

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

PAUL EGGEAR and KAREN EGGEAR, h/w,	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	NO. 00-CV-4636
	:	
THE SHIBUSAWA WAREHOUSE COMPANY,	:	
LTD. and ARMADA MARITIME COMPANY,	:	
LTD.,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J.

MARCH 19, 2001

Presently before this Court are the Motions to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(5), and the Motion to Stay Discovery Pending Resolution of Service and Jurisdiction Issues, filed by the Defendant Shibusawa Warehouse Company, Ltd. ("Shibusawa"). Plaintiffs Paul Eggear and Karen Eggear ("Mr. Eggear" and "Mrs. Eggear" or "Plaintiffs") filed this personal injury action against Shibusawa and Armada Maritime Company, Ltd. ("Armada") after Mr. Eggear was injured while unloading steel pipe from a ship moored in Philadelphia, Pennsylvania. Plaintiffs allege that Shibusawa negligently loaded the steel pipe onto the ship in Japan. For the following reasons, the Motion to Dismiss based upon FED. R. CIV. P. 12(b)(2) (lack of personal jurisdiction) is denied without prejudice, the Motion to Dismiss based upon FED. R. CIV. P. 12(b)(5)

(insufficiency of service of process) will be construed by this Court as a Motion to Quash Service and is granted as such, and the Motion to Stay Discovery is denied as moot.

I. BACKGROUND

On December 17, 1998, Mr. Eggeer was injured while unloading steel pipe from a ship owned by Armada while it was moored in Philadelphia. The injury occurred when the steel pipes on which Mr. Eggeer was standing began to roll, causing him to fall. The steel pipe had been loaded in Japan by Shibusawa, a Japanese Stevedoring company. Plaintiffs are both residents of Pennsylvania. Shibusawa is a Japanese corporation which provides logistics management services exclusively in Japan including warehousing, stevedoring and inland transportation within Japan. Plaintiffs initiated this personal injury action on September 12, 2000, alleging that Shibusawa was negligent in loading the pipe. Shibusawa filed the present Motions to Dismiss and Motion to Stay Discovery on January 11, 2001.

II. STANDARD

A federal court may exercise personal jurisdiction over a non-resident defendant to the extent permitted by the law of the state in which it sits. FED. R. CIV. P. 4(e). The Pennsylvania long-arm statute provides that jurisdiction may be exercised "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact

with this Commonwealth allowed under the Constitution of the United States." 42 Pa. C.S.A. § 5322(b) (Purdon 1981). "Where the defendant has raised a jurisdictional defense, the plaintiff bears the burden of establishing either that the cause of action arose from the defendant's forum-related activities (specific jurisdiction) or that the defendant has 'continuous and systematic' contacts with the forum state (general jurisdiction)". Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros., Inc., 983 F.2d 551, 554 (3rd Cir. 1993)(citations omitted).

II. DISCUSSION

A. Personal Jurisdiction

1. General Jurisdiction

In order to be subject to general jurisdiction, the defendant's contacts with the forum must be continuous and substantial. See Provident Nat'l Bank v. California Federal Sav. & Loan Assoc., 819 F.2d 434, 437 (3rd Cir. 1987). General jurisdiction requires a significantly greater showing than mere minimum contacts. Id. In an uncontroverted affidavit, Shibusawa avers that it has no contacts whatsoever with Pennsylvania. (Def.'s Mot. to Dismiss, Ex. A., Declaration of Koichi Sato). The affidavit states that Shibusawa is a Japanese corporation, with all of its offices, facilities and operations located within Japan. (Id.) Shibusawa is not licenced to do business in

Pennsylvania and has no subsidiaries in Pennsylvania. (Id.) Furthermore, Shibusawa does not own any real estate, personal property, or bank accounts in Pennsylvania and has never leased or maintained any space within Pennsylvania. (Id.) Shibusawa has never had any employees in Pennsylvania nor paid any taxes in Pennsylvania. (Id.) All of Shibusawa's stevedoring and other services are performed within Japan. (Id.) Shibusawa also has not consented to jurisdiction in Pennsylvania. (Id.)

The only contact that Plaintiffs allege that Shibusawa has with Pennsylvania is that Shibusawa is aware that ships that it loads in Japan are unloaded in Pennsylvania. This type of contact is insufficient to establish personal jurisdiction over Shibusawa. See section II. A. 2., infra. Accordingly, Shibusawa does not have continuous or systematic contacts with Pennsylvania and general jurisdiction cannot be asserted over them. See Irby v. Isewan Terminal Servs. Co., Ltd., et al., NO. 90-2210, 1991 U.S. Dist. LEXIS 18480, at *4 (E.D. Pa. Dec. 18, 1991).

2. Specific Jurisdiction

In order to be subject to specific jurisdiction, the defendant first must have sufficient minimum contacts with the forum so that it "should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). There must be "some act by which the defendant purposefully avails itself of the privilege of conducting

activities within the forum state, thus invoking the benefits and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). Furthermore, mere foreseeability that the product will enter a forum has never been a sufficient basis for personal jurisdiction under the due process clause. World-Wide Volkswagen, 444 U.S. at 295-97. Once minimum contacts are established, the court must decide whether the exercise of personal jurisdiction over the defendants would comport with "traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Plaintiffs claim that Shibusawa has sufficient minimum contacts with Pennsylvania because Shibusawa loads cargo onto ships in Japan knowing that the cargo will be unloaded in Pennsylvania. Plaintiffs rely heavily on Muller v. Temura Shipping Co., Ltd., 629 F. Supp. 1024 (E.D. Pa. 1986), to support this proposition. In Muller, the court found that personal jurisdiction existed over a stevedoring company from the United Kingdom that loaded cargo onto a ship which the stevedore knew was bound for Pennsylvania. Muller, 629 F. Supp. at 1026. The court found that the presence of the vessel in Pennsylvania was not fortuitous because the stevedore "should reasonably have expected both that a negligently loaded cargo could cause injury in Pennsylvania and that an injured party would bring suit in Pennsylvania." Id. at 1026-27.

Conversely, Shibusawa cites Irby, 1991 U.S. Dist. LEXIS 18480, for the proposition that such contacts are not sufficient to subject it to personal jurisdiction in Pennsylvania. In Irby, the court found that personal jurisdiction did not exist over a Japanese stevedore who loaded cargo onto a ship which the stevedore knew was bound for Pennsylvania. Irby, 1991 U.S. Dist. LEXIS 18480, at *5-*6. The court found that the stevedore did

not have contact with Pennsylvania such that [it] should reasonably anticipate being haled into court here. It cannot be said that defendants purposefully availed themselves of the privilege of conducting activities within this forum. Defendants load cargo onto ships in Japanese ports. It is uncontroverted that defendants have no interest in or control over the ultimate destination of cargo loaded onto these ships.

Id. The Irby court criticized the Muller court for finding jurisdiction based on mere foreseeability and concluded by stating that

[e]ven assuming arguendo that defendants knew that the cargo they loaded was destined for Philadelphia, they do not have sufficient contacts with this forum to support jurisdiction Defendants exercise no control over a ship's destination Whether or not there is jurisdiction in such a case cannot convincingly turn on the fortuity of whether the carrier or shipper happened to inform the [defendants] of the destination of the ship or whether they were unfortunate enough to have observed a bill of lading while loading the cargo.

Id. Shibusawa also argues that Muller, 629 F. Supp. 1024, was decided before Asahi Metal Industry Co., Ltd. v. Superior Court

of California, Solano County, 480 U.S. 102 (1987), at a time when it was thought that the purposeful availment test might have been abandoned by the Supreme Court. See Narco Avionics, Inc. v. Sportsman Mkt., Inc., 792 F. Supp. 398, 406 (E.D. Pa. 1992)(disagreeing with the plaintiff's reliance on Muller and stating that Muller "pre-date[d] Asahi and [did] not address the need for purposeful availment.")

Plaintiffs also cite other cases in support of their argument, which are distinguishable from the present case. For example, in Friend v. Interior Trade, Inc., No. 86-4073, 1987 U.S. Dist. LEXIS 1935 (E.D. Pa. Mar. 13, 1987), the court exercised jurisdiction over a foreign manufacturer when the plaintiff was injured by defectively packaged bags that the manufacturer had shipped into Pennsylvania through its United States subsidiary. Id. at *1. While the court did cite to Muller, 629 F. Supp. 1024, it stated that the case at issue was a stronger case for the exercise of jurisdiction based upon the admitted jurisdiction of the subsidiary and a possible agency theory. Id. at *3-*4. In the present case, Shibusawa does not have these extra connections to the forum.

Plaintiffs also cite Industrial Maritime Carriers, Inc. v. PT (Persaco) Inka, No. 96-7982, 1998 U.S. Dist. LEXIS 3250 (E.D. Pa. March 9, 1998). In Industrial Maritime, the court denied a motion to dismiss for lack of jurisdiction filed by a

defendant that was the parent corporation of a foreign stevedore subsidiary that loaded a vessel bound for Pennsylvania. Id. at *2-*3. While the court did discuss Muller, 629 F. Supp. 1024, it ultimately denied the motion because there was evidence that the parent corporation had extensive contacts in the United States. Id. at *7-*8. Again, the present situation is distinguishable on the basis that Shibusawa is not part of a parent-subsidary relationship with extensive contacts within the United States.

This Court agrees with the reasoning of the Irby court and with Shibusawa. Shibusawa may not be subjected to personal jurisdiction simply because it knew that ships that it loaded were bound for Pennsylvania. This knowledge does not constitute sufficient contacts with Pennsylvania to subject Shibusawa to personal jurisdiction there. See Irby, 1991 U.S. Dist. LEXIS 18480. To hold otherwise would not comport with traditional notions of fair play and substantial justice. Id.

3. Personal Jurisdiction Based Upon Federal Rule of Civil Procedure 4(k)(2)

Federal Rule of Civil Procedure 4(k)(2) provides a narrow exception to the personal jurisdiction rules which allows

personal jurisdiction over foreign defendants for claims arising under federal law when the defendant has sufficient contacts with the nation as a whole to justify the imposition of United States' law but without sufficient contacts to satisfy the due process concerns of the long-arm statute of any particular state.

BP Chems. Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, 258

(3rd Cir. 2000)(quoting World Tanker Carriers Corp. v. MV YA Mawlaya, 99 F.3d 717, 720 (5th Cir. 1996)). Rule 4(k)(2)

provides that:

if the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

FED. R. CIV. P. 4(k)(2). Therefore, in order to meet the requirements of this Rule: (1) there must be a claim arising under federal law, (2) the defendant must possess sufficient contacts with the nation as a whole to subject it to United States' law, but (3) the defendant must lack sufficient contacts to satisfy the personal jurisdiction requirements of any particular state. BP Chems. Ltd., 229 F.3d at 258.

Federal courts have concluded that, for purposes of Rule 4(k)(2), a claim arising under federal law encompasses admiralty and maritime claims. Industrial Maritime Carriers, 1998 U.S. Dist. LEXIS 3250, at *8 (citing World Tanker, 99 F.3d at 723). Plaintiffs have met this requirement since their claim arises under maritime law. However, Plaintiffs have not met the second and third requirements of Rule 4(k)(2). Plaintiffs have not alleged that Shibusawa has any contacts with the United

States apart from loading vessels which may find their way to ports in the United States. In section II. A. 2., supra, this Court found that simply loading a ship and knowing the ship's destination is insufficient to maintain personal jurisdiction over a defendant. Plaintiffs also have not shown that Shibusawa lacks sufficient contacts to satisfy the personal jurisdiction requirements of any particular state.

Plaintiffs, not Shibusawa, bear the burden of proving jurisdiction under Rule 4(k)(2). Mellon Bank, 983 F.2d at 554. However, without further discovery on this issue, it is unlikely that Plaintiffs would be able to unearth appropriate contacts. Therefore, further discovery is required to determine whether Shibusawa has sufficient national contacts, other than merely knowing the destination of the ships that it loads, to subject it to the law of the United States, but which are insufficient to satisfy the personal jurisdiction requirements of any particular state.

B. Service of Process

Plaintiffs attempted to serve Shibusawa with a copy of the Complaint by sending it via uncertified mail to Shibusawa in Japan. When a Complaint and Summons is served abroad, the validity of service is governed by the Convention on Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, 20 UST 361, TIAS No. 663A ("Hague

Convention"). See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698 (1988); Raffa v. Nissan Motor Co., 141 F.R.D. 45, (E.D. Pa. 1991). Since the Hague Convention is a federal treaty, it pre-empts state law and therefore is the sole determinant of the validity of service of process abroad. See Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079 (E.D. Pa. 1992).

Article 10(a) of the Hague Convention determines whether Plaintiffs' service of process by mail to Shibusawa in Japan was valid.¹ Gallagher, 781 F. Supp. at 1080. However, there is conflicting authority in the Eastern District as to whether service of process by mail to a defendant in Japan is valid under Article 10(a). See McElroy v. Yokota Cycle Co., No. 92-4517, 1993 U.S. Dist. LEXIS 3834 (E.D. Pa. March 26, 1993)(finding service of process by mail to Japan invalid); Gallagher, 781 F. Supp. 1079 (finding same); Raffa, 141 F.R.D. 45 (finding same); but see In re All Terrain Vehicles Litigation, 1989 U.S. Dist. LEXIS 1843 (E.D. Pa. 1989)(finding service of process by mail to Japan valid).² The Third Circuit has not

¹ Article 10(a) of the Hague Convention states, "[p]rovided the State of destination does not object, the present Convention shall not interfere with,(a) the freedom to send judicial documents, by postal channels, directly to persons abroad."

² Pennsylvania state law appears to agree with the view that service of process to Japan by mail is valid. See Jordan v. Septa, 708 A.2d 150 (Pa. Cmwlth. 1998); Sandoval v. Honda Motor Co., 527 A.2d 564 (Pa. Super. 1987). However, a state court's

ruled on this issue.

The interpretation of Article 10(a), which allows service of process by mail to Japan, finds that the term "send" in Article 10(a) is equivalent to "serve", and thus it permits the service of process by mail on any foreign party. See Gallagher, 781 F. Supp. at 1082, and the cases cited therein. The second interpretation, which does not allow service of process by mail to Japan, finds that Article 10(a) only provides for the service of subsequent papers after service of process has been effectuated by proper means, and does not provide an independent method for the service of process through the mail system. See Id. and the cases cited therein.

The Gallagher and Raffa courts, which follow the latter interpretation, found that since Japan had objected to the "less intrusive" provisions of Article 10(b) and 10(c), and since Japan does not permit service of process by certified mail in domestic cases, it was highly unlikely that Japan would consent to the service of foreign process by mail. "This, combined with the fact that the Hague Convention uses the term 'service' in all other articles, rather than the term 'send', [led these courts] to hold that [Article 10(a)] of the Hague Convention" did not

interpretation of a federal treaty is not binding on a federal court, even if the federal court's jurisdiction is based on diversity. Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1082 n.5 (E.D. Pa. 1992).

provide for service of process by mail on foreign parties.
Gallagher 781 F. Supp. at 1082 (citations omitted); Raffa 141
F.R.D. at 46-47.

This Court agrees with the reasoning set forth in the more recent Eastern District cases dealing with this matter; that service of process to Japan by mail is invalid under Article 10(a) of the Hague Convention. See McElroy, 1993 U.S. Dist. LEXIS 3834; Gallagher, 781 F. Supp. 1079; Raffa, 141 F.R.D. 45. Therefore, service of process upon Shibusawa was invalid. When service of process is invalid, district courts have broad discretion to dismiss the action without prejudice or to quash service of process. Umbenhauer v. Woog, 969 F.2d 25, 30 (3rd Cir. 1992). However, it is inappropriate to dismiss a case if "there is a reasonable prospect that plaintiff ultimately will be able to serve defendant properly." Wright & Miller, Federal Practice and Procedure: Civil 2d § 1354; Umbenhauer, 969 F.2d at 30. If this is the case, the court may treat the motion to dismiss as a motion to quash service, thus allowing the plaintiff to effect proper service of process. Umbenhauer, 969 F.2d at 30. Here because Shibusawa's address is stable and is known by Plaintiffs and because the statute of limitations will not expire until December 17, 2001,³ there is a reasonable prospect that

³ There is a three year statute of limitations on maritime claims. See 46 U.S.C. § 763a)

Plaintiffs will ultimately be able to properly serve Shibusawa. Therefore, Shibusawa's Motion to Dismiss for insufficiency of service of process will be treated as a Motion to Quash Service of Process and will be granted as such.

III. CONCLUSION

Neither specific nor general jurisdiction may be exercised over Shibusawa based upon the fact that it is aware that the cargo that it loads onto ships in Japan will be unloaded in Pennsylvania. However, discovery must proceed to determine whether Shibusawa has sufficient contacts with the United States as a whole to subject it United States' laws, but lacks sufficient contacts to satisfy the personal jurisdiction requirements of any particular state, so that it may be subject to jurisdiction under FED. R. CIV. P. 4(k)(2). Furthermore, service of process on Shibusawa by mail to Japan is insufficient and must be quashed.

An appropriate order follows.

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

PAUL EGGEAR and KAREN EGGEAR, h/w,	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	NO. 00-CV-4636
	:	
THE SHIBUSAWA WAREHOUSE COMPANY,	:	
LTD. and ARMADA MARITIME COMPANY,	:	
LTD.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 19th day of March, 2001, upon consideration of the Motion to Dismiss Pursuant to Rules 12(b)(2) and 12(b)(5) (Dkt. No. 13) and the Motion to Stay Discovery Pending Resolution of Service and Jurisdiction Issues (Dkt. No. 14) filed by Defendant, The Shibusawa Warehouse Company, Ltd. ("Shibusawa"), and any Responses and Replies thereto, it is hereby ORDERED that:

- (1) the Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(2) is DENIED without prejudice;
- (2) the Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(5) is construed as a Motion to Quash Service and is GRANTED as such; and
- (3) the Motion to Stay Discovery is DENIED as moot.

BY THE COURT:

ROBERT F. KELLY,	J.
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