

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

CAROLYN H. KENDALL : CIVIL ACTION
: :
V. : :
: :
TRUSTEES OF AMHERST : :
COLLEGE, et al. : NO. 06-4983

MEMORANDUM

Padova, J.

January 18, 2006

Plaintiff, Carolyn H. Kendall, has brought this personal injury action against the Trustees of Amherst College (“Defendant Trustees”).¹ Defendant Trustees has moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(2), for lack of personal jurisdiction and, in the alternative, for transfer of this action to the United States District Court for the Western District of Massachusetts. For the reasons that follow, Defendant Trustees’ Motion to Dismiss pursuant to Federal Rule of Procedure 12(b)(2) is denied and its alternative request to transfer this action to the United States District Court for the Western District of Massachusetts is granted.

I. BACKGROUND

The Complaint alleges that, on September 8, 2004, at approximately 10:00 p.m., Plaintiff, an Amherst student, slipped and fell as a proximate and direct result of a defective and dangerous condition at Amherst College’s Robert Frost Library and its appurtenant structures. (Comp. ¶ 17.)

¹The Complaint asserts claims against the Trustees; Amherst College Corporation; and Amherst College. Defendant Trustees has submitted an Affidavit stating that Amherst College and Amherst College Corporation are not legal entities and asks that they be dismissed as Defendants in this action. (Shea Aff. ¶¶ 5-6.) Plaintiff does not contest the dismissal of Amherst College Corporation and Amherst College based on the representation that they are not legal entities. (Pl.’s Mem. at 2.) Amherst College Corporation and Amherst College are, accordingly, dismissed as Defendants in this action.

She suffered a right trimalleolar ankle fracture as a result of the fall. (Id. ¶ 10.) The Complaint further alleges that, as a proximate and direct result of the incident in question, Plaintiff suffered loss of ankle mobility, pain, suffering, disability, and delay of academic pursuits, was required to withdraw from classes for the remainder of the semester to obtain medical treatment, and incurred monetary damages in the form of medical, surgical, and hospital costs, and loss of earnings. (Comp. ¶¶ 19-23.)

II. LEGAL STANDARD

“[I]n reviewing a motion to dismiss under Rule 12(b)(2), we ‘must accept all of the plaintiff’s allegations as true and construe disputed facts in favor of the plaintiff.’” Pinker v. Roche Holdings, Ltd., 292 F.3d 361, 368 (3d Cir. 2002) (quoting Carteret Sav. Bank, F.A. v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir. 1992)). Nonetheless, a motion made pursuant to Rule 12(b)(2) “is inherently a matter which requires resolution of factual issues outside the pleadings, i.e. whether in personam jurisdiction actually lies.” Time Share Vacation Club v. Atl. Resorts, Ltd., 735 F.2d 61, 66 n.9 (3d Cir. 1984). Accordingly, “[o]nce the [lack of personal jurisdiction] defense has been raised, then the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence,” not mere allegations. Id. Any disputes created by the affidavits, documents, or other records submitted for the court’s consideration are resolved in favor of the non-moving party. Irons v. Transcor Amer., Civ. A. No. 01-4328, 2002 WL 32348317, at *1 n.1 (E.D. Pa. July 8, 2002) (citation omitted). The plaintiff must establish the defendant’s contacts with the forum state with reasonable particularity. Snyder v. Dolphin Encounters Ltd., 235 F. Supp. 2d 433, 436 (E.D. Pa. 2002) (citation omitted). “[A]t no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant’s Rule 12(b)(2) motion to dismiss for lack of in personam

jurisdiction.” Time Share, 735 F.2d at 66 n.9. (citation omitted).

III. DISCUSSION

Pursuant to Federal Rule of Civil Procedure 4(e), a federal court may exercise personal jurisdiction over a nonresident of the state in which the court sits “to the extent permissible under the law of the state where the district court sits.” Pennzoil Prods. Co. v. Colelli & Assocs., 149 F.3d 197, 200 (3d Cir. 1998) (citation omitted). Pennsylvania’s long arm statute authorizes exercise of jurisdiction over a nonresident “to the fullest extent allowed under the Constitution of the United States.” 42 Pa. Cons. Stat. Ann. § 5322(b); see also Pennzoil, 149 F.3d at 200 (noting that Pennsylvania’s long arm statute “permits Pennsylvania courts to exercise personal jurisdiction over nonresident defendants ‘to the constitutional limits of the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment’” (quoting Mellon Bank (East) PSFS, Nat’l Ass’n v. Farino, 960 F.2d 1217, 1221 (3d Cir.1992))). In evaluating whether an exercise of personal jurisdiction is constitutional, a court first determines whether the defendant’s contacts with the forum state are sufficient to support general personal jurisdiction. Pennzoil, 149 F.3d at 200. General jurisdiction exists where a nonresident’s contacts with the forum are “continuous and substantial,” and permits the court to exercise jurisdiction “regardless of whether the subject matter of the cause of action has any connection to the forum.” Id. (internal quotations omitted). In the absence of general jurisdiction, a court looks to whether the requirements of specific personal jurisdiction are met. Id. at 200-01. “Specific jurisdiction exists where the plaintiff’s claim ‘is related to or arises out of the defendant’s contacts with the forum.’” Id. at 201 (quoting Farino, 960 F.2d at 1221). Plaintiff admits that specific jurisdiction does not exist in this case because Plaintiff’s injuries do not arise out of Defendant’s contacts with Pennsylvania. (Pl.’s Mem. at 3.)

Defendant Trustees contends it does not have sufficient contacts with the Commonwealth of Pennsylvania to enable this Court to exercise general personal jurisdiction over it. “General jurisdiction over a non-resident corporate defendant exists where the corporation carries on a ‘continuous or systematic part of its general business within this Commonwealth.’” O’Connor v. Sandy Lane Hotel Co., Ltd., Civ. A. No. 04-2436, 2005 WL 994617, at *2 (E.D. Pa. Apr. 28, 2005) (quoting Weintraub v. Walt Disney World Co., 825 F. Supp. 717, 718 (E.D. Pa.1993) and 42 Pa. Cons. Stat. Ann. § 5301(a)(2)(iii)). “The threshold for establishing general jurisdiction is very high and requires a showing of ‘extensive and pervasive’ facts demonstrating connections with the forum state.” Id. (citing Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 589 (3d Cir. 1982)). See also Surgical Laser Techs., Inc. v. C.R. Bard, Inc., 921 F. Supp. 281, 284 (E.D. Pa. 1996) (noting that the standard for general jurisdiction is difficult to meet). Even “continuous activity of some sorts [by a corporation] within a state is not enough to support [general jurisdiction over the corporation].” Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1199 (4th Cir. 1993) (quoting Int’l Shoe Co. v. Wash., 326 U.S. 310, 318 (1945)). “Only when the ‘continuous corporate operation within a state [is] thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities’ may a court assert general jurisdiction over a corporate defendant.” Id. (quoting Int’l Shoe, 326 U.S. at 318).

Federal courts sitting in Pennsylvania consider the following objective criteria in ascertaining the existence of general jurisdiction: (1) whether the defendant is “incorporated or licensed to do business in Pennsylvania;” (2) whether the defendant has “ever filed any tax returns with the Commonwealth of Pennsylvania;” (3) whether the defendant files “administrative reports with any agency or department of the Commonwealth;” (4) whether “the defendant regularly purchase[s]

products or supplies within Pennsylvania for use in its business outside of the state;” (5) whether “the defendant own[s] land or property within the state;” (6) whether “the defendant advertise[s] in Pennsylvania;” and (7) whether “the defendant maintain[s] an agent in Pennsylvania.” Gaylord v. Sheraton Ocean City Resort & Conference Ctr., Civ. A. No. 93-0463, 1993 WL 120299, at *4 (E.D. Pa. Apr. 15, 1993) (citing Wims v. Beach Terrace Motor Inn, Inc., 759 F. Supp. 264, 269 (E.D. Pa. 1991)). Defendant Trustees has submitted an affidavit from its Treasurer averring that it has no license to do business in Pennsylvania; does not maintain offices or places of business in Pennsylvania; does not have any registered agents in Pennsylvania; does not have any employees in Pennsylvania; does not own, manage, or lease any property in Pennsylvania; does not have a mailing address in Pennsylvania; does not have a telephone listing in Pennsylvania; is not incorporated in Pennsylvania; does not pay taxes or file tax returns with the Commonwealth of Pennsylvania; does not advertise in Pennsylvania; does not file administrative reports with any agency or department of the Commonwealth of Pennsylvania; does not purchase products or supplies in Pennsylvania for use in its business; and does not transport goods directly or indirectly into or through the Commonwealth of Pennsylvania. (Shea Aff. ¶¶ 3-20.) Defendant Trustees admits, however, that it maintains a bank account with Wachovia Bank in Philadelphia, Pennsylvania, through which it accepts the deposit of tuition payments and disburses funds. (Shea Aff. ¶ 21.)

Plaintiff alleges that Defendant Trustees engages in continuous and substantial business in Pennsylvania by: (1) utilizing banks and financial depositories within Pennsylvania for the purpose of collecting payments for tuition and room and board for current students; (2) designating “class agents” to coordinate alumni affairs of Amherst graduates; (3) soliciting monetary gifts from alumni in Pennsylvania; and (4) sending Amherst employees to physically visit Pennsylvania high schools

and conduct other efforts to recruit students of Pennsylvania secondary schools. (Compl. ¶¶ 8-12.) Plaintiff has also submitted evidence that Defendant Trustees solicits donations from alumni through correspondence sent to Pennsylvania, and that it designates “associate agents” in Pennsylvania who solicit donations for its Annual Fund. (Pl.’s Ex. A at 3.) Plaintiff has also submitted evidence that Defendant Trustees has sent an invoice to her in Pennsylvania and directed her to send payment of said invoice to a Pennsylvania mailing address. (Pl.’s Ex. B.)

Plaintiff argues that Defendant Trustees’ banking relationship with Wachovia Bank in Philadelphia strongly supports the exercise of general jurisdiction. She argues that the Trustees’ continuous banking relationship in Pennsylvania, its use of volunteer class agents to solicit donations from alumni in Pennsylvania, and its other contacts with Pennsylvania, constitute substantial and continuous business in the Commonwealth, making general jurisdiction proper. Plaintiff relies on Provident Nat’l Bank v. California Fed. Sav. and Loan Ass’n, 819 F.2d 434 (3d Cir. 1987). Provident sued California Federal in federal court in Pennsylvania to recover money due under the terms of a certificate of deposit. Id. at 435. California Federal was a federally chartered savings and loan, headquartered in California, with no offices in Pennsylvania. Id. at 435-36. California Federal had between 700 and 1000 depositors who lived in Pennsylvania, who “contributed about \$10 million to California Federal’s total of \$14 billion in deposits (about .071%).” Id. at 436. California Federal also had about \$10 million in outstanding loans to Pennsylvania residents, comprising approximately .083% of its total outstanding loans of \$12 billion. Id. In addition, “[t]hree Pennsylvania financial institutions . . . serviced \$10.2 million of loans for California Federal” and “California Federal . . . continuously maintained a ‘controlled disbursement account’ with Mellon Bank in Pittsburgh.” Id. The Mellon Bank account “was a ‘zero balance’ arrangement under which

Mellon Bank notified California Federal every business day of the total amount of checks cleared through the account that day, and California Federal wired a transfer of funds for that amount to Mellon Bank the same day.” Id. In addition, in 1985, “California Federal sold certificates of deposit on sixteen separate occasions aggregating \$144,500,000 to mutual funds for which Provident acted as custodian.” Id. The United States Court of Appeals for the Third Circuit affirmed the district court’s determination that it had general personal jurisdiction over California Federal primarily based upon California Federal’s relationship with Mellon Bank:

California Federal’s zero-balance account with the Mellon Bank constituted a substantial, ongoing, and systematic activity in Pennsylvania. From California Federal’s replies to Provident’s interrogatories, it appears that California Federal conducted business regarding that account with the Mellon Bank every business day. This daily contact was a continuous and central part of California Federal’s business.

Id. at 438.

Defendant Trustees contends that Plaintiff’s reliance upon Provident is misplaced because the Trustees’ account with Wachovia Bank is not a continuous and central part of its business. Defendant Trustees relies on two cases in which universities with Pennsylvania students were found not to have sufficient contacts with Pennsylvania to justify the imposition of personal jurisdiction in Pennsylvania for causes of action which arose out-of-state, Gehling v. St. George’s School of Medicine, Ltd., 773 F.2d 539 (3d Cir. 1985) and Gallant v. Trustees of Columbia University, 111 F. Supp. 2d 638 (E.D. Pa. 2000). In Gehling, the Third Circuit found that “St. George’s lacked the continuous and substantial business relationship with Pennsylvania” necessary to support the exercise of general personal jurisdiction. Gehling, 773 F.2d at 543. Plaintiffs had presented evidence that St. George’s had the following contacts with Pennsylvania: it recruited students from Pennsylvania; it placed

advertisements in out-of-state newspapers which circulated in Pennsylvania; six percent of the St. George's student body originated in Pennsylvania and those students paid several hundred thousand dollars in tuition to St. George's; officials of St. George's toured Philadelphia in 1980, appearing on radio and television shows broadcast to Pennsylvania residents; and St. George's entered into a joint program with Waynesburg College, in Waynesburg, Pennsylvania, whereby students who lacked the necessary scientific background for medical school would attend Waynesburg for two years prior to attending St. George's. Id. at 541-42. The Third Circuit found that these contacts with Pennsylvania were not sufficiently "continuous and substantial" to support general personal jurisdiction because: the placement of advertisements in non-Pennsylvania newspapers "does not constitute 'continuous and substantial' contacts with the forum state"; "the fact that some of St. George's students are Pennsylvania residents" and that St. Georges derived some of its revenue from those Pennsylvania students, did not signify relevant business contacts; and St. George's joint program with Waynesburg did not constitute "'continuous and substantial' business activity by St. George's in Pennsylvania" because there was no evidence that St. George's obtained revenue from education services which Waynesburg rendered in Pennsylvania. Id. at 542-43 (citations omitted).

The district court in Gallant followed Gehling in finding that Columbia University was not subject to general jurisdiction in the Commonwealth. Gallant, 111 F. Supp. 2d at 641-42. Gallant sought to establish that Columbia University's contacts with Pennsylvania were more continuous and substantial than St. George's, so as to subject Columbia University to general personal jurisdiction in Pennsylvania. Gallant relied on the following contacts which Columbia University had with Pennsylvania:

a student body that includes Pennsylvania residents whose tuition

generates income for the school; collection actions filed by Columbia in the Commonwealth's Common Pleas Court; at least four trust accounts overseen by First Union National Bank in Philadelphia; fund raising and recruitment activities in Pennsylvania; participation by Columbia professors and other employees in conferences, visiting professorships, and other academic activities in Pennsylvania; participation in revenue-generating athletic events in this state; and research contracts or agreements to conduct clinical trials between the defendant and at least six pharmaceutical companies conducting business in Philadelphia.

Id. at 640. The Gallant court determined that these contacts were insufficient to establish general personal jurisdiction because “none of these . . . contacts demonstrate that Columbia has purposefully directed its activities to, or availed itself of, Pennsylvania. Rather these contacts are the result of Columbia's general participation in the type of interstate activity in which any nationally prominent educational institution would engage.” Id. at 641. Consequently, the Gallant court concluded that Columbia University was not subject to general jurisdiction in Pennsylvania:

all the contacts upon which the plaintiff relies to support the exercise of general jurisdiction over Columbia are those in which any nationally prominent university would engage. The plaintiff's theory sweeps too broadly, as it would render Columbia and any similar institution subject to general jurisdiction in most, if not all, states. Because there is nothing in the record to indicate that Columbia has purposefully directed its activities to this forum such that it would reasonably anticipate being haled into court here, the exercise of general jurisdiction is not appropriate.

Id. at 643.

Defendant Trustees' contacts with Pennsylvania are very similar to the contacts that Columbia University and St. George's had with Pennsylvania. Defendant Trustees recruits students from Pennsylvania and obtains payment of tuition from those students; those tuition payments are paid into a bank account in Pennsylvania. In addition, Defendant Trustees solicits donations from alumni in

Pennsylvania through correspondence originating in Massachusetts and through Pennsylvania resident “associate agents.” We conclude that the evidence submitted by Plaintiff is insufficient to establish that Defendant Trustees has contacts with Pennsylvania which are more continuous or substantial than those of Columbia University or St. Georges, or which are more that “those in which any nationally prominent university would engage.” Gallant, 111 F. Supp. 2d at 643. The fact that the Trustees has an account with Wachovia Bank in Philadelphia does not alter this conclusion. There is no evidence on the record that Defendant Trustees’ account with Wachovia Bank involved “substantial, ongoing and systematic activity in Pennsylvania” by Defendant Trustees that was “a continuous and central part” of its business so as to subject the Trustees to general personal jurisdiction here. See Provident Nat’l Bank, 819 F.2d at 638. We find, accordingly, that Defendant Trustees is not subject to general personal jurisdiction in Pennsylvania and that this Court does not have personal jurisdiction over Defendant Trustees in this action.

Although we lack personal jurisdiction over Defendant Trustees, we conclude that transferring this action to the United States District Court for the Western District of Massachusetts better serves the interests of justice than dismissing it. See 28 U.S.C. § 1631 (“Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed . . .”). Personal jurisdiction and venue are proper in the Western District of Massachusetts as Defendant’s place of business is located there and Plaintiff’s injuries occurred there. See 28 U.S.C. § 1391(a), (c). Moreover, a transfer is in the interest of justice because it will prevent the duplication of filing costs. See Lawman Armor Corp. v. Simon, 319 F. Supp. 2d 499, 507 (E.D. Pa. 2004) (“Normally transfer will be in the interest of justice because

dismissal of an action that could be brought elsewhere is time-consuming and justice-defeating.”
(quoting In re Ski Train Fire in Kaprun, Austria on November 11, 2000, 257 F. Supp. 2d 717, 734
(S.D.N.Y. 2003))).

An appropriate Order follows.

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ORDER

AND NOW, this 17th day of January 2007, upon consideration of the Defendants' Motion to Dismiss" (Docket No. 2), **IT IS HEREBY ORDERED** as follows:

1. Defendants Amherst College and Amherst College Corporation are **DISMISSED** as Defendants in this action by agreement of the parties.
2. Defendant Trustees of Amherst College's Motion is **DENIED** to the extent it seeks dismissal for lack of personal jurisdiction.
3. Defendant Trustees of Amherst College's Motion is **GRANTED** to the extent it seeks a transfer of this matter to the United States District Court for the Western District of Massachusetts, a district court with personal jurisdiction over it and in which venue may be properly laid.
4. This action is **TRANSFERRED** to the United States District Court for the Western District of Massachusetts pursuant to 28 U.S.C. § 1631.
5. The Clerk of Court shall mark this case **CLOSED**.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.