

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

M. FREDERICK PIERCE, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
HAYWARD INDUSTRIES, INC., et al.	:	NO. 05-5322

Norma L. Shapiro, S.J.

April 4, 2006

MEMORANDUM AND ORDER

Before the court is a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction filed by Edwards and West, Inc. d/b/a Divspec (“Divspec”). This action was originally brought in the Court of Common Pleas, Philadelphia County and subsequently removed to this court. The defendant’s motion to dismiss for lack of personal jurisdiction is dismissed without prejudice.

I. Background

This action arises as a result of a pool filter explosion on May 22, 2004. The accident at the residence of the plaintiff, M. Frederick Pierce, at Malvern, Pennsylvania, seriously injured him. Divspec is a wholesale supplier of hardware operating out of New Jersey and North Carolina. Pierce alleges that Divspec is liable for damages because its defective washers and retainer rods used in the construction of the pool filter are at least partially the cause of the explosion.

It is alleged that Divspec sells washers and retainer rods to the manufacturer of the pool filter, Hayward Industries, a New Jersey corporation. The pool filters are then sold to distributors across the country, including distributors in Pennsylvania. Divspec, in addition to selling component parts for pool filters, sells a small amount of hardware directly into Pennsylvania. According to an affidavit by the President of Divspec, direct sales in Pennsylvania were less than 1% of Divspec's total sales in 2004 (\$4,188) and through mid-October in 2005 (\$2,156). There is no other alleged connection between Divspec and Pennsylvania.

II. Discussion

A. Standard of Review

Once a defendant asserts a lack of personal jurisdiction the burden to prove otherwise is on the plaintiff. Provident Nat. Bank v. California Fed. Sav. & Loan, Inc., 819 F.2d 434, 437 (3d Cir. 1987). To satisfy this burden a plaintiff must provide evidence "establishing with reasonable particularity sufficient contacts between the defendant and the forum state." Mellon Bank (East) PSFS v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). Any factual dispute must be construed in favor of the plaintiff. Toys "R" Us, Inc., v. Step Two, S.A., 318 F.3d 446, 457 (3d Cir. 2003).

A federal court exercises personal jurisdiction to the extent authorized by the state's long-arm statute. See Fed. R. Civ. P. 4(e). Pennsylvania's statute extends jurisdiction to the fullest extent allowable under the Constitution, 42 Pa.Cons.Stat. Ann. § 5322(b) (1981), so the question is whether the exercise of personal jurisdiction over Divspec is constitutional. See Mellon Bank, 960 F.2d at 1221. Constitutional jurisdiction can be established two different ways: specific jurisdiction and general jurisdiction. See Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414-16 (1984). General jurisdiction does not require the defendant's contacts with the

forum state to be related to the underlying cause of action. Id. at 416. The defendant's contacts with the forum state, however, must be "continuous and systematic." Id. Specific jurisdiction is established when the basis of the "plaintiff's claim is related to or arises out of the defendant's contacts with the forum." Pennzoil Prods. Co. v. Colelli & Assocs, Inc., 149 F.3d 197, 201 (3d Cir. 1998) (citations omitted).

B. General Jurisdiction

Whether the plaintiff can establish general jurisdiction depends on whether Divspec has carried out continuous and systematic business within Pennsylvania. See Helicopteros, 466 U.S. at 416; Provident, 819 F.2d at 437. There are numerous factors courts have used to assess the level of contacts, including the maintenance of offices, assets or employees within the forum state as well as direct advertising and sales into the forum state. See Hlavac v. DGG Props., 2005 WL 839158, at *3 (E.D. Pa. Apr. 8, 2005); see also Corporate Aviation Concepts, Inc. v. Multiservice, 2003 WL 22794693, at *3 (E.D. Pa. Nov. 13, 2003) (listing factors). Where the defendant conducts some business in the forum state, the percentage of defendant's business conducted in the forum state is not necessarily dispositive. See Provident, 819 F.2d at 437-38; see also Brown v. AST Sports Science, Inc., 2002 WL 32345935, at *7 (E.D. Pa. June 28, 2002); Driscoll v. Matt Blatt Auto Sales, 1996 WL 156366, at *5 (E.D. Pa. April 3, 1996). The amount of business conducted in the state is less important than the nature of defendant's business in the state, that is, whether the business dealings are central to the defendant's business and how frequently such dealings occur. See Provident, 819 F.2d at 438; Modern Mailers, Inc. v. Johnson & Quin, Inc., 844 F. Supp 1048, 1053-54 (E.D. Pa. 1994).

In Provident, the defendant was a California bank that held less than 1% of its deposits

from, and issued less than 1% of its loans to, Pennsylvania residents. 819 F.2d at 436. The crucial contact was defendant's maintenance of a "controlled disbursement account" at a Pennsylvania bank, with a daily accounting of monies. Id. at 438. The court found that this "constituted a substantial, ongoing, and systematic activity in Pennsylvania," because it was a central part of the defendant's business. Id.

In contrast, the court in Modern Mailers found that general jurisdiction could not be established in the case of an Illinois company whose contact with Pennsylvania was limited to \$231,000 in direct sales, less than 1% of its business. 844 F. Supp at 1054. The court distinguished the facts of that case from Provident because the small amount of direct sales involved was not central to defendant's business and did not involve continuous regular contact. Id. The court held the volume of sales was not "substantial" or "continuous and systematic business." Id.

Pierce argues there is general jurisdiction because of the direct sales Divspec makes into Pennsylvania. There is no evidence that Divspec has any other business connection to Pennsylvania. Divspec admits the direct sales and provides data showing the percentage of business conducted in Pennsylvania was less than 1% in 2004 and less than 1% through mid-October in 2005. As in Modern Mailers, such sales alone do not establish a systematic and continuous carrying on of business. Without showing that this small amount of business was routine and central to the defendant's business, as in Provident, Divspec was not carrying on continuous and systematic contacts in Pennsylvania. See Provident, 819 F.2d at 437.

C. Specific Jurisdiction

The plaintiff also alleges this court has specific jurisdiction over Divspec because the

explosion of the pool filter arises from Divspec's sale of defective washers and retainer rods that entered Pennsylvania through the stream of commerce. In deciding whether specific personal jurisdiction can be asserted successfully the court must first determine whether the defendant has established sufficient minimum contacts with the forum state so that the defendant should reasonably anticipate being hauled into court there. Pennzoil, 149 F.3d at 201; see World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). This requires a fact-sensitive approach. Pennzoil, 149 F.3d at 203. If such minimum contacts have been established, the court may consider whether the exercise of jurisdiction comports with "traditional conception[s] of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). This second step is discretionary. See Pennzoil, 149 F.3d at 201.

A defendant may create the minimum contacts necessary for a court to assert specific jurisdiction by placing a product into the "stream of commerce," which through a chain of distribution finds its way into the forum state. See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Renner v. Lanard Toys Ltd., 33 F.3d 277, 279 (3d Cir. 1994). The Supreme Court in Asahi announced three separate approaches. Justice O'Connor found that additional factors in addition to a product reaching the forum state through the stream of commerce are necessary to establish personal jurisdiction. Such additional factors include any conduct that shows an intent to serve the market in the forum state. Id. at 112 (O'Connor, J., plurality opinion). Justice Brennan stated that awareness the final product is marketed in the forum state in the "regular and anticipated flow of products" is sufficient. Id. at 117 (Brennan, J., concurring). Justice Stevens would require a determination of the volume, value and hazardous nature of the goods entering into the forum state. Id. at 122 (Stevens, J., concurring).

The Third Circuit has not yet adopted any of the three stream of commerce tests announced in Asahi. See Pennzoil, 149 F.3d at 205; Renner, 33 F.3d at 281-82; Affatato v. Hazet-Werk, 2003 WL 22797786 (E.D. Pa. Nov. 19, 2003). Regardless of this uncertainty, the defendant must have engaged in some form of “purposeful availment” of the forum state. Pennzoil, 149 F.3d at 203; Renner, 33 F.3d at 282 (citing Burger King, 471 U.S. at 475). Mere foreseeability that the defendant’s products may end up in the forum state is not sufficient for “stream of commerce” jurisdiction. Pennzoil, 149 F.3d at 203.

In Pennzoil, the plaintiff, a Pennsylvania oil refinery, alleged that a solvent produced by the defendant, an Ohio company, and sold to oil producers in Ohio tainted the crude oil that was subsequently sold to the plaintiff and damaged its refinery. The court found three facts important to its analysis: (1) sixty percent of two grades of oil was sold to Pennsylvania refineries; (2) defendant knew the oil was going to a Pennsylvania refinery; and (3) defendant sent solvent samples to a lab, to design a product for the Pennsylvania market. Id. at 206. The Third Circuit found these facts established “purposeful availment” and satisfied all three “stream of commerce” tests announced in Asahi. Id. at 206-07.

The Third Circuit reached the opposite conclusion in Renner, 33 F.3d at 282-83, where plaintiff was injured when a toy purchased in Pennsylvania exploded. The defendant, a Hong Kong toy manufacturer, sold its toys to distributors F.O.B. Hong Kong and had no direct connection with Pennsylvania other than that its toys entered the state through the stream of commerce. The court found the mere fact that the defendant’s toys were sold in Pennsylvania did not show “purposeful availment” of the state’s market. The court viewing the record as ambiguous, remanded to allow further discovery.

The fact pattern here is more similar to Renner than Pennzoil. Although Divspec has some contact with Pennsylvania unrelated to this action, i.e., the direct sales, plaintiff only alleges that Divspec's washers and retainer rods entered Pennsylvania through a chain of distribution and that Divspec was aware of this. This fact alone is insufficient to exercise personal jurisdiction under any of the three stream of commerce tests announced in Asahi.

It does not appear there is any conduct that shows an intent by Divspec to service the Pennsylvania market. Here, the plaintiff claims the defendant knows or should know that its components reach Pennsylvania, but there is no evidence of the regularity of these component parts in the pool filter at issue reaching Pennsylvania. Last, the plaintiff has not alleged sufficient facts as to the volume and value of Divspec's washers and retainer rods reaching Pennsylvania through incorporation into Hayward pool filters.

The plaintiff has not established sufficient minimum contacts for the exercise of specific jurisdiction so it is not necessary to discuss whether exercising personal jurisdiction would comport with traditional notions of fair play and substantial justice.

D. Jurisdictional Discovery

Plaintiff has asked in the alternative that the defendant's motion be denied to allow jurisdictional discovery. Whether or not a plaintiff has sufficiently established minimum contacts, a trial court may deny a motion to dismiss for lack of personal jurisdiction in order to allow further discovery. See Toys "R" Us, 318 F.3d at 456; Renner, 33 F.3d at 283-84. Such jurisdictional discovery should be allowed for any non-frivolous claims. See Toys "R" Us, 318 F.3d at 456; Nehemiah v. Athletics Cong. of U.S.A., 765 F.2d 42, 48 (3d Cir. 1985); Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances, 723 F.2d 357, 362 (3d Cir. 1983). A plaintiff

is “entitled to conduct discovery into jurisdictional facts,” rather than accept a defendant’s “analysis of the facts without a chance to probe further.” Renner, 33 F.3d at 283 (3d Cir. 1994); see Oeschle v. Pro-Tech Power, Inc., 2006 WL 680908, at *6 (E.D. Pa. Mar. 15, 2006).

In Renner, the Third Circuit found the record ambiguous as to whether the defendant toy manufacturer purposely availed itself of the Pennsylvania market by intentionally marketing and/or designing its toys for the Pennsylvania market. 33 F.3d at 283-84. Finding the record incomplete, the court remanded to allow further jurisdictional discovery. Id. at 284.

Plaintiff has asked that the defendant’s motion be denied in order to conduct jurisdictional discovery on the number of customers located in Pennsylvania, the extent of Divspec’s business dealing with Hayward Industries and other customers in Pennsylvania and Divspec’s purposeful availment of the Pennsylvania market. Discovery may provide information on the nature and volume of Divspec’s placement of washers and retainer rods into the stream of commerce that eventually leads to Pennsylvania. See id. at 284.

III. Conclusion

For the reasons discussed above, Divspec’s motion to dismiss for lack of personal jurisdiction is denied without prejudice to allow limited expedited jurisdictional discovery regarding the defendant’s purposeful availment of the Pennsylvania market. An appropriate Order follows.

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ORDER

AND NOW, this 4th day of April, 2006, upon consideration of Edwards & West, Inc.'s Motion To Dismiss for Lack of Jurisdiction and the plaintiff's response thereto, it is **ORDERED** that:

1. Edwards & West, Inc.'s Motion To Dismiss for Lack of Jurisdiction (Paper # 98) is **DENIED WITHOUT PREJUDICE.**
2. Limited expedited jurisdictional discovery shall be completed on or before **May 19, 2006.**
3. Edward & West, Inc. may renew its motion on or before **May 19, 2006.**
4. Plaintiffs's response, if any, shall be filed on or before **June 2, 2006.**

/s/ Norma L. Shapiro

Norma L. Shapiro, S.J.