

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

BERNHARD A. SACK, et al., : CIVIL ACTION
 :
 v. :
 :
 JOHN T. SACK : NO. 99-1680

MEMORANDUM AND ORDER

HUTTON, J.

November 8, 1999

Presently before the Court is Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, Insufficient Service of Process, Transfer of Venue, and Failure to State a Claim (Docket No. 5). For the following reasons, the Defendant's Motion is GRANTED in part and DENIED in part.

I. BACKGROUND

The cause of action giving rise to this motion surrounds the wills of Jesse O. Thomas and John B. Thomas, each of whom died in the State of Washington during 1997. The wills of the respective parties both named the Defendant John T. Sack, a Washington resident, as the representative of the respective estates. The wills were probated in Washington State Court. Plaintiffs, who are Pennsylvania residents, each have various degrees of beneficiary interests in said wills.

The Plaintiffs allege that Defendant failed to properly execute his fiduciary duties by, inter alia, under-valuing

certain property located in Washington State and inaccurately making distributions. Plaintiffs' complaint does not state that any of the property to be distributed had any connection with Pennsylvania, other than the fact that Plaintiffs are beneficiaries. Defendant seeks to have the action dismissed for lack of personal jurisdiction, insufficient service of process, failure to state a claim, and for improper venue. In the alternative, Defendant seeks to have venue moved to Washington State. The Court in this matter only considers the merits of Defendant's jurisdictional and venue arguments, as such issues have a dispositive effect on this Court's ability to adjudicate the matter.

II. DISCUSSION

1. Applicable Law

When a defendant raises a defense of lack of personal jurisdiction, the plaintiff then bears the burden to come forward with sufficient facts to establish that jurisdiction is in fact proper. Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). The plaintiff must produce "sworn affidavits or other competent evidence," since a Rule 12(b)(2) motion "requires resolution of factual issues outside the pleadings" Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 67 n.9 (3d Cir. 1984). For the purposes of the motion, the court must accept as true the plaintiff's version of the facts, and

draw all inferences from the pleadings, affidavits, and exhibits in the plaintiff's favor. DiMark Mktg., Inc. v. Louisiana Health Serv. & Indem. Co., 913 F. Supp. 402, 405 (E.D. Pa. 1996); In Re Arthur Treacher's Franchisee Litigation, 92 F.R.D. 398, 409-10 (E.D. Pa. 1981).

Under Federal Rule of Civil Procedure 4(e), this Court may exercise personal jurisdiction over non-resident defendants to the extent permitted by Pennsylvania's long-arm statute. Pennsylvania exercises jurisdiction over non-residents to the fullest extent allowed under the Due Process Clause of the Fourteenth Amendment of the Constitution. See 42 Pa. Cons. Stat. Ann. § 5322(b). The constitutional limitations on the exercise of personal jurisdiction differ depending upon whether a court seeks to exercise general or specific jurisdiction over a non-resident defendant. See Mellon, 960 F.2d at 1221. General jurisdiction permits a court to exercise personal jurisdiction over a non-resident for non-forum related activities when the defendant has engaged in "systematic and continuous" activities in the forum state. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16 (1984). In the absence of general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the "relationship between the defendant and the forum falls within the 'minimum contacts' framework" of

International Shoe Co. v. Washington, 326 U.S. 310 (1945); see also Mellon, 960 F.2d at 1221.

2. Personal Jurisdiction

Under the Pennsylvania long-arm statute, both general and specific jurisdiction is contemplated. See Brooks v. Bacardi Rum Corp., 943 F. Supp. 559, 561-62 (E.D. Pa. 1996). For the court to entertain general jurisdiction over an individual defendant, the provisions of Title 42 § 5301(a) of the Pennsylvania Consolidated Statutes must be satisfied.¹ Plaintiffs do not allege that Defendant falls within these three enumerated provisions for exercising general jurisdiction. As such, the Court finds that the Defendant is not subject to general jurisdiction in Pennsylvania.

A court's inquiry as to whether it has specific jurisdiction over a defendant further implicates the Pennsylvania long-arm statute, which provides in pertinent part that "[a] tribunal of this Commonwealth may exercise [specific] personal jurisdiction over a person . . . who acts directly or by an agent . . . (4) Causing harm or tortious injury in the Commonwealth by an

¹ Title 42 Section 5301(a) provides in relevant part:
(a) General Rule.--The existence of any of the following relationships . . . shall constitute sufficient basis of jurisdiction . . . to exercise general personal jurisdiction over such person . . . :
(1) Individuals.--
(i) Presence in this Commonwealth at the time when process is served.
(ii) Domicile in this Commonwealth at the time process is served.
(iii) Consent, to the extent authorized by the consent.

42 Pa. Cons. Stat. Ann. § 5301 (West 1999).

act or omission outside this Commonwealth . . ." 42 Pa. Cons. Stat. Ann. § 5322(a) (West 1999). The statute permits the exercise of jurisdiction "based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." § 5322(b). "Specific jurisdiction is invoked when the cause of action arises from the defendant's forum related activities . . . 'such that the defendant should reasonably anticipate being haled into court there.'" Verotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co., 75 F.3d 147, 151 (3d Cir. 1996) (citations omitted). To establish specific jurisdiction, "the plaintiff must show that the defendant has constitutionally sufficient 'minimum contacts' with the forum." IMO Industries, Inc. v. Kiekert AG, 155 F.3d 254, 259 (3d Cir. 1998). In applying the minimum contacts standard, it is clear that a "defendant will not be haled into a jurisdiction solely as a result of 'random,' fortuitous,' or 'attenuated' contacts." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). Rather, the plaintiff must establish that the defendant "purposefully availed itself" of the privilege of conducting activities within the forum. Hanson v. Denckla, 357 U.S. 235 (1958).

Although the Pennsylvania long-arm statute may initially appear to apply to Defendant upon a surface examination, the "examination must go further, for there are two steps to be undertaken when personal jurisdiction is asserted over a

non-resident defendant The initial determination that must be made is whether the claim or cause of action which is being pursued arises from the defendant's forum related activities or from non-forum related activities." Reliance Steel Prod. v. Watson, Ess Marshal & Enggas, 675 F.2d 587, 588 (3d Cir. 1982). Only after it is determined that "forum related activity" exist, may the Court consider the presence of minimum contacts. See id.

As the Court concludes that Defendant's activities are not forum related, it is unnecessary to consider the sufficiency of Defendant's contacts with Pennsylvania. See id. Further, even if the Court were to consider the sufficiency of Defendant's contacts, those contacts are wholly unrelated to the actions averred in the Plaintiffs' complaint.

Plaintiffs' complaint is based upon allegations that Defendant improperly executed his fiduciary duties under two wills concerning decedents located in the State of Washington. Further, each of the wills in question were probated in Washington State Court and issues particular to the State of Washington predominate them. (See, e.g., Pl.'s Compl.)

As discussed, for the Court to exercise "specific," rather than "general" jurisdiction, the Plaintiff cannot simply rely on Defendant's contacts with Pennsylvania. (See Aff. of Kristine; see also Aff. of Bernhard). The cause of action must arise from said contacts or "forum related activity." As averred

by the Plaintiffs, Defendant's actions concerning the Washington wills have simply not been shown to encompass "forum related activity." Therefore, the Court cannot find a basis for imposing specific jurisdiction as Defendant could not reasonably have anticipated being haled into court in Pennsylvania concerning the Washington wills.

3. Venue

As the Court recognizes the potential ambiguity surrounding the exact boundary of "forum related activity," the Court also considers the Defendant's objection to venue. As such, even assuming personal jurisdiction could be sustained, this matter is presented in the wrong venue. Title 28 Section 1391(a) of the United States Code provides that in diversity venue is proper in:

(1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . , (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a) (West Supp. 1998) (emphasis added). Plaintiffs contend venue is proper under Section 1391(a)(3), apparently under the assumption that Defendant is subject to personal jurisdiction in the Eastern District of Pennsylvania. (See Pl.'s Compl. ¶ 5(e)). However, Plaintiffs' reliance on this section is misplaced as the final clause of § 1391(a)(3) clearly states that the section is

only applicable when there is no other district in which the action could be brought. Thus, Section 1391(a)(1) and 1391(a)(2) are conditions precedent to the applicability of Section 1391(a)(3). See, e.g., Banner Promotions, Inc. v. Ricardo Maldonado, 56 F. Supp. 2d 552, 556 (E.D. Pa. 1999).

The test for determining whether venue is proper is not the Defendant's contacts with the district, but rather the location of those events or omissions giving rise to the claim. See Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994). As all the events or omissions giving rise to this action, as pled by the Plaintiffs, occurred in the State of Washington venue is appropriately placed there pursuant to 28 U.S.C. § 1391(a)(2).

"Where venue is improper, as opposed to inconvenient, this Court may either dismiss the action or transfer it to another venue." Gaylord v. Sheraton Ocean City Resort & Conference Ctr., No. CIV.A.93-0463, 1993 WL 120299, at *4 (E.D. Pa. Apr. 15, 1993) (citations omitted). Further, Title 28 U.S.C. § 1404(a) provides: "[f]or the convenience of 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." Id. As this Court has concluded that the District of Washington is the proper venue pursuant to 28 U.S.C. § 1391(a)(2), the Court will not

dismiss the action, but will grant Defendant's Motion to Transfer Venue to the Western District of Washington.

An appropriate Order follows.

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O R D E R

AND NOW, this 8th day of November, 1999, upon consideration of the Defendant's Motion to Dismiss (Docket No. 5), and Plaintiff's response thereto (Docket No. 8), IT IS HEREBY ORDERED that:

(1) Defendant's Motion to Dismiss for Lack of Personal Jurisdiction and Insufficiency of Service of Process is **DENIED AS MOOT.**¹;

(2) Defendant's Motion to Transfer Venue to the Western District of Washington is **GRANTED.** The Clerk of Court is directed

¹ Defendant's motion to dismiss for lack of personal jurisdiction is not denied on the merits. Rather the request is moot because the Court has transferred the matter to the district having personal jurisdiction and venue.

to transfer this action to the United States District Court for the
Western District of Washington; and

(3) Defendant's 12(b)(6) Motion to Dismiss for Failure to State a Claim is **DENIED WITH LEAVE TO RENEW.**\²

BY THE COURT:

HERBERT J. HUTTON, J.

² As the Court has transferred this matter for improper venue, the merits of Defendant's 12(b)(6) defense have not been considered. As such, the Court denies with leave to renew.