



Products Co. v. Colelli & Associates, 149 F.3d 197 (3d Cir. 1998) and Rittenhouse & Lee v. Dollars & Sense, Inc., No. 83-5996 1987 WL 9665 (E.D. Pa. Apr. 15, 1987), were correct in the context of the allegations made.

Nonetheless, the Court emphasizes that it denied the Motion without prejudice, which will provide Lashbrook and Somerville with the opportunity to make their contentions again on a full record, presumably including the Bagnell affidavit and other materials that are relevant to this issue. After the close of discovery, the Court cannot accept as true the allegations in the Complaint alleging personal jurisdiction, but must look at the facts as established during discovery. At that time, the Court believes, if there are factual disputes, it can take evidence and decide the issue of personal jurisdiction.

Another aspect of the Lashbrook and Somerville Motion to Dismiss (Doc. No. 112) dealt with the adequacy of the substantive allegations in the Third Party Complaint. Man Financial, Inc. has brought two counts for indemnification based on breach of fiduciary duty and negligence and a third count for apportionment and contribution. Once again, although Lashbrook and Somerville make many strong and potentially meritorious points in support of their Motion, they basically fail to give the appropriate weight, which the Court must give, to the allegations of the Third Party Complaint itself.

Lashbrook and Somerville argue that there is no indemnification allowed under Pennsylvania or Illinois law. Man responds that New York law should control, and makes some colorable arguments in favor of New York law. As the Court concluded in denying the motion of the other Third Party Defendants Wallace and Gobora, it would be inappropriate to make a decision about the appropriate choice of law in this case in the context of a motion to dismiss

without full discovery. In this context, Pennsylvania, as the forum state, follows a flexible rule which looks for the state with the most significant relationship to the dispute, including analyzing the policies and interests of the relevant states having contact with the matter, underlying the particular issue before the Court. Preliminary research shows that New York law is broader on indemnification claims than the law of Pennsylvania or Illinois. See Dole v. Dow Chemical Co., 282 N.Y.2d 288 (N.Y. 1972). Man claims that because New York is its principal place of business, and New York law governs the Trading Advisory Agreement, New York law should govern. This contention cannot be decided on a 12(b)(6) motion.

Lashbrook and Somerville are probably correct that Man is not entitled to contribution on Man's claims to the extent it may be liable to the Plaintiff under RICO or the Commodity Exchange Act. Man asserts that New York law permits contribution claims for intentional torts. The Court is not willing to make a formal or final ruling on these issues at this preliminary stage of the case, particularly since the case must go forward in any event on the indemnification claims and other aspects of the claim for contribution concerning tort allegations.

The Court also disagrees with the argument by Lashbrook and Somerville that Man does not allege that the former directors are joint tortfeasors with Man. Paragraphs 94-109 make the same allegations against both of them, seriatim, "Lashbrook and Somerville" always using the conjunctive. The Third Party Complaint is sufficiently broad in its allegations, particularly under notice pleading, that it may be construed as alleging joint tortfeasor responsibility.

As to the Lashbrook and Somerville argument that the Court should decline to exercise supplemental jurisdiction over the Third Party Complaint, the Court finds that it has original diversity of citizenship jurisdiction over the Third Party Complaint under 28 U.S.C. § 1332(a)(3).

However, even if the Court did not have RICO or original subject matter jurisdiction, the Court would, at least at this point, exercise supplemental jurisdiction under 28 U.S.C. § 1367.

For all of these reasons, the Lashbrook and Somerville Motion for Reconsideration and the remaining aspects of its Motion to Dismiss the Third Party Complaint will be denied.

An appropriate Order follows.

