

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

ROTONDO WEIRICH
ENTERPRISES, INC.

v.

CHIEF INDUSTRIES, INC.

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CIVIL ACTION
NO. 04-5521

O'Neill, J.

January 27, 2005

MEMORANDUM

Plaintiff Rotondo Weirich Enterprises, a Pennsylvania corporation, constructs prisons throughout the United States. Defendant Chief Industries, Inc., a Nebraska corporation, entered into two contracts with plaintiff to provide cell doors and frames for plaintiff's prison projects in Strafford County, New Hampshire and Ulster County, New York. On November 29, 2004, plaintiff filed suit against defendant in this Court alleging breach of contract, breach of express warranty, breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular use in connection with the doors and door frames defendant supplied for the Strafford and Ulster County contracts. Now before me is the motion of defendant to dismiss plaintiff's complaint under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction and under Fed. R. Civ. P. 12(b)(3) for improper venue.

Under Rule 4(e)(1) of the Federal Rules of Civil procedure, a District Court has personal jurisdiction over a non-resident defendant to the extent authorized under the law of the state in which the district court sits. Fed. R. Civ. P. 4(e)(1). Pennsylvania's long-arm statute provides

personal jurisdiction over a person for causes of action arising from that person “transacting any business in this Commonwealth,” or “causing harm or tortious injury by an act or omission in [and outside] of this Commonwealth.” 42 Pa. Cons. Stat. Ann. § 5322(a)(1), (3) & (4). The long-arm statute further provides that a court’s jurisdiction extends to the “fullest extent allowed under the Constitution of the United States and may be based on the most minimum contacts with this Commonwealth under the Constitution of the United States.” 42 Pa. Cons. Stat. Ann. § 5322(b).

Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution a plaintiff must first demonstrate that the defendant has sufficient minimum contacts with the forum state.¹ See Guardi v. Desai, 151 F. Supp. 2d 555, 559 (E.D. Pa. 2001). If minimum contacts are established, “the defendant’s contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” Omnikem v. Shepherd Tissue, Inc., No. 98-5269, 2000 U.S. Dist. LEXIS 5268, at *10 (E.D. Pa. Apr. 26, 2000), quoting World Wide Volkswagen Corp. v. Woodson, 44 U.S. 286, 292 (1980).

Plaintiff has not met its burden of establishing that defendant could have reasonably anticipated its amenability to suit in this court. Minimum contacts are established by “affirmative acts directed at residents of the forum; there must be some act by which the

¹Personal jurisdiction may be general or specific, however, plaintiff “must show significantly more than minimum contacts” to establish general jurisdiction. Omnikem, 2000 U.S. Dist. LEXIS 5268, at *7, quoting Provident Nat’l Bank v. California Fed. Savs. Ass’n, 819 F.2d 434 (3d Cir. 1987). Because the record shows no basis for general personal jurisdiction over defendant, I will only consider whether a finding of specific personal jurisdiction is appropriate here.

defendant purposefully avails him or herself of the privilege of conducting activities within the forum state thus invoking the benefits and protections of its laws.” Guardi, 151 F. Supp. 2d at 559, citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a “substantial connection” with the forum State. . . . Thus where the defendant “deliberately” has engaged in significant activities within a State, . . . or has created “continuing obligations” between himself and residents of the forum, . . . he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by “the benefits and protections” of the forum’s laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King Corp., 471 U.S. at 475-76 (citations omitted).

Defendant argues that an exercise of personal jurisdiction over it is improper because it had no contacts with Pennsylvania. However, although defendant allegedly breached contracts that were entirely performed in New Hampshire and New York and no representatives of Chief visited Pennsylvania in negotiating and performing the contracts at issue here, defendant’s physical presence in the forum state is not required for personal jurisdiction to exist. See, e.g., Grand Entertainment Group, LTD v. Star Media Sales, Inc., 988 F.2d 476, 483 (3d Cir. 1993) (“Due process does not require a defendant’s physical presence in the forum before personal jurisdiction is exercised.”). I must look to defendant’s other interactions with the forum state to determine whether defendant created continuing obligations between itself and plaintiff, a resident of the forum.

Plaintiff argues personal jurisdiction over plaintiff exists because of the presence of “Applicable Law” clauses in the purchase orders signed by defendant’s representatives providing that “[t]his Purchase Order and the resulting contract shall be governed by the laws of the

Commonwealth of Pennsylvania.” “A Pennsylvania choice of law provision, although perhaps a factor in showing whether defendant[] could foresee that [its] acts would have effects in Pennsylvania, would not itself be enough to vest jurisdiction.” Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 65 (3d Cir. 1984).

Plaintiff also alleges that in selecting defendant as the supplier for cell doors and door frames for the Strafford and Ulster County prison projects, its personnel, operating out of plaintiff’s corporate headquarters in Pennsylvania contacted defendant’s representatives by telephone and mailed letters to defendant. Plaintiff asserts that the purchase orders for the materials to be supplied by defendant were negotiated by representatives in its Pennsylvania Headquarters. I find that these communications do not provide defendant with the requisite minimum contacts with Pennsylvania to support an assertion of personal jurisdiction over it.

“[I]nformational communications in furtherance of a contract between a resident and a nonresident do[] not establish the purposeful activity necessary for a valid assertion of personal jurisdiction over the nonresident defendant.” Vetrotex Certaineed Corp. v. Consol. Fiber Glass Prods. Co., 75 F.3d 147, 152 (3d Cir. 1995) (citations and alterations omitted) (holding that where only contacts were letters and phone calls to resident seller, nonresident was merely a “passive buyer” and no personal jurisdiction existed).

Although defendant did communicate with plaintiff in Pennsylvania, the operative facts that brought the parties together are connected to the projects in New Hampshire and New York. The Court found plaintiff failed to present evidence of contacts sufficient to establish personal jurisdiction in a similar scenario in The Quandel Group v. Chamberlain Co., Inc. No. 98-5762, 1999 U.S. Dist. LEXIS 8822 (E.D. Pa. Jun. 14, 1999). Where a North Carolina defendant

entered into a subcontract with a Pennsylvania plaintiff to provide waterproofing for a project at a university in Virginia, the Court wrote,

There is no evidence that the one-time provision of waterproofing for a construction project in Virginia entailed an ongoing relationship or required future contacts by [defendant] with Pennsylvania. Performance was to be in Virginia. The alleged breach occurred in Virginia. [Defendant's] representatives never traveled to Pennsylvania for any purpose related to the contract. Any payments were presumably sent to [defendant] in North Carolina. There is certainly no evidence that [defendant] was obligated to direct any payments to or render any performance in the forum.

Id. at *9-10. Similarly, plaintiff here has not presented evidence to show that the letters, phone calls and faxes to defendant were made in the context of a substantial ongoing relationship between plaintiff and defendant. Instead, it appears that the parties entered into a relationship limited to two contracts for the provision of a discrete number of cell doors and door frames to be provided within a definite period of time, a relationship insufficient to establish the “continuing obligations” required for personal jurisdiction to exist. See Murray v. Nat’l Football League, No. 94-5971, 1996 U.S. Dist. LEXIS 9108 (E.D. Pa. Jun. 28, 1996) (holding personal jurisdiction could not be established where defendant did not deliberately engage in a course of conduct designed to cultivate an ongoing relationship with plaintiff). Contra Burger King, 471 U.S. at 482 (20-year franchise relationship between parties requiring ongoing forum contacts including seeding of payments into forum sufficient to establish personal jurisdiction); Cottman Transmission Sys. Inc. v. Miller, No. 00-3283, 2000 U.S. Dist. Lexis 12943, at *11 (E.D. Pa. Sep. 7, 2000) (finding minimum contacts existed where a franchise development agreement clearly contemplated an ongoing relationship between the parties by requiring defendant “to develop prospective franchisees for an initial period of eighteen months with an automatic yearly renewal”).

Plaintiff does not allege that defendant's doors and door frames were shipped from, through or to Pennsylvania. See Vetrotex, 75 F.3d at 151 (finding insufficient minimum contacts where no product was shipped from, through or to the forum state). The alleged breach of contract took place in New Hampshire and New York where the allegedly non-conforming materials were delivered. **In this context, it is not clear that defendant purposefully availed itself of the privilege of doing business in Pennsylvania. See Siskiyou Props., LLC v. Bennett Holdings, LC, 13 Fed. Appx. 553 (9th Cir. 2001) (holding telephone and mail contacts alone insufficient to satisfy purposeful availment test); Kerry Steel Inc. v. Paragon Industries, Inc., 106 F.3d 147, 151 (6th Cir. 1997) (holding an out-of-state defendant-buyer did not purposefully avail itself of the benefits and protections of the forum state's laws because, in part, no facts connected the subject matter or performance of the contract at issue to the forum state); Bell Paper Box v. Trans W. Polymers, 53 F.3d 920 (8th Cir. 1995) (holding a single purchase order containing a choice of law clause and communications by telephone, fax and mail were insufficient contacts to confer personal jurisdiction on an out-of-state purchaser); CPC-Rexcell, Inc. v. La Corona Foods, Inc., 912 F.2d 241 (8th Cir. 1990) (holding no personal jurisdiction in Missouri where defendant manufactured products under contract in North Carolina and shipped them to Arizona and California and where defendant's only contacts with Missouri were telephone calls and mailing of payments to a post office box in the forum).**

I find that defendant's interactions with the forum state were not sufficiently substantial that it could have reasonably anticipated being required to defend against a claim by plaintiff in

Pennsylvania.² I will therefore grant defendant's motion to dismiss for lack of personal jurisdiction.³

²Because I find plaintiff has not met its burden of establishing the minimum contacts required for personal jurisdiction to exist, I need not consider whether the assertion of personal jurisdiction over defendant would comport with the notions of "fair play and substantial justice."

³Although I may, in the interest of justice transfer this matter to any other court in which the action could have been brought at the time it was filed under 28 U.S.C. Section 1631, I will not do so for two reasons. First, in its reply brief, plaintiff did not designate an alternative forum in which it would file suit if personal jurisdiction were found not to exist. I decline to deprive plaintiff of its right to choose the forum in which it will litigate. See Donohue v. Team Rensi Motorsports, LLC, No. 01-5564, 2002 U.S. Dist. LEXIS 20312, at *23 n.4 (E.D. Pa. Oct. 10, 2002). Second, plaintiff will not be time barred from bringing suit in another jurisdiction if this matter is not immediately transferred. The statute of limitations for contract disputes in Nebraska is five years. Neb. Rev. St. §25-205. In New York, the statute of limitations for breach of contract is six years. N.Y. C.P.L.R. 213(2) (McKinney 2004). In New Hampshire, the statute of limitations for contract actions is three years. N.H. Rev. Stat. Ann. § 508:4. Allowing plaintiff to choose the most appropriate forum best serves the interests of justice.

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ORDER

AND NOW, this 27th day of January 2005, after considering defendant's motion to dismiss for lack of personal jurisdiction and improper venue, and plaintiff's response thereto and for the reasons set forth in the accompanying memorandum, it is ORDERED that defendant's motion to dismiss for lack of personal jurisdiction is GRANTED and plaintiff's claims against Chief Industries, Inc. are DISMISSED.

If plaintiff wants me to transfer this action to another District, plaintiff should file a motion for reconsideration of this Order within ten days from the date of its entry. Defendant may file a response to any such motion for reconsideration within ten days thereafter.

s/Thomas N. O'Neill, Jr.

THOMAS N. O'NEILL, JR., J.