

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

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SUPERIOR PRECAST, INC.,	:	
	:	
Plaintiff,	:	
v.	:	Civil Action No. 99-1893
	:	
PROTO CONSTRUCTION AND	:	
DEVELOPMENT CORP.,	:	
	:	
Defendant.	:	

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**MEMORANDUM**

R.F. KELLY, J.

JULY 6, 1999

Before this Court is Defendant's Motion to Dismiss the Complaint or, in the alternative, to transfer this matter to the United States District Court for the Eastern District of New York. Plaintiff, Superior Precast, Inc. ("Superior"), has brought this action seeking damages from Defendant Proto Construction and Development Corp. ("Proto") for breach of contract. For the following reasons, Proto's Motion to Dismiss will be denied in favor of Proto's alternative request for transfer to the United States District Court for the Eastern District of New York.

**I. BACKGROUND**

Proto was selected by a New York State agency to erect sound barriers along a thruway in Westchester, New York. Subsequently, Superior and Proto entered into a contract whereby Superior was to supply Proto with precast concrete posts and panels to be used in the construction of the New York public

improvement.

Superior's Amended Complaint alleges that "[d]ue to Proto's errors, omissions and construction deficiencies, Proto failed to complete all required predicate work, failed to obtain required approvals from the Authority, [and] failed to obtain and furnish Superior with all necessary information needed for Superior's fabrication in a timely fashion." Amended Complaint at ¶ 11. Superior further alleges that it "has fabricated and has had available for delivery substantial quantities of [contracted] [m]aterials" . . . and that "Proto has wrongfully and without probable or just cause declared its contract with Superior 'terminated,' thereby materially breaching the contract with Superior . . . ." Id. at ¶¶ 12 and 13.

On May 12, 1999, Proto filed a motion to dismiss the Complaint or, in the alternative, to transfer this action to New York federal court.<sup>1</sup> In doing so, Proto contends that "[d]espite [its] persistent efforts to obtain the materials from Plaintiff, Plaintiff failed to meet a single deadline, and unilaterally abandoned two-thirds of its obligations, causing the New York public improvement to be delayed over eight months, and then

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<sup>1</sup> Superior's original complaint listed United Pacific Insurance Company, Proto's surety, as an additional defendant. After Proto filed its motion to dismiss, Superior amended the Complaint, having learned that the insurance company was incorporated in Pennsylvania. As a result, Superior's Amended Complaint only lists Proto as a defendant in order to obtain complete diversity in accordance with 28 U.S.C. § 1332(a).

maliciously refused to cooperate with Proto to mitigate the damages resulting from Plaintiff's default." Proto's Supporting Mem. at 2.

Proto's Motion to Dismiss argues inter alia, that this Court lacks personal jurisdiction. In this regard, the parties disagree as to whether Proto had enough minimum contacts with Pennsylvania that it could reasonably expect to be sued here, and whether it would offend fair play and substantial justice if Proto was subjected to suit in Pennsylvania. The parties also dispute whether a forum selection clause requires this lawsuit to be litigated in New York. In addition, Proto contends that Pennsylvania is an inconvenient and inappropriate venue. Finally, Proto argues that its surety, United Pacific Insurance Company ("United"), is an indispensable party to this lawsuit, and its presence divests this Court of subject matter jurisdiction. Each of the above issues will be addressed in turn.

## **II. STANDARD OF REVIEW FOR PERSONAL JURISDICTION**

"The Third Circuit has repeatedly held that courts should take a 'highly realistic' view when deciding whether to assert personal jurisdiction over a non-resident defendant." DiMark Marketing, Inc. v. Louisiana Health Serv. & Indem. Co., 913 F. Supp. 402, 405 (E.D. Pa. 1996). "Personal jurisdiction is a fact-specific inquiry. The focus is on the relationship among the defendant, the forum state and the litigation." AMP Inc. v.

Methode Electronics Inc., 823 F. Supp. 259, 262 (M.D. Pa. 1993). Once a defendant has properly raised a jurisdictional defense, the plaintiff bears the burden of proving, either by affidavits or other competent evidence, that the defendant has had sufficient contacts with the forum state to establish personal jurisdiction. North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 689 (3d Cir.), cert. denied, 498 U.S. 847 (1990); Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984). "To meet this burden, the plaintiff must establish either that the particular cause of action sued upon arose from the defendant's activities within the forum state ('specific jurisdiction') or that the defendant has 'continuous and systematic' contacts with the forum state ('general jurisdiction')." Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987) (citations omitted).

Here, Superior contends that it has properly sued Proto in this forum based upon the concepts of specific jurisdiction. "Specific jurisdiction arises when the plaintiff's 'claim is related to or arises out of the defendant's contacts with the forum.'" Mellon Bank (East) PSFS v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992). In such a case, due process requires the plaintiff to prove that the defendant purposely availed itself of the privilege of conducting business within the forum State, thus invoking the benefits and protections of its laws. Hanson v. Denckla, 357 U.S. 235, 253 (1958). A court may go forward if, after examining the relationship among the defendant, the

litigation, and the forum, "the defendant's conduct and connection with forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

Once the plaintiff has made out a prima facie case of minimum contacts, "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction . . . comports with 'fair play and substantial justice.'" The burden shifts to the defendant to "present a compelling case that the presence of . . . other considerations . . . render jurisdiction unreasonable." The considerations to be weighed include: 1) the burden litigation in the forum state would impose on the defendant; 2) the forum State's interest in adjudicating the dispute; 3) the plaintiff's interest in obtaining "convenient and effective relief"; 4) the "interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and 5) the "shared interest of the several States in furthering fundamental substantive social policies."

Under this second tier analysis, the "[m]inimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." Application of this second tier analysis is discretionary with the court and appropriate only in certain cases.

AMP, 823 F. Supp. at 262-64 (citations omitted).

### **III. ANALYSIS OF PROTO'S CONTACTS WITH PENNSYLVANIA**

"The mere existence of a contract between the non-resident defendant and the resident plaintiff does not, by itself, establish personal jurisdiction . . . ." AMP, 823 F. Supp. at 264. In the Eastern District of Pennsylvania, courts

have generally considered and balanced four factors identified in Strick Corp. v. A.J.F. Warehouse Distributors, Inc., 532 F. Supp. 951 (E.D. Pa. 1982), when evaluating contacts where a non-resident is involved in a contract with a Pennsylvania resident: (1) the character of the precontract negotiations; (2) the location of those negotiations; (3) the terms of the sales agreement; and (4) the type of goods sold. Id. at 958.

With respect to the character of the negotiations, "[t]he Strick court envisioned this factor as looking to whether the defendant `initiated the deal, attempted to alter the terms of the contract, or conducted significant negotiations with plaintiff." Allied Leather Corp. v. Altama Delta Corp., 785 F. Supp. 494, 500 (M.D. Pa. 1992). In this case, Proto contends that the character of the pre-contract negotiations weighs in its favor because Superior solicited Proto seeking to participate in the New York public improvement project. Def.'s Reply at 8-9 (citing Cloverbrook C & D, Inc. v. William Graulich & Associates, 664 F. Supp. 960, 961 (E.D. Pa. 1987)). Superior points out, however, that Proto did not merely ratify the terms of the contract but entered into significant negotiations that consisted of numerous telephone calls to Superior's Pennsylvania facility and two trips by Proto to Superior's Pennsylvania offices in an attempt to finalize the agreement. Based on the above, the character of the negotiations does not favor any one party.

As stated above, the location of the negotiations "is also relevant to assessing whether the buyer has purposefully

availed itself of the opportunity of conducting activities in the forum." Strick, 532 F. Supp. at 959. In this regard, Proto argues that "any phone calls or letters that Proto may have sent in connection with the contract negotiations is insufficient to confer jurisdiction." Def.'s Reply at 9 (citing Jaffe v. Julien, 754 F. Supp. 49, 52 (E.D. Pa. 1991)). However, as Superior makes clear, the negotiations between the parties consisted of more than just phone calls and letters. In fact, Proto sent representatives to Superior's facility on two occasions during the negotiation phase of the contract, at which time the parties further discussed the terms of the contract. Moreover, the contract was finally executed in Pennsylvania. These additional contacts were such that Proto should have reasonably anticipated being haled into court here and also serve to distinguish this case from Proto's cited authority. Cf. DiMark, 913 F. Supp. at 407. Thus, this factor weighs in favor of maintaining the lawsuit in a Pennsylvania forum.

On the other hand, the terms of the sales agreement favor having the case litigated in New York. To support this position, Proto points to a purchase order signed by the parties which states the following under "Description of the Work":  
"Furnish all posts and panels as per contract Tane 98-75 & attached letter from Superior Precast, Inc., dated 10-8-98, and Schedule A, dated October 5, 1998 (As Amended), and Schedule B, dated 10-5-98." Exh. E to Proto's Motion to Dismiss (emphasis added). Tane 98-75 is the agreement that Proto was operating

under with the New York State Thruway Authority and contains a forum selection clause that states:

**12. NO ARBITRATION AND SERVICE OF PROCESS.**

Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized) but must, instead, be heard in a court of competent jurisdiction of the State of New York.

Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested.

Exh. A to Proto's Motion to Dismiss. Based on the above, Proto contends that the parties' contract requires this matter to be litigated in New York State.

While there appears to be little question that the above clause requires disputes between Proto and the New York State Thruway Authority to be litigated in a New York forum, whether the parties in the instant case intended to incorporate that forum selection clause into their agreement by making reference in the purchase order to TANE 98-75 is not entirely clear. However, the fact that the agreement at issue requires Superior to deliver posts and panels to the job site located in New York favors transfer to a forum in that state. See Cloverbrook, 664 F. Supp. at 961 (construction of concrete panels in Pennsylvania did not outweigh fact that finished product was to be delivered to construction site in New Jersey); Allied Leather, 785 F. Supp. at 501 (discounting the effect of the manufacture of leather in Pennsylvania).

Finally, with regard to the type of goods at issue, the

Strick court described this factor as taking into consideration the notion that "there is less justification for asserting jurisdiction over a non-resident purchaser of mail-order consumer goods than over a non-resident commercial purchaser of sophisticated, high-priced industrial equipment." 532 F. Supp. at 959. The type of goods contracted for here, concrete posts and panels, fall more in line with highly specialized products. Thus, this factor weighs in favor of jurisdiction in Pennsylvania.

Based on the above analysis, Superior has established that Proto had sufficient contacts with Pennsylvania such that it could "reasonably anticipate being haled into court" in this jurisdiction.

#### **IV. "FAIR PLAY AND SUBSTANTIAL JUSTICE"**

Although it appears that Proto has sufficient minimum contacts, this Court will next examine "whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (quoting International Shoe, 326 U.S. at 320). In doing so, this Court must examine the following factors: "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of

controversies, and the shared interest of the several States in furthering fundamental substantive social policies." Burger King, 471 U.S. at 477.

In this regard, Proto contends that it would be unjust for Proto to be forced to litigate this dispute with Plaintiff in Pennsylvania because Proto is based exclusively in New York and has never performed a single job in Pennsylvania, as compared to Plaintiff, a Michigan corporation, who has been involved in several New York based construction projects. Def.'s Supp. Mem. at 8. Proto also contends that Pennsylvania has little interest in determining a breach of contract action between foreign corporations, while New York has a compelling interest in this dispute in that it arises out of a public improvement project for the State of New York by a New York contractor. Id. Thus, Proto asserts that concerns of fair play and substantial justice demand that it not be hauled into Pennsylvania because it accepted Superior's solicitation. Id.

In response, Superior states that "it does not offend traditional notions of fair play to require Proto to return to Pennsylvania again to defend a breach of contract action which it executed in Pottstown." Plf.'s Response at 7-8. Superior further states that "[a]lthough Proto asserts that this dispute involves a New York public improvement with New York witnesses, those allegations have virtually nothing to do with the trial of

this action. The Complaint simply alleges that Proto breached its contract by unlawfully terminating Superior and refusing to pay for contracted materials." Id. at 9. Superior also asserts that Proto has failed to make the required showing that would warrant a disturbance of Superior's selected forum. Id. at 10; see also Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970) (plaintiff's choice of forum is a "paramount consideration" and "should not be lightly disturbed."), cert. denied, 401 U.S. 910 (1971).

Superior is correct in that the burden on the defendant in this case is not of the magnitude that would justify a transfer of venue. As Superior points out, the inconvenience of traveling to Pennsylvania from New York is not sufficient to upset Superior's chosen forum. Proto does make a valid point, however, with respect to New York's vested interest in this case because it arises out of a public improvement project for the State of New York. As for the Plaintiff's interest in obtaining convenient and effective relief, the convenience factor does not outweigh the fact that the parties in this matter could more effectively resolve their dispute in New York.

There are several reasons why the interstate judicial system's interest in obtaining the most efficient resolution of controversies can be best accomplished by transferring this case to the United States District Court for the Eastern District of

New York. First, in addition to the instant action, Proto has filed a complaint in New York, the litigation of which would, according to Proto, require several New York witnesses to testify. Second, Proto asserts that Superior has filed a mechanic's lien in New York with two New York state agencies, encumbering the proceeds of the contract pertaining to the public improvement -- the enforcement of which would have to be tried in New York. Thus, all claims concerning the same New York public improvement project should be heard in one jurisdiction where all of the issues can be resolved. Indeed, the shared interest of the several States in furthering this fundamental policy of judicial economy favors resolution of these disputes in New York, the jurisdictional beneficiary of this contract.

**V. INDISPENSABLE PARTY**

Proto further argues that United Pacific Insurance Company ("United"), Proto's surety, is an indispensable party to this litigation and that joining United to this lawsuit would destroy diversity jurisdiction, providing still another basis for this case not to be litigated in Pennsylvania. Def.'s Reply at 2-6. Because joinder of United would divest this Court of diversity jurisdiction, Rule 19(b) of the Federal Rules of Civil Procedure governs this issue. Precision Piping, Inc. v. United States Fidelity and Guaranty Co., CIV. A. No. 89-7079, 1990 WL 5156, \*1 (E.D. Pa. Jan. 23, 1990).

When a person cannot be made a party to a lawsuit, Rule 19(b) sets forth a number of factors to be considered by a federal court in determining "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." FED. R. CIV. P. 19(b). They include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Id.

According to Proto, a judgment rendered in United's absence would deprive United of the opportunity to defend itself and such prejudice cannot be avoided if United is dropped from this case. "[H]owever, 'a merely theoretical possibility of prejudice is insufficient. Whether an absent party's interests are adequately represented by the existing parties, and the absentee's ability to protect its own interests through intervention or otherwise, also are considerations to be examined.'" Precision Piping, 1990 WL 5156 at \*2.

Here, it appears that Proto has exaggerated the

prejudice United would suffer. Indeed, before Superior filed its Amended Complaint, dropping United from this case, counsel for Proto filed the instant motion not only on behalf of Proto, but on behalf of United. Thus, United would be hard-pressed to contend that its interests are not being adequately represented by Proto.<sup>2</sup> Moreover, while intervention by United would divest this Court of jurisdiction, that same problem would exist if United intervened in New York federal court. The third factor, whether a judgment rendered in United's absence will be adequate, "refers to the interest of the courts and public in 'settling disputes by wholes' and resolving controversies in a 'complete, consistent, and efficient' manner rather than in piecemeal fashion." Id. At this early stage, transfer of this federal action to New York would result in little or no duplication of effort, yet, as stated above, United would still be absent from the federal litigation in that state. Finally, Superior does have a remedy if the instant action is dismissed, which is for Superior to assert its claims in New York federal court. Based on the above analysis, this Court concludes that United is not an indispensable party.

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<sup>2</sup> "It is a basic proposition of surety law that the surety is only liable to the extent of the principal . . . ." C. Arena & Co. v. St. Paul Fire and Marine Insurance Co., Civ. No. 91-7425, 1992 WL 368455, \*4 (E.D. Pa. Dec. 3, 1992). Proto, as the principal, is therefore able to raise any available defenses. Id.

## VI. CONVENIENCE OF THE FORUM

As already explained above, Proto has alternatively requested that this Court, pursuant to 28 U.S.C. § 1404(a), transfer this action to the Eastern District of New York for the convenience of the parties and witnesses and in the interest of justice. Edwards v. Texaco, Inc., Civ. A. No. 86-5240, 1987 WL 9293, \*2 (E.D. Pa. April 10, 1987) ("A court can transfer an action pursuant to 28 U.S.C. § 1404(a), if, first, the action could have been brought in the transferee court, and second, the transfer will serve the convenience of the parties and witnesses and the interest of justice.").

Motions to transfer venue are decided by consideration of the same factors relevant to deciding a forum non conveniens motion. When weighing these factors, however, the court exercises broader discretion when deciding § 1404(a) motion than when deciding a forum non conveniens motion,. Also, a lesser showing of inconvenience is required to warrant transfer pursuant to § 1404(a) than is required to warrant dismissal on forum non conveniens grounds.

The factors relevant to deciding § 1404(a) motions are:

- (1) relative ease of access to sources of proof;
- (2) availability of compulsory process for attendance of unwilling witnesses;
- (3) cost of attendance at trial by willing witnesses;
- (4) the 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) "public interest" factors, including the relative congestion of court dockets, and the advantage of having local issues of law and fact determined by local courts and juries.

Rowles v. Hammermill Paper Co., 689 F. Supp. 494, 495 (E.D. Pa. 1988) (citations omitted).

In analyzing Proto's Motion to Dismiss for Lack of Personal Jurisdiction, this Court has already considered many of the § 1404(a) factors. As indicated above, this litigation will require several New York witnesses to testify. In addition, another lawsuit in the Eastern District of New York between the parties in this case, as well as the enforcement of Superior's mechanic's lien will have to be tried in New York, and the fact that New York has a vested interest in this case because it arises out of a public improvement project for the State of New York all weigh in favor of transferring the case to the Eastern District of New York.

For the above reasons, this case will be transferred to the United States District Court for the Eastern District of New York. An accompanying order will follow.

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

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SUPERIOR PRECAST, INC., :  
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 Plaintiff, :  
 v. : Civil Action No. 99-1893  
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PROTO CONSTRUCTION AND :  
DEVELOPMENT CORP., :  
 :  
Defendant. :  
\_\_\_\_\_ :

**ORDER**

AND NOW, this 6th day of July, 1999, upon consideration of Defendant Proto Construction and Development Corporation's Motion to Dismiss the Complaint or, in the alternative, to Transfer this action to the United States District Court for the Eastern District of New York, and Plaintiff's response thereto, it is hereby ORDERED that Defendant's Motion to Dismiss is DENIED, and Defendant's Motion to Transfer is GRANTED. The Clerk of Court is hereby ORDERED to transfer the above-captioned matter to the United States District Court for the Eastern District of New York.

BY THE COURT:

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ROBERT F. KELLY, J.