

**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.

November 6, 2006

MEMORANDUM AND ORDER

Defendant Alger Manufacturing Comany (“Alger”) has moved to dismiss plaintiffs’ complaint under Fed.R.Civ.P. 12(b)(2) for lack of personal jurisdiction. Alger’s previous motion to dismiss on the same grounds was denied without prejudice, so that plaintiffs could take limited discovery on the question of jurisdiction. Alger renewed its motion to dismiss after the completion of that discovery. Alger’s motion will be granted because plaintiffs have not established sufficient contacts with the Commonwealth of Pennsylvania or demonstrated that Alger carries on continuous and systematic business within the state.

I. Facts

On May 22, 2004, plaintiff M. Frederick Pierce was seriously injured at his residence in Malvern, Pennsylvania when his pool filter violently exploded in his face while he was performing required annual maintenance work. The pool filter was manufactured by Alger’s co-defendant Hayward Industries, Inc. Alger is a manufacturer of precision machined products, including a brass sleeve nut that was incorporated in the Hayward pool filter.

Alger is not a Pennsylvania corporation. It is incorporated under the laws of the State of California, and its principal place of business is located in Ontario, California. (Affidavit of Duane Femrite, Chairman of the Board and Chief Executive Officer of Alger, Exhibit 1 to Alger's Motion (the "Femrite Affidavit"), ¶2). Alger does not own, use or possess any real property within Pennsylvania; it does not pay business or other taxes to Pennsylvania; it does not maintain any offices, or have any agents or employees, located within the Commonwealth. (Femrite Affidavit, ¶¶ 6, 8, 9, 10). It has not consented to the jurisdiction of any Pennsylvania court. (Femrite Affidavit, ¶13).

Alger has had sporadic business contacts with Pennsylvania over the years. A review of Alger's sales from 1999 through 2006 showed four sales to a Pennsylvania company, with the last one made in 2001. These sales totaled \$2,156.93, or approximately 0.001% of Alger's total sales during that period. (Second Femrite Affidavit, Exhibit C to Alger's Motion, ¶6).

The allegedly defective brass sleeve nut, manufactured by Alger and then incorporated in the Hayward filter, was not sold to Hayward in Pennsylvania. Alger maintains, and Pierce does not dispute, that all brass sleeve nuts sold by Alger to Hayward were shipped to Hayward's facilities in California or North Carolina, not to Pennsylvania. (Femrite Affidavit, ¶17; James Hemingway, N.T.41, Exhibit E to Alger's motion). There is no evidence that Alger knew, at the time it supplied brass sleeve nuts to Hayward in California in 1998 (when the pool filter was manufactured) that Hayward distributed products in all 50 states. (Stipulation of Counsel, ¶2).

During the seven year period from 1999 to 2006, Alger made fifty-eight purchases of goods or services from Pennsylvania totaling \$149,303, or approximately \$22,000 per year. These purchases amounted to 0.082% of Alger's total sales during that period. (See Femrite

Affidavit ¶8 and Exhibit D to Alger's Motion). Alger did not directly purchase metal used to manufacture the brass sleeve nuts for Hayward from any Pennsylvania vendor. (Stipulation of Counsel, ¶1).

In addition to these sales and purchases of products, Alger maintains a website, www.alger1.com, that is available to Pennsylvania residents. The website was not used to buy or sell the sleeve nut at issue. It enables users to learn information about the company and to click on a map of Pennsylvania, from which they are then referred to the phone number of an Alger sales representative in California. The website lists sales representatives dedicated to at least 20 states other than Pennsylvania but none for Pennsylvania. Pennsylvania residents can view products offered by Alger and electronically submit prints of specific parts sought to be purchased. They can also apply for employment with Alger online, with a free gift promised for doing so. Products cannot be ordered online and communication can only be initiated through an email link.

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 establish 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).

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), so the question is whether the exercise of personal jurisdiction over Alger 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). 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 Products Co. v. Colelli & Assoc., Inc., 149 F.3d 197, 201 (3d Cir. 1998) (citations omitted). General jurisdiction does not require the defendant’s contacts with the forum state to be related to the underlying cause of action, Helicopteros, 466 U.S. at 414, but the contacts must have been “continuous and systematic.” Id at 416.

Alger contends that Pierce has not met its burden to establish either kind of jurisdiction.

B. Specific Jurisdiction

The Pennsylvania Long Arm statute, 42 Pa. C.S.A. § 5322, provides that specific jurisdiction can be exercised over a defendant who “transact[s] any business” in Pennsylvania or “caus[ed] harm or tortious injury in [Pennsylvania] by an act or omission outside of [Pennsylvania].” In deciding whether specific personal jurisdiction is appropriate, a court must first determine whether the defendant had the minimum contacts with the forum necessary to have reasonably anticipated being haled into court there. Pennzoil, 149 F.3d at 201, citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). Second, assuming minimum contacts have been established, a court may inquire whether the assertion of personal jurisdiction would comport with traditional conceptions of fair play and substantial justice. Pennzoil, 149 F.3d at 201, citing Burger King Corporation v. Rudzewicz, 471 U.S. 462, 476 (1985);

International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). The first step is mandatory but the second step is discretionary. See Pennzoil, 149 F.3d at 201.

In addition to direct sales of products into a forum state, 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). In its plurality opinion, the Supreme Court in Asahi proposed three separate tests for establishing stream of commerce jurisdiction. One test is whether any conduct by a defendant shows an intent to serve the market in the forum state. Id. at 112 (O’Connor, J.). A second test requires demonstration of an awareness that the final product is marketed in the forum state in the “regular and anticipated flow of products” . Id. at 117 (Brennan, J., concurring). A third test would evaluate the volume, value and hazardous nature of the goods entering the forum state. Id. at 122 (Stevens, J., concurring).

Our Court of Appeals 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). However, it has made clear that a defendant must have engaged in some form of “purposeful availment” of the laws of the forum state. Cf. Pennzoil, 149 F.3d at 207 (purposeful availment found where defendant sold sixty percent of two grades of oil to Pennsylvania refineries; defendant knew the oil was going to Pennsylvania; and defendant was designing a product for the Pennsylvania market); with Renner, 33 F.3d at 283 (no purposeful availment by Hong Kong toy manufacturer in merely placing

product, F.O.B. Hong Kong, into the stream of commerce).¹

Pierce argues that specific jurisdiction under the “stream of commerce” theory is present because (1) component parts Alger sold to Hayward were incorporated in the Hayward pool filter; (2) Hayward is an international corporation making regular sales in Pennsylvania (3) Hayward has authorized dealers in Pennsylvania; (4) Hayward has sales in excess of \$500 million and over 1,500 employees; and (5) Hayward products are marketed worldwide. Pierce concedes there is no evidence that Alger knew, at the time it supplied the brass sleeve nut to Hayward, that Hayward distributed its products to all 50 states (Stipulation, ¶2). The facts cited by Pierce may establish personal jurisdiction over Hayward because of its distribution of products in Pennsylvania, but they are not sufficient to establish jurisdiction over Alger. 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. The defendant must have demonstrated some “purposeful availment” of the laws of the forum state. Id.

No such purposeful availment has been shown here. The sleeve nut in question was not sold in Pennsylvania, and no other Alger sleeve nuts were sold to Pennsylvania businesses. Alger’s other sales to Pennsylvania were very insignificant and sporadic. Although Alger’s sleeve nuts, after incorporation in Hayward’s products, entered Pennsylvania through a chain of distribution, this fact alone is insufficient to exercise personal jurisdiction under any of the three stream of commerce tests announced in Asahi. Apart from its website, Alger did not exhibit any conduct showing an intent to service the Pennsylvania market. There was no evidence of the

¹The Court of Appeals in Renner found the record regarding “purposeful availment” was ambiguous and remanded for further proceedings. 33 F.3d at 284.

regularity of Alger's sleeve nut in Hayward's filters reaching Pennsylvania. There was no evidence of the volume and value of Alger's sleeve nuts reaching Pennsylvania through incorporation in Hayward pool filters. The sleeve nut was not hazardous by nature. Pierce has not established sufficient minimum contacts with Pennsylvania to show that it could have reasonably anticipated being sued here or that any of the three Asahi tests for the exercise of specific jurisdiction have been met.

C. General Jurisdiction

Pursuant to Pa. C.S.A. § 5301(2), general jurisdiction can be exercised over a corporation in Pennsylvania if the corporation: (a) is incorporated in Pennsylvania; or (b) has consented to jurisdiction; or (c) carries on a continuous or systematic part of its general business in Pennsylvania. Whether Pierce can establish general jurisdiction depends on whether Alger has carried out continuous and systematic business within Pennsylvania. See Helicopteros, 466 U.S. at 416; Provident, 819 F.2d at 437. Numerous factors are used to assess the level of contacts, including the maintenance of offices, location of assets or employees within the forum state, as well as direct advertising and sales in 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). 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. Cf. Provident, 819 F.2d at 438 (California bank's maintenance of controlled disbursement account at a Pennsylvania bank, with daily accounting of monies, constituted "substantial, ongoing, and systematic activity in Pennsylvania," because it was a

central part of the defendant's business, even though less than 1% of defendant's loans and deposits originated in Pennsylvania); with Modern Mailers, Inc. v. Johnson & Quin, Inc., 844 F. Supp 1048, 1053-54 (E.D. Pa. 1994) (\$231,000 of direct sales to Pennsylvania, less than 1% of Illinois company's sales, was not sufficient to establish jurisdiction because the sales were not central to defendant's business and did not involve substantial continuous regular contact).

Pierce concedes that Alger's sales to Pennsylvania are de minimis (Pierce Response, Brief at 14), so it does not rest its claim to jurisdiction on such sales. Pierce instead contends that Alger carries on a "continuous and systematic part of its business" in Pennsylvania by its purchases of raw materials from Pennsylvania vendors and by its maintenance of an interactive website.

a. Purchases of Products

Alger's purchases from Pennsylvania vendors totaled only \$149,303, less than \$22,000 per year or 0.082% of Alger's cumulative sales during that period. Pierce counters that in 2001 alone, Alger purchased 109,000 pounds of raw brass from Pennsylvania vendors. This may seem like a large quantity without context, but Alger's website declares purchases of 10,000,000 pounds of raw materials annually, so the Pennsylvania purchases would constitute only 1% of total annual purchases. Even if there were a significantly larger volume, "mere purchases, even if occurring at regular intervals, are not enough to warrant a state's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." Helicopteros, 466 U.S. at 418 (Columbian corporation's purchases of 80% of its helicopters from Texas and \$4,000,000 worth of parts did not constitute systematic and

continuous contacts necessary to establish general personal jurisdiction).²

b. Alger's Website

Pierce also contends that Alger's website demonstrates its continuous and systematic business operations in Pennsylvania. There is no allegation that the brass used in the allegedly defective sleeve nut was purchased over the internet or that the sleeve nut was sold via the internet so that the exercise of specific jurisdiction would be appropriate. The website is relevant only if it demonstrates evidence of sufficient continuous business to establish general jurisdiction over Alger.

Since the advent of the internet, which allows easy communications, commerce, and general transactions across state lines, courts have struggled to address jurisdictional issues arising from these electronic activities. To the extent that a direct solicitation or contractual agreement sent via email directly leads to a civil action, jurisdiction is readily exercised. Actions involving domain names that infringe on trademarks, or companies that offer purely (or primarily) internet-based services are also straightforward; jurisdiction and interstate activities are central to the case, so the exercise of specific jurisdiction is warranted. In personal injury cases, plaintiffs have attempted to assert general personal jurisdiction over non-resident defendants based solely on the existence of a defendant's website having nothing to do with the alleged injury. Because a website is always available, it is likened to "continuous and systematic" activity in the forum state.

²The Helicopteros holding was limited to foreign corporations, but the Supreme Court relied on, and did not overrule, the previous case of Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923) (Brandeis, J.), in which purchases and related trips were deemed insufficient to support personal jurisdiction.

A leading case regarding personal jurisdiction based on a website is Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997), in which the district court established a sliding scale test, with personal jurisdiction found to be appropriate if a website was “interactive” but not if the website was “passive”. In Zippo, a manufacturer of lighters had sued a California company for trademark infringement after it registered a series of domain names that included the plaintiff’s trademark. The defendant used the domain names in its website newsgroup postings. The court held that personal jurisdiction was proper because the California company had about 3,000 Pennsylvania subscribers who regularly downloaded messages containing the purported trademark infringements. Purposeful availment was established by the processing of applications from Pennsylvania residents and the assignment of passwords to the web site. The alleged trademark infringements were deemed to have occurred in Pennsylvania when local residents viewed the site, and the state was found to have a substantial interest in protecting the trademarks of its residents.

Our Court of Appeals considered personal jurisdiction in another trademark case based on an infringing website in Toys “R” Us, 318 F.3d at 446. The Court discussed the “sliding scale” approach of Zippo and called it the “seminal authority” on these types of cases. Id. at 452. It held that “the mere operation of a commercially interactive web site should not subject the operation to jurisdiction anywhere in the world. Rather, there must be evidence that the defendant ‘purposefully availed’ itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its

web site, or through sufficient other related contacts.” Id. at 454. ³

While Zippo offers a simple test for courts to follow based on the level of website interactivity, interactivity is not the only consideration, especially in a personal injury case where the website is unrelated to the cause of action. See generally Dennis T. Yokoyama, You Can’t Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction, 54 DePaul L. Rev. 1147 (2005) (evaluating courts’ adoption of the Zippo test). Courts have shown a reluctance to exercise personal jurisdiction based solely on a website and have looked at interactivity along with other factors. Three Eastern District of Pennsylvania decisions are instructive.

In O’Connor v. Sandy Lane Hotel Co., 2005 WL 994617 (E.D. Pa. Apr. 28, 2005) (Joyner, J.), the court found that the defendant hotel in Barbados was not subject to general jurisdiction in a personal injury case despite the fact that it operated a website accessible to Pennsylvania residents. “[M]uch like an in-print advertising campaign, the website must either be ‘central’ to the defendant’s business in the forum state or specifically target residents of the forum state.” Id. at *3 (citing Snyder v. Dolphin Encounters, 235 F. Supp.2d 433, 440-41 (E.D. Pa. 2002)).

In Hlavac v. DGG Properties, 2005 WL 839158 (E.D. Pa. Apr. 8, 2005) (Yohn, J.), the defendant, a Connecticut resort, operated a website through which visitors could purchase gift certificates and inquire about reservations but not book online. Plaintiffs claimed they would not have chosen the resort but for the website. Using the Zippo test, the court determined that the

³Ultimately, the court determined that further discovery was necessary to determine whether there was purposeful availment. Id. at 455.

resort's website was not sufficiently interactive to justify general jurisdiction, and the ability to purchase gift certificates was insufficient because plaintiffs had not alleged any facts suggesting that gift certificates were "central to defendants' business." Id. at 6. The court also found the exercise of general jurisdiction to be inappropriate because the website was not designed specifically to reach customers in Pennsylvania. Id., citing Molnlycke Health Care AB v. Dumex Med. Surgical Prods., Ltd., 64 F. Supp. 2d 448 (E.D. Pa. 1999) and Toys "R" Us, 318 F.3d at 446.

In Snyder v. Dolphin Encounters Ltd., 235 F. Supp. 2d 433 (E.D. Pa. 2002) (Brody, J.), personal jurisdiction was found lacking over a Bahamian corporation despite the fact that it received 5% of its website information requests from Pennsylvania and 3% of its overall requests from Pennsylvania. The court reasoned that the contacts were "insufficient to comprise the continuous and systematic contacts necessary to establish personal jurisdiction." Id. at 438. Considering the Zippo formulation and citing Molnlycke, the court also found that the website was not sufficiently interactive to establish general jurisdiction, even though it included an on-site order form, an on-site "ask the trainer" form, an on-site souvenir order form, and an on-site page allowing correspondence with management personnel (accessed more than 1,400 times by Pennsylvania IP addresses). Id. at 440. The court found that the websites were not targeted specifically to Pennsylvanians and were not central to the defendant's business in Pennsylvania. Id. at 440-41. See also Horizon Aggressive Growth, L.P. v. Rothstein Kass, P.A., 421 F.3d 1162 (11th Cir. 2005) (requiring "connexity" between the out-of-state communications and the cause of action).

There is an understandable judicial reluctance to extend the traditional limits on the

exercise of personal jurisdiction over defendants based solely on a website accessible from the forum state. Whether the site is deemed not interactive enough, not targeted toward the forum state, not central to the defendant's business, or simply having no "connexity" to the cause of action, courts have resisted asserting general jurisdiction in these circumstances. Pierce's counsel contends that the decisions in Mar-Eco, Inc. v. T&R & Sons Towing & Recovery, Inc., 2003 Pa.Super. 444, 837 A.2d 512 (2003) and Gammino v. SBC Communs., Inc., 2005 U.S. Dist. LEXIS 5077 (E.D. Pa. March 29, 2005) support the exercise of jurisdiction based on Alger's website. Both of these cases are distinguishable. First, neither is a personal injury case.⁴ Second, using the Zippo analysis, both websites had elements of substantial interactivity. The website in Mar-Eco was highly interactive, as it enabled one to complete nearly an entire vehicle purchase transaction on the site; the Gammino website linked Pennsylvania residents to a subsidiary's highly interactive website, Cingular Wireless.

The Alger website is not highly interactive, and users can only initiate a communication through an email link or an online employment form. Users can click on a map of Pennsylvania, but they are then referred to the number of an Alger sales representative in California. A prospective employee can apply for a job online, and a free gift is promised to users who submit an application on line. Pierce makes much of a potential customer's ability to send prints over the internet, or the ability to apply for employment online, but there is no transaction, purchase or sale, that can be consummated by means of the website. Under the Zippo analysis, the website is not sufficiently interactive to support a finding of personal jurisdiction.

⁴Mar-Eco was an action for unjust enrichment against a Maryland motor vehicle dealer for failing to record timely the Pennsylvania dealer's interest in vehicles sold. Gammino was a patent infringement case.

In addition, there is no connection between the website and the cause of action here. The website does not demonstrate a “conscious choice to conduct business with the residents” of Pennsylvania and “intentionally interact with [Pennsylvanians] via the web site in order to show purposeful availment...” Toys “R” Us, 318 F.3d at 446. The website is not targeted specifically to reach Pennsylvanians and is not central to the defendants’s business in Pennsylvania. See Molyntycke Health Care, 64 F. Supp.2d at 448. No sales are conducted by means of the web. Users cannot link to a specific sales representative for Pennsylvania but are instead routed to an email link for Alger’s headquarters in California. The capabilities that are offered, *ie.*, the ability to send prints, view product lines and submit employment applications, are simply not enough to find that the exercise of personal jurisdiction is warranted. As Judge Brody stated, “[a] passive website that does little more than provide information is not grounds for the exercise of personal jurisdiction...If the contacts at issue here establish general personal jurisdiction, then any corporation with websites like [defendant’s] would be subject to general jurisdiction in every state.” Snyder v. Dolphin Encounters Limited, 235 F.Supp.2d at 441. The same is true here.

III. Conclusion

For the reasons discussed above, Alger’s motion to dismiss for lack of personal jurisdiction is granted. An appropriate Order follows.

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ORDER

AND NOW, this 6th day of November, 2006, upon consideration of Alger Manufacturing Company's Renewed Motion To Dismiss for Lack of Jurisdiction and the plaintiffs' response thereto, it is **ORDERED** that:

1. Alger's Motion To Dismiss for Lack of Jurisdiction (Paper #221) is **GRANTED**.
2. Alger's Motion for Leave to File a Reply (Paper #227) is **DENIED** as moot.

/s/ Norma L. Shapiro

S.J.

