

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

MOTORUP CORPORATION : CIVIL ACTION
: :
v. : :
: :
INTERPUBLIC GROUP OF COMPANIES :
INC., WESTERN INTERNATIONAL :
MEDIA CORPORATION, INC. and :
FULFILLMENT HOUSE : NO. 97-7468

O R D E R - M E M O R A N D U M

AND NOW, this 11th day of May, 1998, the motion to dismiss, Fed. R. Civ. P. 12(b)(2),¹ (3), (6),² or to transfer, 28 U.S.C. § 1404(a) (1994), of defendants Interpublic Group of Companies, Inc. (Interpublic), Western International Media Corporation, Inc. (Western), and Fulfillment House is denied:

1. Lack of personal jurisdiction - Plaintiff's affidavit in support of jurisdiction contains a certification by the Secretary of State of California that, on October 5, 1995, defendant Fulfillment House was merged into defendant Western International Media Corporation. Exh. a. It also contains

¹ Once a defendant has filed a motion, supported by affidavits, to dismiss an action for lack of personal jurisdiction, the burden shifts to plaintiff to prove "through sworn affidavits or other competent evidence" that a basis for jurisdiction exists. See Stranahan Gear Co. v. NL Industries, Inc., 800 F.2d 53, 58 (3d Cir. 1986) (quoting Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 67 n.9 (3d Cir. 1984)).

² Under Rule 12(b)(6), the allegations of the complaint are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would entitle him to relief. Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997).

certifications by the Secretary of State of Pennsylvania that defendants Interpublic and Western are foreign corporations qualified to do business in Pennsylvania. Id., exhs. b, c.³

Qualification as a foreign corporation under Pennsylvania law is sufficient for general jurisdiction. 42 Pa. Con. Stat. Ann. § 5301(a)(2)(i) (West Supp. 1997); Bane v. Netlink, Inc., 925 F.2d 637, 640-41 (3d Cir. 1991) ("By registering to do business in Pennsylvania, Netlink 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'") (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183, 85 L. Ed.2d 528 (1985) (further citation omitted)). Inasmuch as Fulfillment House and Western appear to be a single entity, and both Western and Interpublic are qualified to do business in Pennsylvania, personal jurisdiction over them exists.

2. Improper venue – The existence of personal jurisdiction in this district enables venue. See 28 U.S.C. § 1391(a)(3), (c) (1994).

3. Alter ego liability (All Counts) – Western and Fulfillment House are one entity. Plaintiff's affidavit, exh. a. Any liability on the part of Fulfillment House is imputable to Western. The complaint also alleges direct as well as alter ego liability. ¶¶ 8-14, 44. Given the allegations that defendants are

³ Interpublic is a Delaware corporation qualified to do business in Pennsylvania since 1966. Plaintiff's affidavit, exh. d. Western is a California corporation qualified to do business in Pennsylvania since 1988. Id.

1) inseparable, ¶ 12, and 2) defrauded plaintiff, ¶¶ 77-81, the complaint is sufficient to withstand the motion. See Lycoming County Nursing Home Assn. v. Commonwealth of Pa., 156 Pa. Commwlth. 280, 290, 627 A.2d 238, 243-44 (1993) (corporate veil will be pierced on alter ego theory upon showing that controlling corporation ignored separate status of subsidiary corporation and used it to perpetrate fraud).

4. Breach of contract (Count I) – This claim, complaint ¶¶ 21-29, is sufficiently stated. See General State Authority v. Coleman Cable & Wire Co., 27 Pa. Commwlth. 385, 365 A.2d 1347 (1976); Advanced Lifeline Services, Inc. v. Northern Health Facilities, Inc., C.A. No. 97-3757, 1997 WL 763024, at *3 (E.D. Pa. Dec. 9, 1997).

5. Duty of good faith and fair dealing (Count II) – Inasmuch as a fiduciary relationship is alleged to have been created by the parties' agreement, ¶¶ 24-26 (plaintiff supplied defendants with inventory in trust and confidential customer list), the complaint states a claim for breach of the duties of good faith and fair dealing under Pennsylvania law. See Commonwealth of Pa. v. E-Z Parks, Inc., 153 Pa. Commwlth. 258, 268, 620 A.2d 712, 717 (business relationship may be the basis of a confidential relationship if one party surrenders substantial control over portion of his affairs to the other), appeal denied, 534 Pa. 651, 627 A.2d 181 (1993).

6. Breach of fiduciary relationship (Count IV) – see supra ¶ 5.

7. Fraud (Count VII) – Fraud is alleged with requisite particularity, Fed. R. Civ. P. 9(b). Complaint, ¶¶ 31-37, 77-81. See Shapiro v. UJB Financial Corp., 964 F.2d 272, 284 (3d Cir.), cert. denied, 506 U.S. 934, 113 S. Ct. 365, 121 L. Ed.2d 278 (1992).

8. Theft of trade secrets (Count VIII) – Confidential customer lists are entitled to trade secret protection under Pennsylvania common law. See Morgan's Home Equipment Corp. v. Martucci, 390 Pa. 618, 624-25, 136 A.2d 838, 842-43 (1957); Kwatoski v. National Railroad Passenger Corp., C.A. No. 91-5637, 1993 WL 185567, at *16 (E.D. Pa. May 27, 1993), aff'd, 79 F.3d 1138 (3d Cir. 1996).

9. Trademark infringement (Count IX) – The complaint alleges, ¶¶ 32, 39, 87-95, that defendants re-packaged and sold plaintiff's product for their own benefit under the guise of a "special offer." This conduct, if true, gives rise to a claim under the Lanham Act, 15 U.S.C. § 1125(a)(1) (1994). See Polymer Technology Corp. v. Mimran, 975 F.2d 58, 61-62 (3d Cir. 1992).

10. Copyright infringement (Count X) – According to the complaint, no sale occurred. Instead, defendants are alleged to have held plaintiff's inventory in trust to distribute it at plaintiff's price. ¶¶ 22, 24-26. Since defendants were not the owners of the inventory, the "first sale doctrine," 17 U.S.C. § 109(a) (1994), is inapplicable.

11. RICO (Count XII) – Defendants’ motion is denied without prejudice to reconsideration upon submission of plaintiff’s RICO Case Order Statement. See RICO Case Order, dated May 5, 1998.

12. Transfer under 28 U.S.C. § 1404(a) – Defendants invoke § 1404(a) without arguing any of the public or private interest factors pertinent to a transfer inquiry. Defendants’ memorandum, at 27. Plaintiff’s choice of forum is a paramount consideration and should not be disturbed lightly, see Jumara v. State Farm Insurance Co., 55 F.3d 873, 880 (3d Cir. 1995). Here, it can not be said that all – or even most – of the public and private interests point to the transferee requested by defendants, the Northern District of Texas, id. at 879-80 (delineating § 1404(a) public and private interests).

Edmund V. Ludwig, J.