proper when parties "reach out beyond one state and create continuing relationships and obligations with the

citizens of another state." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 256 (1985). In cases where a out-of-state resident contracts with a forum resident, whether the out-of-state resident initiated the relationship is crucial. See Vetrotex Certainteed Corp. v. Consolidated Fiber, 75 F.3d 147 (3d Cir. 1996).

Simply initiating a contractual relationship with a Pennsylvania resident, however, is not the only contact in this case which goes towards establishing personal jurisdiction. Indeed, the Defendants also engaged in crucial communications about the performance of the contract directed at the state of Pennsylvania. See Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 482 (3d Cir. 1993)(mail and telephone contacts may support jurisdiction). These contacts cannot be dismissed as mere informational contacts, rather some of them go to the heart of the transaction. Specifically, the May 16, 2000, letter from the Defendants finalized the price of the portrait. These contacts evidence a conscious decision by the Defendants to do business with a Pennsylvania resident operating in the Commonwealth of Pennsylvania.

Perhaps the most meaningful contact occurred when the portrait was delivered to the Defendants' agent within the state of Pennsylvania. This delivery is crucial to the breach of contract claim because delivery of the portrait was necessarily

an implied condition of the contract. Not only is it significant to the contract, but by sending a courier to drive on Pennsylvania roads, make a pick up at a Pennsylvania business, and then return to Ohio, the Defendants purposely availed themselves to the benefits of doing business in the Commonwealth. While merely passing through a state is not a sufficient contact to warrant jurisdiction, when a party makes a business delivery in the state purposeful availment has been established.

Papachristou v. Turbines, Inc., 902 F.2d 685, 685 (8th Cir. 1990); see Carney v. Bill Head Trucking, Inc., 83 F.Supp.2d 554, 557 (E.D.Pa. 2000)(drawing a distinction between merely passing through a state and stopping and making a delivery).

The Defendants argue that they are not amenable to personal jurisdiction in Pennsylvania because they never physically entered the state. They attempt to support this argument with the fact that the only two face-to-face meetings between the parties occurred in New York and Ohio. As noted above, however, for jurisdictional purposes the courier pickup of the painting was a physical contact with the state because the courier was an agent of the Defendants. See note 5 supra. Moreover, the lack of any physical contacts with the state would not bar this Court from exercising personal jurisdiction over the Defendants. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). The Court is also not troubled by the Defendants' assertions that the majority of negotiations for the contract

occurred in New York. Nothing in due process restricts more than one state from having personal jurisdiction over a party to a given transaction. The contacts the Defendants may have had with New York are not relevant to whether there are sufficient contacts with Pennsylvania. As discussed above, the initiation of the relationship with the Pennsylvania Plaintiff, the entangling contacts with Pennsylvania during the painting of the portrait, and the final delivery of the portrait to the Defendants at the Pennsylvania Plaintiff's business, satisfy the minimum contacts requirement regardless of the fact that significant negotiations may have taken place in New York.

**V. Traditional Notions of Fair Play and Substantial Justice**

Because the Court concludes that the Defendants had sufficient minimum contacts to warrant jurisdiction, we must now turn to the second part of our due process inquiry, whether this Court's exercise of jurisdiction over the Plaintiff comports with traditional notions of fair play and substantial justice. At this point in the analysis, the burden falls on the Defendants to convince the Court that these principles will be offended by this Court's exercise of jurisdiction. Mesalic v. Fiberfloat Corp., 897 F.2d 696, 701 (3d Cir.1990). We conclude that the Defendants cannot meet this burden. The interests of both the Commonwealth of Pennsylvania and the Plaintiff are substantially forwarded by

hearing the case in this Court. The Plaintiff, a Pennsylvania resident, should be able to seek a remedy in his home state. It is certainly no more unfair for the Plaintiff to bring the Defendants into a Pennsylvania court, than it would be to force the Plaintiff to travel to Ohio in search of a remedy. Moreover, Pennsylvania has an interest in assuring that its residents have a convenient forum to remedy breaches of contracts, particularly when it appears that the vast majority of the contract was performed within the Commonwealth. Accordingly, the Court sees no reason why exercising jurisdiction over the Defendants would violate traditional notions of fair play and substantial justice.

## **VI. Conclusion**

For the foregoing reasons, the Defendants Motion to Dismiss for Lack of Personal Jurisdiction is denied. An appropriate order will follow.

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Clarence C. Newcomer, S.J.