

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

<b>ROBERT DUNN,</b>	:	
<b>a minor by and through</b>	:	<b>Civil Action</b>
<b>his mother and natural guardian,</b>	:	
<b>Robin TATUM,</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>SKATE 22, INC.,</b>	:	<b>No. 97-2373</b>
	:	
<b>Defendant.</b>	:	

**MEMORANDUM-ORDER SUR MOTION TO DISMISS  
FOR LACK OF PERSONAL JURISDICTION**

AND NOW, this 20th day of November, 1997, upon consideration of the motion of defendant Skate 22, Inc. to dismiss or, in the alternative, to transfer the complaint of plaintiff Robert Dunn for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) (Document No. 4), and all subsequent memoranda submitted by the parties, and having found and concluded that:

1. The following facts are based upon the well-pleaded allegations of the complaint. See Miree v. DeKalb County, 433 U.S. 25, 27 n.2 (1977); Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). On March 31, 1996 plaintiff was allegedly injured at a skating rink in Union, New Jersey. Plaintiff was and continues to be a resident of Pennsylvania. Defendant Skate 22, Inc. is a New Jersey corporation that owns, manages and controls the skating rink where plaintiff was injured. On March 6, 1997, plaintiff filed a complaint in the Philadelphia Court of Common Pleas alleging that defendant negligently caused plaintiff's injuries. Specifically, plaintiff alleges that defendant violated a number of New Jersey skating rink regulations when defendant failed to post adequate safety warnings in the rink, employed too few rink-side supervisory guards, and failed to properly maintain and inspect the rink. On April 7, 1997, upon defendant's petition, the case was removed, as a diversity case, to the United

States District Court for the Eastern District of Pennsylvania. On April 14, 1997, defendant filed a motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2) or, in the alternative, to transfer the action, under 28 U.S.C.A. § 1404(a), to a more appropriate venue in New Jersey;

2. Removal

It is well settled that if the state court would lack jurisdiction over a party, the federal court acquires none upon removal. Arizona v. Manypenny, 451 U.S. 232, 242 n.17 (1981). Yet, plaintiff makes the unpersuasive and legally unsupported argument that defendant waived any objection to this Court's jurisdiction by removing the case before challenging personal jurisdiction in the state court. What plaintiff offers is simply not the law.

Removal, in itself, does not constitute a waiver of the right to object to lack of jurisdiction that could have been exercised in the state court. Morris & Co. v. Skandinavia Ins. Co., 279 U.S. 401, 409 (1928); Cantor Fitzgerald, L.P. v. Peaslee, 88 F.3d 152, 157 n.4 (2d Cir. 1996); Nationwide Eng'g & Control Sys., Inc. v. Thomas, 837 F.2d 345, 347-48 (8th Cir. 1988); Allen v. Ferguson, 791 F.2d 611, 614-15 (7th Cir. 1986); Wright & Miller, Federal Practice and Procedure: Civil 2d § 1395 (1990); see also Lambert v. Kysar, 983 F.2d 1110, 1113 n.2 (1st Cir. 1993) (“[F]iling of a removal petition in a diversity action, without more, does not waive the right to object in federal court to the state court venue.”); Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824, 835 (5th Cir. 1993) (removal to federal court from state court did not prevent defendant from later moving to dismiss under *forum non conveniens* or to transfer), cert. denied, 508 U.S. 973. After removal, the federal court merely takes up the case where the state court procedurally left off. Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423, 436 (1974) (citation omitted).

After removing an action, a defendant who "has not answered . . . shall . . . present the other defenses or objections available under the [Federal Rules of Civil Procedure]." Fed. R. Civ. P. 81(c).<sup>1</sup> Thus, after removal, a defendant may assert any defense of lack of personal jurisdiction so long as she does so before filing responsive pleadings and the motion is otherwise proper. Fed. R. Civ. P. 12(h)(1).<sup>2</sup> Prior to the filing of its motion to dismiss in this Court, defendant had not raised any other preliminary objections. Moreover, defendant has not

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<sup>1</sup> In addition, Rule 81(c) places time limitations on the filing of answers or objections. Defendant has satisfied these time limitations. Defendant filed the motion to dismiss for lack of personal jurisdiction only seven days after receiving summons, well within the twenty-day limit. See Fed. R. Civ. P. 81(c).

<sup>2</sup> Federal Rule of Civil Procedure 12(h)(1) provides:

A defense of lack of jurisdiction over the person . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g) [governing consolidation of defenses], or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

answered the complaint. And, in its petition for removal, defendant does not, in any way, waive its defense of lack of personal jurisdiction. Therefore, I find that defendant has not jeopardized its right to press for dismissal for lack of personal jurisdiction or transfer of this case;

3. Standard of Review

Once the defendant raises a jurisdiction defense, the burden of establishing the court's jurisdiction rests with the plaintiff. Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987). The jurisdictional allegations of plaintiff must be supported by competent evidence, that is, affidavits, documents, or depositions. Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 67 n.9 (3d Cir. 1984). All conflicts or doubts unresolved by competent evidence must be resolved in favor of the plaintiff. DiMark Marketing, Inc. v. Louisiana Health Serv. & Indem. Co., 913 F. Supp. 402, 404 (E.D. Pa. 1996).

a A federal district court is permitted to exercise "personal jurisdiction over nonresident of the state in which the court sits to the extent authorized by the law of that state." Provident, 819 F.2d at 436. Pennsylvania's long-arm statute provides for both general and specific jurisdiction to the "fullest extent allowed under the Constitution of the United States and may be based on the most minimum contacts with this Commonwealth allowed under the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 5322(b) (West 1981). The due process limit on a long-arm statute is satisfied when the defendant purposefully establishes "minimum contacts" in the forum state, by deliberately engaging in significant activities or by creating continuing obligations such that he has "availed himself of the privilege of conducting business there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). These acts must be "such that [a defendant] should reasonably anticipate being haled into court [in the forum state]." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980);

4. Personal Jurisdiction

Aside from arguing that defendant has waived its right to challenge this Court's jurisdiction, which I have rejected, plaintiff makes no showing in support of jurisdiction. Plaintiff offers no assertions or proof that would establish personal jurisdiction in this Court.

Under Pennsylvania Law, general jurisdiction exists over corporations in only three circumstances: (1) when the corporate defendant is incorporated or qualifies as a foreign corporation under Pennsylvania law, (2) when the corporate defendant consents, or (3) when the corporate defendant carries on "continuous and systematic part of its general business" in Pennsylvania. 42 Pa. Cons. Stat. Ann. § 5301(a)(2) (West 1981). However, when personal jurisdiction is asserted over a nonresident corporation on a basis other than physical presence, consent, or doing business, the claim must arise from a specific act in the forum. 42 Pa.

Cons. Stat. Ann § 5322(b) (West 1981); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985); Schwilm v. Holbrook, 661 F.2d 12 (3d Cir. 1981); Estoril v. Brown, 556 F. Supp. 153 (E.D. Pa. 1983). In either instance, the defendant must have been an active participant in the forum state.

In this case, plaintiff has not established that either specific or personal jurisdiction exists. Plaintiff has neither shown nor even asserted that defendant had any contacts whatsoever with Pennsylvania. To the contrary, the complaint alleges that defendant is a business corporation located at and doing business in New Jersey, and owns and manages a rink in New Jersey. The complaint further alleges that plaintiff sustained injuries while on defendant's premises in New Jersey. In short, any negligence for which the defendant might be liable was committed in New Jersey. The fact that a Pennsylvania resident sustains injuries, out of state, which result in residual harm within the state is not a sufficient basis for personal jurisdiction. See Dunnigan v. Silverthorn, 542 F. Supp. 32, 33 (E.D. Pa. 1982); DeFay v. McMeekin, 508 A.2d 324, 326 (Pa. Super. 1986). Therefore, I conclude that plaintiff has failed to meet his burden of establishing personal jurisdiction in this Court;

5. Dismissal or Transfer

Finally, finding that this Court lacks personal jurisdiction over the defendant does not fully dispose of the case. This Court must now decide whether to grant defendant's motion to dismiss, or in the alternative, transfer the case to a more appropriate forum in New Jersey.<sup>3</sup> This Court recognizes that dismissal could potentially prejudice plaintiff by suddenly throwing him outside the statute of limitations of another forum, whereas transfer would hold in abeyance all statutes of limitations. See Norwood v. Kirkpatrick, 349 U.S. 29, 31 (1955).

The New Jersey statute of limitations for personal injury suits is two years. N.J. Stat. Ann. § 2A:14-2 (West 1997). Because plaintiff was allegedly injured in March 1996, the applicable New Jersey statute of limitations will not bar plaintiff's claim if he chooses to file in a proper forum there. Moreover, dismissing the complaint without prejudice will afford plaintiff the opportunity to bring his lawsuit in state court as he had originally intended; and

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<sup>3</sup> In response to defendant's requests, plaintiff has asked this court to remand the case back to the state court. Plaintiff supports his request to remand with Jenkins v. United Steel Workers of Am., 552 F. Supp. 80 (E.D. Pa. 1981). However, Jenkins, recognizes that when the federal court lacks jurisdiction over the subject matter, the state may properly entertain the case. In our case, because the state court would also lack jurisdiction over the person of the defendant, a remand would be futile.

it is accordingly **ORDERED** that the motion of defendant to dismiss the complaint for lack of personal jurisdiction is **GRANTED** and the complaint is **DISMISSED FOR WANT OF PERSONAL JURISDICTION WITHOUT PREJUDICE**.

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**LOWELL A. REED, JR.**