

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

CAL FISHKIN, et al., : CIVIL ACTION
Plaintiffs and Counter- :
claim Defendants :
 :
v. :
 :
SUSQUEHANNA PARTNERS, G.P., :
et al., :
Defendants and Counter- :
claim Plaintiffs :
 :
v. :
 :
TABFG, LLC, et al., :
Additional Counterclaim :
Defendants : NO. 03-3766

MEMORANDUM AND ORDER

McLAUGHLIN, J.

May 2, 2005

Cal Fishkin, Igor Chernomzav and Francis Wisniewski brought this action in the Montgomery County Court of Common Pleas, seeking declaratory and injunctive relief against Susquehanna Partners, G.P. and Susquehanna International Group, LLP (collectively "SIG"). SIG is engaged in the business of trading products tied to underlying securities. SIG acts as a market maker and trades on all major securities exchanges around the world. The plaintiffs sought to invalidate certain restrictions contained in their employment agreements with SIG that purported to restrict their ability to associate with each other and to trade certain securities products following termination of their employment with SIG.

SIG counterclaimed against the plaintiffs and brought claims against third party defendants TABFG, LLC, NT Prop Trading LLC ("NT Prop"), and Richard Pfeil. SIG contends that the plaintiffs are attempting to utilize a confidential trading strategy developed by Wisniewski while he was employed by SIG. SIG alleges that Fishkin and Chernomzav formed TABFG as a vehicle to conduct business using the confidential trading strategy, and TABFG entered into a joint venture with NT Prop whereby NT Prop agreed to provide up to \$4.5 million in capital in exchange for a share of TABFG's profits from its trading activities. NT Prop is co-owned by NT Financial Group LLC and Pfeil Commodity Fund LLC.

NT Prop and Richard Pfeil filed a notice of removal to this court on June 23, 2003. They then filed a motion to transfer venue to the Northern District of Illinois and to dismiss for lack of personal jurisdiction. SIG filed a motion for a preliminary injunction. The Honorable James McGirr Kelly issued a Memorandum and Order on September 16, 2003, granting SIG's request for preliminary relief to enforce the restrictive covenants contained in the plaintiffs' employment agreements. The case was reassigned to this Judge on March 16, 2005. The Court decides here the motions to dismiss and transfer of NT Prop and Richard Pfeil.

I. Motion to Dismiss For Lack of Personal Jurisdiction

Rule 4(e) of the Federal Rules of Civil Procedure gives a federal district court personal jurisdiction over non-resident defendants to the extent permissible under the state law of the jurisdiction where the court sits. Pennsylvania has a so-called long-arm statute. It provides in relevant part:

(b) Exercise of full constitutional power over non-residents. - In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) 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.C.S.A. § 5322(b). This statute reaches as far as the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits. Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984).

We first consider whether the third party defendants had minimum contacts with Pennsylvania "such that [the defendants] should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). "[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

There are two independent bases for the exercise of personal jurisdiction: general and specific. See, e.g., 42 Pa. C.S.A. §§ 5301, 5322. General jurisdiction is not applicable here. A defendant is subject to the specific jurisdiction of the court when the events giving rise to the cause of action are related to the forum state and the defendant has the necessary minimum contacts with the forum state. Id. at 414 n. 8.

If minimum contacts are present, the Court then looks to see whether the district court's exercise of personal jurisdiction over the third party defendants "accords with the notions of 'fair play and substantial justice.'" Mesalic v. Fiberfloat Corp., 897 F.2d 696, 701 (3d Cir. 1990) (quoting Int'l Shoe, 326 U.S. at 316)).

Judge Kelly ordered that discovery could be taken on the issue of personal jurisdiction. SIG relies on the following facts to establish personal jurisdiction over NT Prop and Pfeil. These facts are supported by the record.

In late 2002, Fishkin began to explore the possibility of obtaining the necessary capital to form his own trading company. In December 2002, Fishkin had a dinner meeting with Larry Nocek. Fishkin Dep. at 170-171. Nocek owned 42% of the shares of NT Financial Group. Nocek Dep. at 27-28.

At the meeting, Fishkin explained to Nocek that he and Wisniewski were currently under contract with SIG. Fishkin

stated that he could begin working for Nocek in March 2003, at the end of his contract. Fishkin Dep. at 170-171. Fishkin told Nocek, however, that:

there are these restrictive covenants in my contract that it's going to take some legal fees. We're going to have to hire some attorneys to deal with that. Id.

Fishkin further explained that it would take "even more fees to deal with" Wisniewski because Wisniewski had recently resigned a contract with such a covenant. Id. Fishkin further testified about the conversation with Nocek:

Fishkin: And we said, you know, you understand that we're going to want you to help us bear those costs when the time comes if we are to agree to work with you.

Question: What was their response?

Fishkin: Yes, we understand. Id.

During the next two months following the December meeting with Nocek, Fishkin's Chicago attorneys, Freeborn & Peters, generated over \$36,000.00 in legal fees working on a "contract" matter. SIG Mem. in Opp. Ex. C. Counsel spent this time working, at least in part, on how the TABFG principals could get out of their contracts with SIG. SIG Mem. in Opp. Ex. C; Fishkin Dep. at 127. In February 2003, Fishkin and Wisniewski met with "NT representatives" to begin negotiating the terms of a joint venture. NT Prop Motion to Transfer Venue Ex. F.

By March 2003, Freeborn & Peters accumulated an additional \$25,671.00 in legal fees for a different matter

described as "Susquehanna Investment Group." SIG Mem. in Opp. Ex. C. These fees are related, at least in part, to the filing of this litigation on March 31, 2003. SIG Mem. in Opp. Ex. H.

The SIG employees' employment agreements - the same contracts which contained the restrictive covenants that Fishkin revealed to Nocek at their initial meeting and for which Nocek agreed to pay legal fees to resolve - contained forum selection and choice of law clauses requiring that any litigation for injunctive relief or equitable remedies be brought in Pennsylvania and be governed by Pennsylvania law.¹ The three employees initiated this litigation against SIG by filing a complaint in the Court of Common Pleas, Montgomery County, Pennsylvania, seeking a declaratory judgment that the restrictive covenants in their employment agreements were void and unenforceable. NT Prop Motion to Transfer Venue Ex. C.

¹ The employment agreements with SIG contained forum selection clauses stating (1) that any dispute involving injunctive relief or other equitable remedies had to be brought in "any state or federal court located in Montgomery County, Pennsylvania," (2) that in any such action the employees "agree that such courts shall have personal jurisdiction over each of them in connection with such action or proceeding," and (3) that in any such proceeding they "waive, to the fullest extent each may effectively do so, the defense or argument of an inconvenient forum or improper venue" The same provision is in the employment agreements between SIG and each of Fishkin, Chernomzav and Wisniewski. See, e.g., NT Prop Motion to Transfer Venue Ex. A at ¶ 19(c). The same agreements also called for disputes to be governed by Pennsylvania law. See id. at ¶19(a).

In April 2003, Nocek approached Richard Pfeil about investing in the proposed joint venture to fund "some great traders . . . looking for seed money." Pfeil Dep. at 6-8. Pfeil told Nocek to talk to Pfeil's attorney, William Anthony. Id. Anthony, who had been Pfeil's attorney for approximately two years, then formed NT Prop, an Illinois limited liability company. Anthony Dep. at 5-6. Pfeil drafted the operating agreement for NT Prop, and Nocek was named as the manager. SIG Mem. in Opp. Ex. F. NT Prop would be owned 50% by NT Financial Group LLC and 50% by Pfeil Commodity Fund LLC. Nocek Dep. at 12-13. Pfeil's company made an initial investment in NT Prop of \$1 million, followed approximately one month later by an additional investment of \$1 million. Pfeil Dep. at 9. Pfeil asked Anthony to manage Pfeil's investment in NT Prop. Id. at 8-9.

NT Prop then entered into a joint venture agreement with TABFG. On behalf of NT Prop, Nocek and Anthony signed a Joint Venture Term Sheet that had been prepared by Freeborn & Peters. SIG Mem. in Opp. Ex. G; Anthony Dep. at 6-7. Anthony participated in negotiations with TABFG's counsel and reviewed the terms of the agreement on behalf of Pfeil Commodity and NT Prop. Anthony Dep. at 6-7.

NT Prop never engaged in any business other than what it did in connection with that joint venture. Nocek Dep. at 10. The Term Sheet is dated "as of" April 23, 2003. SIG Mem. in Opp.

Ex. G. at 1. It calls for NT Prop to receive up to 50% of the net trading profits in exchange for committing to an investment of up to \$4.5 million. Id. at 2, 4-5.

In addition to committing to the \$4.5 million investment, NT Prop also agreed to pay a share of "the costs incurred by TABFG and/or its principals in connection with termination of their previous employment relationship" Id. at 3. NT Prop and TABFG agreed to "equally bear" the cost of attorney's fees up to \$250,000 and any "payments made [by] TABFG and/or its principals to their previous employer" up to \$450,000. Id. The parties further agreed that TABFG would direct its counsel to provide NT Prop counsel with "copies of the pleadings file and billing records regarding the *employment litigation*." Id. at 3-4 (emphasis added).

During the negotiation and drafting of the Term Sheet, Anthony asked TABFG's counsel about the previous "employment relationship" involving the TABFG principals. He was told by their attorney that they were subject to some employment covenants which their attorney thought were invalid. Anthony Dep. at 8-10.

In May 2003, the month after the Joint Venture Term Sheet was signed, Fishkin began providing NT Prop with copies of his legal bills dating back to January 2003. SIG Mem. in Opp. Ex. H at 3. The bills were from TABFG's Chicago counsel,

Freeborn & Peters, as well as Conrad O'Brien Gellman & Rohn, a Philadelphia-based law firm which has served as co-counsel for the former SIG employees in relation to this lawsuit. Id. The bills generated up to that point show time spent by Freeborn & Peters conferring with "local counsel in Philadelphia." SIG Mem. in Opp. Ex. C.

In addition to the fact that the Joint Venture Term Sheet which Anthony and Nocek signed in April 2003 referred to the "pleadings file and billing records regarding the employment litigation," Anthony knew that the former SIG employees had commenced litigation in Pennsylvania after reviewing invoices from the law firms. Anthony Dep. at 25. Anthony testified that "I may have heard about litigation in May. Observing the invoices, I would have had a strong inference that there was litigation existing." Anthony Dep. at 22.

After seeing the invoices, Anthony asked the Freeborn & Peters attorneys about the litigation and learned that it "was a declaratory judgment action addressing the employment covenants and employment agreements that at least some of the individuals had signed." Id. at 25-26. After learning that the former SIG employees had commenced litigation against SIG in Pennsylvania, NT Prop reimbursed TABFG for legal fees incurred in connection with the litigation. Anthony Dep. at 18-19. As a NT Prop manager and the person responsible for managing Pfeil's

investment, Anthony monitored these disbursements from the NT Prop account. Id.

The Court is persuaded that the above facts support the exercise of personal jurisdiction over NT Prop but not over Richard Pfeil. I will, therefore, grant the motion to dismiss filed by Pfeil and deny the motion to dismiss filed by NT Prop.

SIG alleges that NT Prop tortiously interfered with the contractual obligations of SIG's former employees to abide by the restrictive covenants. NT Prop purposely availed itself of the protection of the Pennsylvania court system to litigate the validity of the restrictive covenants with which NT Prop allegedly interfered. NT Prop did so by entering into a joint venture with SIG's former employees, knowing that the viability of the venture depended on the former employees either violating or voiding through litigation the restrictive covenants they had with their former employer. NT Prop agreed to pay for such litigation.

Under these circumstances, NT Prop could foresee being haled into the same court in which it was seeking a ruling that the restrictive covenants were invalid. Exercising personal jurisdiction over NT Prop is consistent with notions of fair play and substantial justice.

The Court has a different view with respect to Richard Pfeil. Pfeil did not enter into a joint venture agreement with

TABFG. Nor is he an owner of NT Prop; Pfeil Commodity Fund LLC is a co-owner. Under these circumstances, the exercise of personal jurisdiction over Pfeil would not comport with constitutional requirements.

II. Motion to Transfer

NT Prop also filed a motion to transfer this case to the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a). The Court will deny the motion.

This case was filed in Pennsylvania by persons who entered into a joint venture with NT Prop. The success of that joint venture was dependent on the success of the Pennsylvania lawsuit. NT Prop's argument, therefore, that Pennsylvania is an inconvenient forum is unpersuasive.

In addition, SIG has stated in opposition to the motion that its lawyers have already traveled to Chicago to take depositions on the jurisdiction issue and are willing to return to Chicago to take depositions on the merits.

Finally, the original plaintiffs and SIG agreed by contract that this litigation would take place in Pennsylvania and should be governed by Pennsylvania law. The case will remain here.

An appropriate Order follows.

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Additional Counterclaim :
Defendants : NO. 03-3766

ORDER

AND NOW, this 2nd day of May, 2005, upon consideration of Third-Party Defendants NT Prop Trading LLC's and Richard Pfeil's (collectively "Third-Party Defendants") Motion to Transfer Venue to the Northern District of Illinois (Docket No. 4), Third-Party Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) (Docket No. 11), Counterclaim Plaintiff Susquehanna International Group, LLP's ("SIG") Response thereto, Third-Party Defendants' Reply thereto, and SIG's Sur-reply thereto, and for the reasons stated in a memorandum of today's date, IT IS HEREBY ORDERED that:

- A. Third-Party Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) (Doc. No. 11) is granted in part and denied in part. IT IS FURTHER ORDERED that the motion to dismiss of Richard Pfeil is

GRANTED, and the motion to dismiss of NT Prop Trading
LLC is DENIED; and

- B. Third-Party Defendants' Motion to Transfer Venue to the
Northern District of Illinois (Doc. No. 4) is DENIED.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.