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

CREATIVE WASTE MANAGEMENT, INC.,	:	
Plaintiff,	:	**CIVIL ACTION**
v.	:	
CAPITOL ENVIRONMENTAL SERVICES, INC., et al.,	:	**No. 04-1060**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **October 22, 2004**

Plaintiff Creative Waste Management, Inc. ("Creative") alleges that Defendant City of New Rochelle ("New Rochelle") fraudulently induced it into a contract to de-water and remove sludge from New Rochelle's municipal marina. Creative also alleges that Defendants Capitol Environmental Services, Inc. ("Capitol") and Code Environmental Services, Inc. ("Code"), the firms with which it subcontracted to transport the de-watered sludge, breached their respective contracts. Presently before the Court is Defendant City of New Rochelle's motion to dismiss because of lack of personal jurisdiction or, in the alternative, to transfer this case to the Southern District of New York. For the reasons set forth below, the Court finds that it does not have jurisdiction over New Rochelle. In the interests of justice, however, the Court will not dismiss the claims against New Rochelle, but rather orders that the entire action be transferred to the Southern District of New York.

I. BACKGROUND

The City of New Rochelle, located along the Long Island Sound in Westchester County, New York, operates a municipal marina. In June 2003, New Rochelle solicited competitive bids for a

contract to dredge sediment from the marina's bottom (the "Dredging Contract") by publishing an invitation to bid in two local newspapers, the Journal News and the Westchester County Press. (Def. New Rochelle Mot. to Dismiss ¶ 14 [hereinafter "Def.'s Mot."]; Maxwell Aff. ¶ 4.) Beginning on June 10, 2003, prospective bidders were directed to pick up copies of the project plans, specifications, and contract documents (the "Bid Package") at the New Rochelle City Hall. (Maxwell Aff. ¶ 6.) A representative of Creative traveled to New Rochelle, picked up a Bid Package, and brought that package back to Pennsylvania for review. (Am. Compl. ¶ 46.)

On June 19, 2003, a Creative representative attended a mandatory pre-bid meeting held at Hudson Park, adjacent to the marina. (Maxwell Aff. ¶ 5.) By the terms of the bid solicitation, sealed bids had to be hand-delivered to James Maxwell, the Commissioner of Public Works, in New Rochelle's City Hall by July 2, 2003. (Def.'s Mot. Ex. D at 30.) On or before that date, a Creative representative came to New Rochelle and submitted Creative's bid. (Maxwell Aff. ¶ 7; Am. Compl. ¶¶ 8, 11.) In its' bid, Creative proposed to dredge sludge from the marina bottom, de-water the sludge, transport it to a storage facility, and dispose of the dried material. (Def.'s Mot. Ex. D at B-1.1.) All bids (including Creative's) exceeded New Rochelle's budget for the project. (Maxwell Aff. ¶ 8.) On July 3, 2003, New Rochelle's Senior Engineer, Kaz Orszulik, called Creative's Vice President, Russ Pinkerton, and asked if Creative would be willing to bid on a reduced scope. (Pinkerton Aff. ¶ 5.) Creative agreed, and on July 14, 2003, Creative representatives met with City officials in New Rochelle and negotiated several aspects of the deal. (Maxwell Aff. ¶ 9.) On July 18, 2003, James Maxwell informed Creative that it won the Dredging Contract. (Pinkerton Aff. ¶ 7.) The parties executed the Dredging Contract in New Rochelle on August 28, 2003. (Def.'s Mot. Ex. D at D-4.)

The Dredging Contract did not specify where the dredged material was to be stored. Instead, the "Technical Summary of Work" section stated only that "[t]he intent of the Contract Documents is to require the Contractor to furnish all equipment, labor, supervision and other items necessary to . . . transport and dispose of the dewatered sediment at an approved off-site disposal area" (*id*. at TS-1), and that "Disposal of the dewatered materials must be to an approved disposal area." (*Id*. at TS-4.) It appears that the disposal site was not chosen before the contract was awarded, for as late as September 19, 2003, at least two disposal sites were still being considered: one in New York and one in Pennsylvania. (Pl.'s Reply to Def.'s Mot. Ex. 4.) Ultimately, 531 tons of de-watered dredge material were transported to the Copley Quarry disposal site in Bethlehem, Pennsylvania between October 16, 2003 and October 23, 2003. (Pinkerton Aff. ¶ 17.)

Creative subcontracted the transportation and disposal aspects of the Dredging Contract to Capitol and Code on a per-ton price basis. (Am. Compl. ¶¶ 13-16, 18-21.) Sometime later, Creative alleges, it learned neither Capitol nor Code would timely provide the transportation and disposal services each had separately contacted to perform. (*Id*. ¶¶ 17, 22.) Creative was unable to locate a substitute subcontractor until December 2, 2003, and the substitute charged a significantly higher price per ton to transport and dispose of the de-watered marina sludge. (*Id*. ¶ 24.)

II. STANDARD OF REVIEW

Once a defendant has raised a jurisdictional defense, the burden shifts to the plaintiff to prove that jurisdiction exists in the forum state. *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 257 (3d Cir. 1998); *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir. 1996). While a court must construe all facts in a light most favorable to the plaintiff when determining whether personal

jurisdiction exists, *Pinker v. Roche Holdings, Ltd*., 292 F.3d 361, 368 (3d Cir. 2002), a plaintiff may not rest solely on the pleadings to satisfy its burden, *Carteret Sav. Bank, F.A. v. Shushan*, 954 F.2d 141, 146 (3d Cir. 1992). Rather, a plaintiff must present a prima facie case for the exercise of personal jurisdiction with sworn affidavits or other evidence that demonstrates, with reasonable particularity, a sufficient nexus between the defendant and the forum state to support jurisdiction. *Mellon Bank v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992); *Carteret Sav. Bank*, 954 F.2d at146. If the plaintiff makes out a prima facie case in favor of personal jurisdiction, the burden then shifts to the defendant to establish that the presence of some other consideration would render jurisdiction unreasonable. *Carteret Sav. Bank*, 954 F.2d at 150.

Generally, "to exercise personal jurisdiction over a defendant, a federal court sitting in diversity must undertake a two-step inquiry." *Imo Indus.*, 155 F.3d at 259. First, the court must ascertain whether the relevant state long-arm statute permits the exercise of personal jurisdiction FED. R. CIV. P. 4(e); *Pennzoil Prod. Co. v. Colelli & Assocs., Inc.*,149 F.3d 197, 200 (3d Cir. 1998) (holding that district court may assert personal jurisdiction "over non-resident defendants to the extent permissible under the law of the state where the district court sits"). Second, the court must determine if the exercise of jurisdiction comports with the Due Process Clause of the Constitution. *Imo Indus.*, 155 F.3d at 259. In Pennsylvania, the two-step inquiry collapses into a single step because the reach of Pennsylvania's long-arm statute is coextensive with the constitutional limits of due process. 42 PA. CONS. STAT. ANN. § 5322 (2004); *Mellon Bank*, 960 F.2d at 1221 (finding that Pennsylvania's long-arm statute authorizes Pennsylvania courts "to exercise personal jurisdiction over nonresident defendants to the constitutional limits of the Due Process Clause of the Fourteenth Amendment"); *Giusto v. Ashland*, 994 F. Supp. 587, 590 (E.D. Pa. 1998) (same).

Where, as here, plaintiff's claim "results from alleged injuries that 'arise out of or relate to'" defendant's contacts with the forum, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (*quoting Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)), "the court is said to exercise specific jurisdiction." *Imo Indus.*, 155 F.3d at 259.[1] For specific jurisdiction to be properly exercised under the Due Process Clause, a two-part test must be met. *Id.* First, the plaintiff must show that the defendant has sufficient minimum contacts with the forum; second, the court must determine whether the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." *Id.* (*citing Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945)).

To demonstrate defendant's "minimum contacts" with the forum, physical presence in the forum is not required. *Burger King*, 471 U.S. at 476 (1985). Rather, the plaintiff must show that the defendant has "purposefully directed" its activities toward the residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), or otherwise "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Although evaluation of "minimum contacts" for the exercise of specific jurisdiction traditionally rests upon whether defendant "purposefully directed" its activities toward the forum or "purposefully availed" itself of the forum's benefits, *id*. at 260 (internal quotations and citations omitted), an alternative test is used if a plaintiff alleges that defendant has committed an intentional

---

[1] If the plaintiff's claim does not arise out of the defendant's contacts with the forum, the court is said to exercise "general jurisdiction." *Imo Indus.*, 155 F.3d at 259. A defendant is subject to general jurisdiction in a state when the defendant's activities in that state are continuous and systematic, regardless of whether the subject matter of the cause of action has any connection with the forum state. *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 416 (1984); *Imo Indus.*, 155 F.3d at 259-60; *Mellon Bank*, 960 F.2d at 1221.

tort but fails to demonstrate sufficient minimum contacts. Then, plaintiff may be able to rely on *Calder v. Jones*, 465 U.S. 783 (1984), to "enhance otherwise insufficient contacts with the forum such that the 'minimum contacts' prong of the Due Process test is satisfied." *Id*. at 260. This alternative test is known as the *Calder* "effects" test, and permits satisfaction of the minimum contacts prong of the personal jurisdiction inquiry if three elements are met: (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; and (3) the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity. *Id*. at 265-66. For this third prong to be met, plaintiff must be able to "point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum," *i.e.*, that defendant "manifested behavior intentionally targeted at and focused on the forum." *Id*. at 265.

If a defendant has "purposefully availed" itself of the forum under either the traditional minimum contracts analysis or the *Calder* effects analysis, a court may exercise personal jurisdiction over a defendant so long as the exercise of that jurisdiction "comport[s] with fair play and substantial justice." *Burger King*, 471 U.S. at 476. To defeat jurisdiction based on fairness, a defendant must "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable". *Id*. at 477. In determining fairness, the court may consider "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id*. (internal quotations omitted).

III. DISCUSSION

On March 11, 2004, Creative commenced this action for breach of contract and promissory estoppel, alleging that Capitol and Code breached their respective contracts with Creative, and that Creative relied, to its detriment, on assurances made by Capitol and Code. On July 8, 2004, Creative filed a motion to join New Rochelle as a defendant and to amend its complaint, claiming that during discovery, it learned that New Rochelle's Bid Package concealed and withheld material information regarding both the physical conditions of the marina floor and the chemical composition of the sludge to be removed. (*Id*. ¶¶ 47, 55-57.) This Court granted Creative's motion, and on August 20, 2004, Creative filed an Amended Complaint asserting a claim for fraudulent inducement and punitive damages against New Rochelle.[2] On September 14, 2004, New Rochelle filed the instant motion.

---

[2]In the July 8 motion, Creative asked the Court's permission to amend its' Complaint "as set forth in the draft Amended Complaint, attached hereto as Exhibit A." (Pl.'s Mot. for Leave to Join Add'l Def ¶ 17.) The draft Amended Complaint set forth the claim for fraudulent inducement and punitive damages. (*Id*. Ex A.) On August 13, 2004, this Court granted Creative's motion. The August 20, 2004 Amended Complaint filed by Creative, however, included an additional claim against New Rochelle for breach of the implied covenant of good faith and fair dealing which was not in the draft attached to Creative's July 8 motion. (Am. Compl. ¶¶ 74-76.)

Although Creative neither sought nor received permission from this Court to include its breach of implied covenant claim in its Amended Complaint, Plaintiff confidently predicts that it could merely amend the complaint again and receive this permission. (Pl.'s Resp. to Def.'s Mot. at 15). While federal courts do employ a liberal pleading amendment standard, "the decision to grant or deny leave to supplement or amend a complaint is committed to the sound discretion of the district court." *Thomas v. SmithKline Beecham Corp.*, No. 00-2948, 2002 U.S. Dist LEXIS 17328, at *5 (E.D. Pa. Sept. 5, 2002) The question of amendment is irrelevant for present purposes, however. Plaintiff admits that the breach of the implied covenant of good faith "was based upon the same factual predicate as the amended complaint presented to the court through Plaintiff's motion for leave to file an amended complaint." (Pl.'s Resp. to Def.'s Mot. ¶ 4.) Because Plaintiff alleges no contacts specific to the breach of the implied covenant claim, the minimum contacts analysis for that claim is identical to the analysis for the fraudulent inducement claim.

A. Minimum Contacts

"In general, a court must analyze questions of personal jurisdiction on a defendant-specific and claim-specific basis." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 95 n.1 (3d Cir. 2004); *see also Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2000) (determining specific jurisdiction "is claim specific because a conclusion that the District Court has personal jurisdiction over one of the defendants as to a particular claim . . . does not necessarily mean that it has personal jurisdiction over that same defendant as to [the plaintiff's] other claims"); *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987) (describing specific jurisdiction as present when "the particular cause of action sued upon arose from the defendant's activities within the forum state").[3] Accordingly, Creative must show that its cause of action results from alleged injuries arising out of New Rochelle's forum related activities. *N. Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 690 (3d Cir. 1990) ("[s]pecific jurisdiction is invoked when the cause of action arises from the defendant's forum related activities").

A claim for fraudulent inducement is "an issue which goes to the 'making' of the agreement." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); *see also Battaglia v. McKendry*, 233 F.3d 720, 724 (3d Cir. 2000) (holding arbitration clause broad enough to "encompass disputes going to the formation of th[e] Agreement" such as fraudulent inducement disputes). Fraudulent inducement "induces a party to assent to something he otherwise would not have." *Connors v. Fawn Mining Corp.*, 30 F.3d 483, 490 (3d Cir. 1994) (*quoting Southwest Admrs.*,

[3] Pennsylvania courts cannot exercise general jurisdiction over New Rochelle, because Creative does not allege that, apart from the facts giving rise to this action, New Rochelle has ever had any contact with Pennsylvania. It is a New York municipal corporation, has no agent for service in Pennsylvania, does not own or directly lease any property in Pennsylvania, and has no Pennsylvania telephone listing or address. *See Helicopteros*, 466 U.S. at 414.

Inc. v. Rozay's Transfer, 791 F.2d 769, 774 (9th Cir. 1986) (citation omitted); *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 437 (Pa. 2004) (defining fraudulent inducement as "false representations that induced the complaining party to agree to the contract"); *see also* BLACK'S LAW DICTIONARY 687 (8th ed. 2004) (defining "fraud in the inducement" as when "a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved"). Therefore, "[f]raud in the inducement . . . does not involve terms omitted from an agreement, but rather allegations of oral representations on which the other party relied in entering into the agreement but which are contrary to the express terms of the agreement." *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1300 (3d Cir. 1996). Accordingly, for this Court to exercise jurisdiction over New Rochelle, Creative must show that its' fraudulent inducement claim arises out of New Rochelle's contacts in Pennsylvania because New Rochelle purposefully directed its fraudulent activity, during the negotiation and formulation of the Dredging Contract, towards Pennsylvania.

Creative asserts that New Rochelle used fraud to induce Creative to enter the Dredging Contract by omitting and withholding two categories of material information from the Bid Package. First, Creative claims that New Rochelle included in the Bid Package a November 21, 1996 Analysis Report of the proposed dredge material (the "1996 Analysis") which purported to be representative of the composition of the proposed dredge material. (Am. Compl. ¶ 55; Pinkerton Aff. ¶ 48.) However, Creative asserts that New Rochelle fraudulently omitted from the Bid Package an August 22, 2001 Summary of Chemical and Physical Analysis of marina sediment (the "2001 Analysis"), which disclosed higher levels of contamination and environmental impairment than the 1996 Analysis (*id*. ¶¶ 56-57), even though New Rochelle had received a copy of the 2001 Analysis and

was aware of its contents. (*Id*. ¶ 58.) Second, Creative claims that New Rochelle omitted any reference to an air bubble system at the bottom of the marina, made of rubber tubing and metal piping, which made the marina much more difficult to dredge than represented in the Bid Package. (*Id*. ¶ 47.) According to Creative, New Rochelle was aware of the air bubble system as far back as 1992. (*Id*. ¶ 48-50.)

The parties consummated the Dredging Contract on August 28, 2003. (Def.'s Mot. Ex. D at B-1.1.) Prior to that date,[4] the parties had the following contacts: (1) New Rochelle published a notice inviting bids in two New York newspapers (Maxwell Aff. ¶ 3), and Creative became aware of the opportunity to bid (Am. Compl. ¶ 45); (2) a Creative representative came to New York in June 2003 and picked up the Bid Package (Maxwell Aff. ¶ 6; Am. Compl. ¶ 46); (3) the Creative representative then brought this Bid Package (containing the allegedly fraudulent omissions) back to Pennsylvania, where Creative reviewed it and decided to bid on the Dredging Contract (Am. Compl. ¶ 47; Pl.'s Resp. to Def.'s Mot. at 11); (4) a Creative representative traveled to New Rochelle on June 19, 2003 and attended a mandatory pre-bid meeting at Hudson Park (Maxwell Aff. ¶ 5); (5) a Creative representative traveled to New Rochelle before July 2, 2003 and submitted its bid for the Dredging Contract (Maxwell Aff. ¶ 7; Pinkerton Aff. ¶ 4); (6) Kaz Orszulik of New Rochelle called Russ Pinkerton of Creative on July 3, 2003 and asked Pinkerton if Creative would be willing to negotiate the Dredging Contract at a reduced scope (Pinkerton Aff. ¶ 5); (7) the parties met in New

[4]Creative also asserts contacts between the parties subsequent to the Dredging Contract's execution, but as discussed above, when analyzing specific jurisdiction, the analysis is undertaken on a claim specific basis. The gravamen of fraudulent inducement is a false representation made to the injured party *before* the disputed transaction, but for which, the party would not have agreed to the transaction. Therefore, in determining specific, as opposed to general, jurisdiction over New Rochelle, only pre-Dredging Contract contacts are relevant.

Rochelle on July 14, 2003, and Creative agreed to reduce the scope of the project (Maxwell Aff. ¶ 9); (8) James Maxwell sent a letter to Creative on July 18, 2003, awarding it the Dredging Contract and requesting the required insurance and bond (Pinkerton Aff. ¶ 7); and (9) the parties executed the Dredging Contract on August 28, 2003, in New Rochelle (Maxwell Aff. ¶ 11; Def.'s Mot. Ex. D at D-4).

These contacts, considered in the context of a claim for fraudulent inducement, are insufficient to demonstrate that New Rochelle has purposefully directed its activities towards this forum or has purposefully availed itself of the benefits and privileges of conducting its activities within Pennsylvania. Indeed, only two contacts, the July 3, 2003 phone call and the July 18, 2003 letter, evince any "reaching out" on the part of New Rochelle into Pennsylvania. These contacts, however, do not rise to the level of "minimum contacts" as required in this circuit. It is well established that "informational communications in furtherance of a contract between a resident and a nonresident does not establish the purposeful activity necessary for a valid assertion of personal jurisdiction over the nonresident defendant." *Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prods. Co.*, 75 F.3d 147, 152 (3d Cir. 1995) (holding that where only contacts were letters and phone calls to resident seller, nonresident was merely "passive buyer" and no personal jurisdiction existed); *see also Imo Indus.*, 155 F.3d at 259 n.3 ("Minimal communication between the defendant and the plaintiff in the forum state, without more, will not subject the defendant to the jurisdiction of that state's court system."); *Carteret Sav. Bank*, 954 F.2d at 149 (same). Only when communications themselves form the basis of plaintiff's claim will they be found to rise to the level of minimum contacts. *See, e.g.*, *Burger King*, 471 U.S. at 475 n.18; *see also Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 483 (3d Cir. 1993). That is not the case here. Instead, all of the

alleged fraudulent inducement took place in New York. The contract was advertised only in New York. In addition, the contract was offered to prospective bidders only at New Rochelle's City Hall, and the July 14, 2003 negotiation meeting was held at New Rochelle's Department of Public Works, in New York. Furthermore, the contract was signed in New York and the situs of the contract's subject was the marina, located in New York.

Creative has therefore not presented any contacts between New Rochelle and Pennsylvania during the period in which the Dredging Contract was being formulated that would permit the exercise of personal jurisdiction over New Rochelle under the traditional minimum contacts analysis. Therefore, because the threshold "purposeful availment" requirement has not been met, it is unnecessary for this Court to proceed to the second, "fair play and substantial justice," prong of the traditional minimum contacts test. *Miller Yacht Sales*, 384 F.3d at 98; *Imo Indus.*, 155 F.3d at 259; *Vetrotex*, 75 F.3d at 153 n.9.

B. *Calder* "Effects" Test

Although Creative has failed to meet its burden of showing that New Rochelle is subject to personal jurisdiction in this forum under the traditional minimum contacts test, our analysis is not complete, because Creative has alleged that New Rochelle committed the intentional tort of fraudulent inducement. This Court must therefore now apply the *Calder* effects test, as articulated by the Third Circuit in *Imo Industries*, to determine whether specific jurisdiction is proper over New Rochelle. In the realm of intentional torts, the *Calder* test recognizes that "the unique relations among the defendant, the forum, the intentional tort, and the plaintiff may under certain circumstances render the defendant's contacts with the forum – which otherwise would not satisfy the requirements of due process – sufficient." *Imo Indus.*, 155 F.3d at 265.

Creative easily passes the first prong of the *Calder* effects test, which merely requires that the plaintiff allege an intentional tort. *Id*, 155 F.3d at 265. Fraudulent inducement is an intentional tort, *Yocca*, 854 A.2d at 437, and therefore this prong is met. Creative likewise meets the *Calder* test's second prong, which is satisfied if Creative felt the brunt of the harm caused by New Rochelle's tort in Pennsylvania, such that the forum is the "focal point" of the harm suffered by Creative. *See Imo Indus.*, 155 F.3d at 265. Because Creative's business is based in Pennsylvania, Creative felt the brunt of New Rochelle's tort in Pennsylvania. *See Remick*, 238 F.3d at 260 ("The brunt of the harm caused by the alleged intentional tort must necessarily have been felt by [plaintiff] in Pennsylvania, as his business is based in Philadelphia."); *see also Directory Dividends, Inc. v. SBC Communications, Inc.*, No. 01-1974, 2003 U.S. Dist LEXIS 19560, at *11, 2003 WL 22533708, at *3 (E.D. Pa. Oct. 23, 2003) ("[S]everal of Plaintiff's claims are for intentional torts. The brunt of the harm of these torts must necessarily have been felt by Plaintiff in Pennsylvania, where its business is based.").

Creative fails, however, to pass the third prong of the effects test, which requires the plaintiff to show that "the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity." *Imo Indus.*, 155 F.3d at 266. Creative alleges three contacts by New Rochelle with Pennsylvania that it claims satisfy this prong of the *Calder* test. First, after Creative's representative went to New York and picked up the Bid Package at New Rochelle's City Hall, it took the Bid Package back to Pennsylvania for review. Creative asserts that this satisfies the third prong of the *Calder* effects test, as "the fraud took place" in Pennsylvania: "The bid package was located in Pennsylvania. Creative was located in Pennsylvania. Pennsylvania was where Creative reviewed the bid package and, based on that package, decided to

bid on and accept the contract." (Pl.'s Resp. to Def.'s Mot. at 11.) This argument misunderstands the third prong's requirements. As New Rochelle aptly inquired in its reply brief, "if one of Creative's employees reviewed the bid package while on vacation in Alaska, would the City be subject to personal jurisdiction in Alaska?" (Def.'s Reply Br. at 5.) "There is a critical difference between an act which has an effect in the forum and one directed at the forum itself . . . absent some conduct by defendant directed at Pennsylvania rather than simply directed at plaintiff, Pennsylvania is not a reasonably foreseeable forum." *Surgical Laser Techs., Inc. v. C.R. Bard, Inc.*, 921 F. Supp. 281 (E.D. Pa. 1996) (granting motion to dismiss for lack of personal jurisdiction notwithstanding foreseeability of harm to Plaintiff in Pennsylvania). If the Bid Package omitted material information that could induce a contractor to bid, those omissions would have an effect in any state in which the bidder was based. This does not mean, however, that New Rochelle directed those fraudulent omissions at any particular state.

Second, Creative alleges that because 531 tons of waste are being stored at a waste disposal site in Bethlehem, PA, New Rochelle expressly aimed its tortious conduct at Pennsylvania. However, the Dredging Contract itself did not specify to which state the material would be shipped. (Def.'s Mot. Ex. D.) Moreover, the record is clear that even after the contract was consummated, the parties had not decided where the dredged material would be stored. On September 8, 2003, Russell Pinkerton, a Vice President at Creative, sent a letter to John Clemente, New Rochelle's City Engineer, in which Pinkerton attached "acceptance letters from two facilities for the disposal of dewatered dredge material." (Pl.'s Resp. to Def.'s Mot. Ex. 4 at 6.) One facility, Transmine, was located in New York, and the other, Coplay Quarry, was located in Pennsylvania (and was ultimately chosen as the disposal site). Pinkerton wrote, "The Transmine, Inc. disposal option is preferable."

(*Id*.) As previously stated, the elements of fraudulent inducement are completed by the time the contract is executed. *See Prima Paint*, 388 U.S. at 403-404; *Yocca*, 854 A.2d at 437. Because it was unclear at that time whether the dredged material would even be stored in Pennsylvania, New Rochelle cannot be said to have manifested behavior intentionally targeted at and focused on Pennsylvania "such that [Pennsylvania] can be said to be the focal point of the tortious activity," *Imo Indus.*, 155 F.3d at 266.

Third, Creative asserts that New Rochelle "maintained year-long contact with Creative and PAEDP - both located in Pennsylvania - through numerous letters, faxes, telephone calls and document exchanges, for the sole purpose of facilitating the contract." (Pl.'s Resp. to Def.'s Mot. at 11.) Creative cites to *A&F Corp. v. Bown*, No. 94-4709, 1995 U.S. Dist. LEXIS 11503 (E.D. Pa. Aug. 11, 1995) for the proposition that the third prong of the *Calder* effects test can be met through correspondence sent by an out of state defendant. In *Bown*, plaintiff sued defendant for fraudulent and negligent misrepresentation based upon statements that defendant made in two letters thathe faxed from out of state to plaintiff's factory in Philadelphia. *Bown*, 1995 U.S. Dist. LEXIS 11503, at *3. Defendant moved to dismiss for lack of personal jurisdiction. The court held that the two faxed letters provided sufficient contacts with Pennsylvania to form the basis of personal jurisdiction over defendant because "the genesis of [plaintiff's] claims . . . are Bown's letters sent to A&F." *Bown*, 1995 U.S. Dist. LEXIS 11503, at *7. In the instant case, Creative alleges that the communications between the parties may similarly form the basis of jurisdiction because they were done "for the sole purpose of facilitating the contract with Creative to relocate into Pennsylvania hundreds of tons of contaminated New Rochelle sludge." (Pl.'s Resp. to Def.'s Mot. at 11.) What Creative does not appreciate, however, is that in *Bown*, the communications sent into Pennsylvania

that formed the jurisdictional contacts with Pennsylvania also formed the basis of plaintiff's claim. *Bown*, 1995 U.S. Dist. LEXIS 11503, at *7-8. Therefore, jurisdiction attached based on these communications according to the Third Circuit's mandate that "specific jurisdiction is invoked when the cause of action arises from the defendant's forum related activities." *North Penn Gas*, 897 F.2d at 690. Here, on the other hand, the alleged communications all took place *after* any inducement to contract had been completed, because they all occurred after the contract was signed. Because fraudulent inducement "goes to the 'making' of the agreement." *Prima Paint*, 388 U.S. at 403-404, Creative cannot demonstrate that their cause of action "arose from" New Rochelle's forum related telephone and email communications.

Creative also points to the manifest that accompanied each shipment of waste material into Pennsylvania as part of New Rochelle's "year-long contacts" with Pennsylvania. Creative asserts that "New Rochelle perpetuated the fraud in Pennsylvania every time a shipment [of dredged material] arrived with a delivery manifest signed by Clemente and certifying that the sludge had been 'properly described [and] classified.'" (Pl.'s Resp. to Def.'s Mot. at 11.) The first such manifest is dated October 16, 2003, and the final one is dated October 29, 2003. (Pl.'s Resp. to Def.'s Mot. Ex. 3.) Again, however, none of these contacts are relevant for jurisdictional analysis of a fraudulent inducement claim because none of these contacts began until after the Dredging Contract was executed on August 28, 2003. Despite Creative's attempt to find support in *Vector Security, Inc. v. Corum*, No. 03-741, 2003 U.S. Dist. LEXIS 6573, 2003 WL 21293767 (E.D Pa. Mar. 21, 2003), that case is inapposite. In *Vector Security*, plaintiff's fraud action arose from nine email messages that defendant sent (and sixteen whose transmission he directed) from Maryland to plaintiff's Pennsylvania headquarters. The communications contained the representations that plaintiff claimed

were fraudulent. Therefore, because "the litigation results from alleged injuries that arise out of or are related to those activities," *Vector Security*, 2003 U.S. Dist. LEXIS 6573, at *5, jurisdiction was proper in Pennsylvania. Here, by contrast, the shipping manifests could not possibly have included the tortious inducements to contract, because they were sent into Pennsylvania after the Dredging Contract was signed.

In conclusion, while *Calder* recognized that, in the realm of intentional torts, "Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises" *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) (*citing Calder*, 465 U.S. at 788-89), that is not the situation here. Any contractor, from any state, who brought the Bid Package back to his home state from New Rochelle and read it over may have been similarly induced by the allegedly fraudulent omissions therein. It is irrelevant, for jurisdictional purposes, that Creative is a Pennsylvania corporation. *Imo Industries* clearly stated that "the *Calder* 'effects test' can only be satisfied if the plaintiff can point to contacts which demonstrate that the defendant expressly aimed his tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity . . . . The defendant must manifest behavior intentionally targeted at and focused on the forum for *Calder* to be satisfied." 155 F.3d at 265. Creative has failed to point to such contacts, and this Court is thus without jurisdiction over New Rochelle.

C. Transfer or Dismissal

Having found that this court lacks personal jurisdiction over New Rochelle, this Court must now either transfer the entire action or dismiss New Rochelle.[5] 28 U.S.C. § 1404(a) provides, "For

[5]In this Circuit, a district court may transfer a case pursuant to § 1404(a) without personal jurisdiction over the defendant. *United States v. Berkowitz*, 328 U.S. 358, 360-61 (3d Cir. 1964) (stating that reasoning of *Goldlawr Inc. v. Heiman*, 369 U.S. 463 (1962), which held personal

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."

Thus, in considering New Rochelle's motion to transfer, this Court must first determine whether transfer is sought to a district or division where the action could have originally been brought. 28 U.S.C. § 1391(a)(2) states that "[a] civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated." New Rochelle has moved to transfer this action to the Southern District of New York. Transfer to that district is appropriate because it is where the Dredging Contract was advertised, negotiated, signed, and partially performed, and complete diversity among the parties would be maintained there.[6]

Next, this Court must decide if transfer should be ordered "for the convenience of parties and witnesses, in the interest of justice." In making this determination we are "vested with a large discretion." *Solomon v. Cont'l Am. Life Ins. Co.*, 472 F.2d 1043, 1045 (3d Cir. 1973). The burden is on the moving party – here, New Rochelle – to establish that the balance of interests favors transfer. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988); *Jumara v. State Farm Ins.*

---

jurisdiction not necessary for transfers under § 1406(a), applicable to transfers under § 1404(a)). *See also Omni Exploration v. Graham Eng'g Corp.*, 562 F. Supp. 449, 455 n.2 (E.D. Pa. 1983) ("A district court may transfer under § 1404(a) even though the court lacks personal jurisdiction over the defendant.").

[6]Creative is a Delaware corporation (Am. Compl. ¶ 1); Capitol is a Virginia corporation (*id*. ¶ 2); Code is a New Jersey corporation (*id*. ¶ 3); and New Rochelle is a New York municipal corporation (*id*. ¶ 4). Furthermore, Code and Capitol are subject to jurisdiction in New York under New York's Long-Arm Statute, N.Y.C.P.L.R. § 302(a)(1), because they contracted to provide services in New York, namely, transporting the de-watered sludge from New Rochelle's marina.

Co., 55 F.3d 873, 879 (3d Cir. 1995). While a plaintiff's choice of forum should not be lightly disturbed, transfer may be appropriate when private interests and public interests warrant. *See id*.

Case law has enumerated numerous factors that should be considered when evaluating the private and public interests at stake. Private interest factors have included: plaintiff's forum preference as manifested in the original choice; the defendant's preference; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses – but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum). *Jumara*, 55 F.3d at 879. Public interests have included: the desire to avoid multiplicity of litigation from a single transaction; the enforceability of the judgment; practical considerations that could make the trial easy, expeditious, or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; and the familiarity of the trial judge with the applicable state law in diversity cases. *Id*., 55 F.3d at 879; *see also* 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3854 (2d ed. 1986).

Plaintiff's forum preference obviously weighs against transfer. A plaintiff's choice of forum is important, however, "the deference given to a plaintiff's choice of forum is reduced when the operative facts that give rise to the action occur in another district." *Cameli v. WNEP-16 The News Station*, 134 F. Supp. 2d 403, 405 (E.D. Pa. 2001); *see also Nat'l Mortgage Network, Inc. v. Home Equity Ctrs.*, 683 F. Supp. 116, 119 (E.D. Pa. 1988). In the instant action, the claims arose in New York: Creative picked up the Bid Package at New Rochelle's City Hall, and the Dredging Contract was solicited, negotiated, and signed in New York. Moreover, the marina itself is located in New

York, as is much of the documentary evidence related to the marina and the Dredging Contract.

Next, New Rochelle has specifically identified four key witnesses who are located in New York and who work for the City. New Rochelle argues that it wold be more convenient for these witnesses and less burdensome on the City's ability to perform its governmental functions if these officials could testify at a trial held in New York. Creative, on the other hand, argues that "non-party witnesses employed at the Bethlehem storage facility and those working for PAEDP must be considered." (Pl.'s Opp'n to Def.'s Mot. at 16.) Although Creative does not identify any of those witnesses, this factor does not weigh in favor of New Rochelle, as the witnesses it has identified work for a party and the courthouse in Philadelphia is within 100 miles of New York. Therefore, New Rochelle's witnesses may be subpoenaed and compelled to appear at trial. FED. R. CIV. P. 45(b)(2).

In sum, we find that Plaintiff's choice of forum weighs less heavily than the usual case against transfer; Defendant's preference and where the claim arose weigh strongly in favor of transfer; and the remaining private interest factors are in equipoise. The Court next considers the public interest factors.

The public interest in conservation of scarce judicial resources militates strongly in favor of transfer here. "A transfer, obviating a jurisdictional difficulty, has been found to serve the interests of justice within the meaning of that language in § 1404(a)." *Kahhan v. Fort Lauderdale*, 566 F. Supp 736, 740 (E.D. Pa. 1983) (*quoting Donnelly v. Klosters Rederi A/S*, 515 F. Supp. 5, 7 (E.D. Pa. 1981). Here, if Creative's claims against Code and Capitol were not transferred, then to obtain complete relief, two actions arising out of the same set of operative facts would proceed in two different judicial districts. This type of situation "leads to the wastefulness of time, energy, and

money that § 1404(a) was designed to prevent." *Cont'l Grain Co. v. The FBL*, 364 U.S. 19, 26 (1960). Moreover, because without New Rochelle in this action, Plaintiff would have to either pursue two cases on parallel tracks in two separate fora or refile its case in New York, the "practical considerations that could make the trial easy, expeditious, or inexpensive" weigh in favor of transfer. *Jumara*, 55 F.3d 873, 879.

The remaining public interest factors do not tip the scales. Each party argues that public policy considerations favor them. New Rochelle states that "New York courts have a local interest in deciding a controversy concerning a local government at home," (Def.'s Mot. at 17), while Creative claims that "Pennsylvania's interest in this case as the recipient of New Rochelle's contaminated waste sludge is at least as great." (Pl.'s Resp. to Def.'s Mot. at 16). Because each party has a reasonable argument this factor does not weigh heavily in either party's favor. Similarly, there is no substantial difference in the relative congestion of dockets in the Eastern District of Pennsylvania versus the Southern District of New York.

On balance, because both the private and public interest factors favor transfer, the interests of justice will be better served by transfer of this action.

IV. CONCLUSION

For the reasons set forth above, Defendant New Rochelle's motion is granted in part and denied in part. An appropriate order follows.

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

CREATIVE WASTE MANAGEMENT, INC.,	:	
Plaintiff,	:	**CIVIL ACTION**
v.	:	
CAPITOL ENVIRONMENTAL SERVICES, INC., et al.,	:	**No. 04-1060**
Defendants.	:	

ORDER

AND NOW, this **22nd** day of **October**, **2004**, upon consideration of Defendant City of New Rochelle's Motion to Dismiss the Amended Complaint or, in the Alternative, to Transfer, Plaintiff's response thereto, Defendant New Rochelle's reply thereon, and for the foregoing reasons, it is hereby **ORDERED** that:

Defendant New Rochelle's Motion to Dismiss or, in the Alternative, to Transfer (Document No. 22) is **GRANTED in part** and **DENIED in part** as follows:

a. Defendant New Rochelle's Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(2) is **DENIED**;

b. Defendant New Rochelle's Motion to Transfer pursuant to 28 U.S.C. § 1404(a) is **GRANTED** and this matter is **TRANSFERRED** to the United States District Court for the Southern District of New York.

BY THE COURT:

_____

Berle M. Schiller, J.