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

STEALTH AUDIO ALARM & PET CONTAINMENT SYSTEMS, INC.,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
ORION ENGINEERING, INC.,	:	
Defendant.	:	NO. 96-7931

J.M. KELLY, J. **SEPTEMBER , 1997**

MEMORANDUM & ORDER

Defendant Orion Engineering, Inc. (Orion) has filed the present Motion to Dismiss the Amended Complaint of Plaintiff Stealth Audio Alarm and Pet Containment Systems, Inc. (Stealth) based upon lack of personal jurisdiction over Orion in Pennsylvania. In the alternative, Orion seeks to have this matter transferred to the United States District Court for the Middle District of Florida.[1]

The origin of this action is a contract for Orion to develop a pet containment system ("system") for Stealth, using

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1. By this Court's standing order, presented to the parties at a pre-trial conference in this matter, Orion's Reply Brief on these motions was due July 25, 1997. Subsequently, counsel for Orion filed a stipulation requesting that the time for filing Orion's reply brief be extended to August 23, 1997. By letter to Orion's counsel, Matthew Portella, dated August 18, 1997, I informed Orion that no extension would be granted since these motions were initially filed on March 3, 1997. Despite my denial of the requested extension, Orion filed a reply brief on August 26, 1997. This brief was not considered in the decision of this motion, however, review of the reply brief indicates that the Court had considered the issues raised by Orion in making its decision.

several patents owned by Stealth. The proposed system was to utilize underground electric fence and slight shocks to a pet that tries to cross the fence. Orion is a Florida engineering corporation with its office in Clearwater, Florida. Stealth is a Delaware corporation with its principal place of business in Kimberton, Pennsylvania. Stealth's Complaint generally alleges that Orion breached the contract by failing to develop the system.

PERSONAL JURISDICTION

In its motion to dismiss, Orion asserts that it does not have sufficient minimum contacts with Pennsylvania in order to reasonably expect that it will be haled into court there. A district court asserts personal jurisdiction over a nonresident defendant to the extent allowed by state law in the forum state. Fed. R. Civ. P. 4(e). Pennsylvania's Long Arm Statute allows jurisdiction "to the fullest extent allowed under the Constitution of the United States." Pa. Con. Stat. Ann. § 5322(b). Thus, "the constitutional touchstone remains whether the defendant established 'minimum contacts' in the forum state." Burger King v. Rudzewicz, 471 U.S. 462, 474 (1985) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Stealth argues that personal jurisdiction over Orion is appropriate based upon specific, rather than general jurisdiction.[2] "Specific jurisdiction is invoked when the cause

2. General jurisdiction is appropriate where a defendant (continued...)

of action arises from the defendant's forum related activities." North Penn Gas v. Corning Natural Gas, 897 F.2d 687, 690 (3d Cir. 1990). Minimum contacts analysis does not require a physical presence in the forum. Id. at 691. Rather, the analysis is driven by whether the defendant's activities amount to a purposeful availment of the "privilege of conducting activities within the forum state." Hanson v. Denckla, 357 U.S. 235, 253 (1958). If the defendant has minimum contacts with the forum state, the court must then determine whether jurisdiction over the defendant "accords with the notions of 'fair play and substantial justice.'" Mesalic v. Fiberfloat Corp.,897 F.2d 696, 701 (3rd Cir. 1990) (quoting International Shoe Co. v. Washington, 326 U.S. at 316.)

Sufficient minimum contacts with Pennsylvania were established, despite no physical presence in Pennsylvania, where a defendant New York natural gas corporation signed a storage agreement with a Pennsylvania gas company that contemplated a thirty year relationship; the Pennsylvania gas company reserved storage space For defendant; defendant intervened in the Pennsylvania gas company's tariff proceedings and defendant forwarded payments to Pennsylvania. North Penn Gas v. Corning Natural Gas, 897 F.2d at 691. Similarly, a defendant Florida

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2. (...continued)
maintains continuous and substantial contacts with a forum, whether or not those contacts are related to the cause of action. Reliance Steel Products Co. V. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 588 (3d Cir. 1982).

boat manufacturer had sufficient contacts to be sued in New Jersey where the boat manufacturer delivered a boat to the plaintiff in New Jersey, a mechanic was sent to New Jersey to repair the boat and significant mail and telephone contacts were directed by the defendant to New Jersey. Mesalic v. Fiberfloat Corp.,897 F.2d at 701.

ORION'S PENNSYLVANIA CONTACTS

On a defendant's motion to dismiss for lack of personal jurisdiction, a plaintiff must come forward with affidavits or other competent evidence to establish the defendant's contacts with the forum state. Patterson by Patterson v. Federal Bureau of Investigation, 893 F.2d 595, 603-604 (3d Cir. 1990). Based upon the evidence presented, the Court finds that Orion has the following contacts with Pennsylvania: 1) The contract contains a negotiated choice of law clause specifying Pennsylvania law. Pennsylvania choice of law replaced Florida choice of law in the original proposed contract. 2) The parties anticipated that a long term relationship would ensue from the contract because Orion would continue as manufacturer of the system for Stealth. 3) Orion directed mail, faxes and telephone calls concerning the system to Stealth in Pennsylvania. 4) The president of Orion, John S. Lands ("Lands"), traveled to Pennsylvania to observe a test of the system. 5) The ability to make the system work in the topography and geological formations found in Pennsylvania was considered important as part of preparation of the system for

national distribution, therefor the system would not be ready for distribution until it passed Pennsylvania testing.

Stealth also asserts that the contract was signed in Pennsylvania and that other Orion representatives traveled to Pennsylvania for testing of the system. I believe that Stealth is stretching the truth in arguing that the contract was signed in Pennsylvania. My review of the contract indicates that Stealth's officers signed the contract on June 22, 1994. Lands signed the contract seven days later on June 29, 1994. This difference in dates is consistent with the contract acceptance procedure set forth in Lands' letter of April 22, 1994, and supports Orion's position that it signed the contract in Florida. Accordingly, I do not find Stealth's signing the contract in Pennsylvania to be a significant contact of Orion with Pennsylvania. Stealth's assertion in an affidavit that representatives of Orion traveled to Pennsylvania in February of 1995 is contradicted by Orion. Since Stealth does not identify the representative of Orion, the date the representative came to Pennsylvania or the specific acts performed by the representative in Pennsylvania, I do not credit this purported visit as a significant contact.

Upon review of Orion's relevant contacts with Pennsylvania, I believe that Orion has purposefully availed itself of the rights and privileges of doing business in Pennsylvania. While the existence of a Pennsylvania choice of law provision in and of itself is not dispositive in establishing

personal jurisdiction, it does serve to reinforce Orion's purposeful availment of the benefits and protections of Pennsylvania's laws by entering into a contract that specified that Pennsylvania law would govern. Burger King, 471 U.S. at 482. The importance of the strength, as a relevant contact, of the choice of law provision in the contract here is augmented by the undisputed fact that Orion had proposed Florida choice of law and then accepted Pennsylvania choice of law through negotiation. Further, the decision to follow Pennsylvania law, coupled with the long term agreement for Orion to manufacture the system for a Pennsylvania corporation, demonstrates a "deliberate affiliation with the forum state and the reasonable foreseeability of possible litigation there." Id. Orion facilitated its relationship with Stealth through telephone calls, faxes and mail directed to Stealth in Pennsylvania. Lands' representation of Orion at a test of the system in Pennsylvania is a substantial and purposeful contact with Pennsylvania which, coupled with the understanding that the system would have to pass future testing in Pennsylvania, shows that Orion had availed itself of the privilege of conducting activities within Pennsylvania. Orion's argument that Lands was a passive visitor to Pennsylvania misconstrues that concept. While in some instances even a physical presence within a state may not be a purposeful availment of the privilege of conducting activities in the state, here Orion made a positive choice to further its contract by sending Lands to Pennsylvania.

Whether personal jurisdiction comports with fair play and substantial justice requires analysis of the following five factors: 1) The burden placed upon the defendant, 2) the interest of the forum state in the litigation, 3) the interest of the plaintiff in obtaining relief, 4) the interstate interests of obtaining the most efficient resolution of the controversy and 5) the shared interests of the "states in furthering fundamental substantive social policies." Asahi Metal Industry Co. V. Superior Court, 480 U.S. 102, 113 (1987).

The burden placed upon Orion of defending this suit in Pennsylvania is not severe. See Mesalic v. Fiberfloat Corp.,897 F.2d at 701 (Burden placed upon Florida corporation to defend litigation in New Jersey "is not severe by today's standards"). Pennsylvania has an overriding interest in providing a means of redress for its residents. McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957). Stealth obviously believes that it is entitled to relief for Orion's breach of contract. There is no evidence that the interests of either Florida or Pennsylvania would be better served depending upon where this case is heard. Nor is their evidence that Stealth's interests are outweighed by Orion's interests. Accordingly, Orion's defense of this matter in Pennsylvania would not offend traditional notions of fair play and substantial justice.

FORUM NON CONVENIENS

Having determined that personal jurisdiction over Orion in Pennsylvania is proper in this matter, the Court now turns to

Orion’s motion to transfer this matter to the Middle District of Florida based upon forum non conveniens. Orion's Motion to Transfer is made pursuant to 28 U.S.C. § 1404(a) which provides:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The proposed transferee court must also be one in which venue is proper. The Middle District of Florida is an appropriate venue for this case because many events relating to this law suit occurred in that jurisdiction and Orion is located in that jurisdiction. See 28 U.S.C. §§ 1391(a).

Although the district court is vested with a wide discretion in making the transfer decision, the burden of justifying the transfer is on the moving party. Plum Tree, Inc. v. Stockment, 488 F.2d 754, 756 (3d Cir. 1973); Leonardo Da Vinci's Horse, Inc. v. O'Brien, 761 F. Supp. 1222, 1229 (E.D. Pa. 1991). The factors which the court may consider in ruling on a motion to transfer are:

1. the plaintiff's choice of forum;
2. relative ease of access to sources of proof;
3. availability of compulsory process for attendance of unwilling witnesses and cost of obtaining attendance of willing witnesses;
4. possibility of view of the premises, if appropriate;
5. all other practical problems that make trial of a case easy, expeditious and inexpensive; and
6. factors of public interest, including the relationship of the community in which the courts and jurors are required to serve to the occurrences that give rise to the litigation.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947); National Mortgage Network, Inc. v. Home Equity Centers, Inc., 683 F. Supp. 116, 119 (E.D.Pa. 1988).

The Third Circuit has stated that the plaintiff's selection of a proper forum is a "paramount consideration" and should not be "lightly disturbed." Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970). A balancing of the other choice of forum considerations is, however, equally as important as the plaintiff's initial choice of forum. Stealth has chosen the Eastern District of Pennsylvania as its favored forum for the litigation of the present controversy. Stealth is a Pennsylvania resident with its principal place of business in this state and it is evident that many of the relevant events underlying this controversy occurred in Pennsylvania and Florida. When the central facts of a lawsuit occur outside the chosen forum state, a Plaintiff's selection of that forum is entitled to less deference. See National Mortg. Network, Inc. v. Home Equity Ctrs., Inc., 683 F. Supp. 116, 119 (E.D. Pa. 1988). In this case, central facts of the case occurred in both Pennsylvania and Florida, therefor the deference owed to Stealth’s choice of forum is substantial.

Relevant documents and other sources of proof are likely to be located in Pennsylvania and Florida. Accordingly, neither retaining venue in Philadelphia nor transferring the case to Orlando will offer substantially greater ease of access to this evidence. To the extent that it may be necessary to

subpoena unwilling witnesses, compulsory process under Fed. R. Civ. P. 45(e) would be available in either the Middle District of Florida or this District.

Orion complains that many witnesses central to the presentation of its case reside in Florida, are not under its control and will not travel to Pennsylvania for the trial of this matter. Orion fails to identify any specific witnesses that it will need to call who refuse to testify in Pennsylvania. But assuming that those witnesses exist and conceding that this factor weighs in favor of transfer, the weight in favor of transfer is due minimal significance. First, there are also likely to be Pennsylvania witnesses who prefer not to testify in Florida, a factor that weighs in favor of Stealth. Further, alternative procedures for preserving the testimony of Florida witnesses de bene esse, such as videotape depositions, will allow Orion to present the testimony that it desires without requiring the witness to travel to Pennsylvania. Accordingly, this factor gives little weight to Orion's argument.

It is more likely that a visit to Stealth's property would be required than a visit to Orion's property, since unsuccessful testing of the system occurred in Pennsylvania and successful testing occurred in Florida. For view of premises purposes, the District Court for the Eastern District of Pennsylvania is far more conveniently located.

Finally, there is no unique public interest in having this case tried in either Pennsylvania or Florida. The

communities with perhaps the most direct interest in the resolution of this dispute are located in Pennsylvania and Florida. While both states have an interest in protecting the rights of their citizens who enter into contracts, there is no evidence that the interests of one state override the interests of the other.

Because it appears that the Eastern District of Pennsylvania is Stealth's chosen forum and also that the most likely property to be viewed is in Pennsylvania, while all other factors weigh evenly in favor of either hearing this matter in Pennsylvania or Florida, Orion has failed to meet its burden to have this case transferred. Accordingly, the Court will deny Defendant's Motion for Transfer under 28 U.S.C. § 1404(a) to the Middle District of Florida.

CONCLUSION

For the reasons stated in this Memorandum, the Court concludes that Orion's contacts with Pennsylvania, related to this matter, are sufficient to confer personal jurisdiction in this Court over Orion. Such jurisdiction does not offend traditional notions of fair play and substantial justice. Finally, a balancing of the factors on Orion's motion to transfer favor not transferring this matter to the Middle District of Florida. Accordingly, Orion's motions will be denied.