

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

DOROTHY LEAN	:	CIVIL ACTION
	:	
v.	:	
	:	
ATLANTIC CITY SHOWBOAT INC.	:	
d/b/a/ SHOWBOAT CASINO HOTEL	:	NO. 07-0407

**MEMORANDUM**

**Baylson, J.**

**May 25, 2007**

**I. Background**

Plaintiff, Dorothy Lean, instituted this action against Defendant, Atlantic City Showboat Inc., in the Pennsylvania Court of Common Pleas, Philadelphia County, to recover damages for personal injuries she allegedly sustained as the result of a “slip and fall” on Defendant’s premises in New Jersey in August 2005. Defendant removed the case to this Court on January 31, 2007 on the basis of diversity jurisdiction. Presently before the Court is Defendant’s motion to dismiss the complaint for lack of personal jurisdiction under Rule 12(b)(2) and improper venue under Rule 12(b)(3). For the reasons set forth below, we conclude that this Court lacks personal jurisdiction over Defendant. However, the Court will deny the motion to dismiss the complaint, and exercise its discretionary power under 28 U.S.C. § 1406 to transfer this matter to the United States District Court for the District of New Jersey.

**II. Motion to Dismiss Under Rule 12(b)(2)**

Defendant is a New Jersey corporation with its principal place of business in New Jersey. It claims that it is not licensed to conduct, and has never conducted, business in Pennsylvania; it

does not own or operate any property in Pennsylvania; it has no employees or agents in Pennsylvania, nor has it consented to the jurisdiction of Pennsylvania courts. (Defendant’s Mot. to Dismiss ¶¶ 11-16).<sup>1</sup> Accordingly, Defendant contends this Court cannot exercise personal jurisdiction over it. Plaintiff asserts that Defendant should be collaterally estopped from litigating the personal jurisdiction issue because “Pennsylvania State Courts have determined, in multiple cases involving issues identical to the ones in this case, that personal jurisdiction exists over this defendant in its courts. . . .” (Plaintiff’s Response Br. 4). Even if Defendant is not estopped from relitigating the jurisdiction issue, Plaintiff claims this Court may exercise general personal jurisdiction over Defendant because of its “continuous and systematic” business contacts with Pennsylvania. We address each of Plaintiff’s arguments in turn below.

#### **A. Collateral Estoppel**

Under certain circumstances, the doctrine of collateral estoppel (issue preclusion) may apply to bar a party from relitigating the issue of personal jurisdiction. See Compagnie des Bauxites de Guinee v. L’Union Atlantique S.A. D’Assurances, 723 F.2d 357 (3d Cir.1983). The party asserting the bar bears the burden of establishing that:

(1) the issue decided in the prior adjudication was identical with the one presented in the present action; (2) there was a final judgment on the merits; (3) the party against whom the estoppel is asserted was a party or in privity to a party in the

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<sup>1</sup> Defendant makes these assertions about its lack of contacts with Pennsylvania in its brief, and does not submit a supporting affidavit. Although “[r]eferences in a brief, unsupported by affidavit, are not properly before the Court as ‘facts’ evidencing contact for jurisdictional purposes,” Plaintiff bears the burden of establishing that Defendant has sufficient contacts with the Commonwealth for this Court to exercise personal jurisdiction over it. Peek v. Golden Nugget Hotel & Casino, 806 F.Supp. 555, 558 (E.D. Pa. 1991); see also Rushton v. Marina Assoc., No.Civ.A. 04-1889, 2005 WL 2176835, at \*2 n.2 (W.D. Pa. Aug. 18, 2005) (“Defendant has also not submitted an affidavit . . . [but] Plaintiff bears the burden of proving by a preponderance of the evidence that Defendant has sufficient forum contacts. . . .”).

prior adjudication; and (4) had a full and fair opportunity to litigate the issue in the prior action.

Hickey v. Tennessee Gas Pipeline Co., Civ.A.No. 90-3921, 1992 WL 158074, at \*1 (E.D. Pa. July 1, 1992).

In this case, Plaintiff has submitted four civil docket reports from actions initiated against the Defendant in Pennsylvania state court between February 2003 and April 2005. (Plaintiff's Response, Exhibit B). The docket entries indicate that in each case, defendant filed preliminary objections which were overruled by the court. Plaintiff contends that in each of these cases, the Defendant challenged personal jurisdiction as part of its preliminary objections, and the Court of Common Pleas determined that jurisdiction was appropriate because Defendant regularly conducts business in Pennsylvania. (Plaintiff's Response Br. 4). Defendant claims that the state court overruled its preliminary objections "without an evidentiary hearing or opinion" and without making any factual findings, and therefore Plaintiff is unable to show on "what basis, if any, the decisions were made." (Defendant's Reply Br. 2)

Plaintiff has not established that this is an appropriate case for collateral estoppel. First, the docket entries submitted by Plaintiff only indicate that Defendant made general preliminary objections in the prior state court actions, and do not specify what issues were actually raised. We also do not know on what grounds the state court overruled the objections, and to what extent the Defendant was given an opportunity to present arguments or evidence on the jurisdiction issue. See Karibjanian v. Chromalloy Pharmaceutical, Inc., Civ.A.No. 90-4641, 1991 WL 125176, at \*2 (E.D. Pa. June 28, 1991) ("All that is necessary [for a full and fair adjudication of an issue] is that the party against whom collateral estoppel is asserted had the

opportunity to present his arguments and evidence on the issue. . . .”) (quoting Calesnick v. Redevelopment Auth., No. 83-0498 (E.D. Pa. July 26, 1985) (Pollak, J.)). Under these circumstances, we cannot say that the issue of personal jurisdiction was fully and fairly litigated in state court. Cf. Hickey, 1992 WL 158074, at \*1 (concluding that defendant was estopped from challenging jurisdiction when a court previously had determined, after a “full investigation,” that it was subject to personal jurisdiction in Pennsylvania).

Furthermore, the orders overruling the defendant’s preliminary objections were not “final orders” for collateral estoppel purposes. “[W]hether an order is sufficiently final to be given collateral estoppel effect depends to a large extent on the appealability of the order.” Karibjanian, 1991 WL 125176, at \*1. In Pennsylvania, orders overruling preliminary objections and directing the filing of an answer are “interlocutory and unappealable.” Chase Manhattan Mortgage Corp. v. Hodes, 784 A.2d 144, 145 (Pa. Super. Ct. 2001). In determining if a decision is final for purposes of issue preclusion, courts also consider whether the “parties were fully heard [and whether] the court supported its decision with a reasoned opinion.” Karibjanian, 1991 WL 125176, at \*1 (quoting Restatement (Second) of Judgments § 13 comment g (1982)). As noted above, Plaintiff has presented no evidence that Defendant was ever given the chance to present argument or evidence on the jurisdiction issue in state court.

Accordingly, because Plaintiff has not established that this issue was fully and fairly litigated in the prior state court actions, and the orders overruling the preliminary objections were not final judgments on the merits, Defendant is not collaterally estopped from challenging

personal jurisdiction in this Court.<sup>2</sup>

## **B. General Jurisdiction**

Federal Rule of Civil Procedure 4(e) allows a district court to assert personal jurisdiction over a non-resident to the extent allowed by the law of the state in which it sits. See Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984). Pennsylvania’s long-arm statute provides that a court may exercise personal jurisdiction over non-residents “to the fullest extent allowed under the Constitution of the United States.” 42 PA. CONS. STAT. ANN. § 5322(b).

Due process requires that the defendant have “minimum contacts” with the forum state, and that the exercise of jurisdiction comports with “traditional notions of fair play and substantial justice.” Remick v. Manfredy, 238 F.3d 248, 255 (3d Cir. 2001) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). “Minimum contacts must have a basis in ‘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.’” Remick, 238 F.3d at 255 (quoting Asahi Metal Indus. Co., Ltd. v. Superior Court of California, 480 U.S. 102, 109 (1987)). When determining whether personal jurisdiction exists, the court must resolve the question based on the circumstances that the particular case presents. Burger King, 471 U.S. at

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<sup>2</sup> Most cases where courts have estopped parties from relitigating the issue of jurisdiction have involved prior determinations that the forum lacked jurisdiction over the defendant. In those cases, the orders were clearly final and appealable for collateral estoppel purposes. See, e.g., Karibjanian, 1991 WL 125176; Kitces v. Wood, 917 F.Supp. 338 (D.N.J. 1996); Brodak v. McClain, No.Civ.A. 06-146, 2007 WL 319993, at \*1 (W.D. Pa. Jan. 30, 2007) (rejecting plaintiffs’ argument that a prior determination that a court lacked jurisdiction was not a final order because under this reasoning, the “adjudication . . . could never become binding and entitled to full faith and credit because in all such cases a court cannot adjudicate the substantive claims advanced in the lawsuit”).

485.

A court may exercise personal jurisdiction based on a defendant's general or specific contacts with the forum. General jurisdiction is based upon the defendant's "continuous and systematic contacts" with the forum. General Elec. Co. v. Deutz AG, 270 F.3d 144, 150 (3d Cir. 2001) (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-416 (1984)). Specific jurisdiction is appropriate only if the "plaintiff's cause of action arises out of a defendant's forum-related activities, such that the defendant 'should reasonably expect being haled into court' in that forum." Vetrotex Certaineed Corp. v. Consol. Fiber Glass Prod. Co., 75 F.3d 147, 151 (3d Cir. 1996) (quoting Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). Specific jurisdiction is established where the defendant "purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate[] to' those activities." BP Chemicals Ltd. v. Formosa Chemical & Fibre Corp., 229 F.3d 254, 259 (3d Cir. 2000) (quoting Burger King, 471 U.S. at 472).

In deciding a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), we "must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff." Pinker v. Roche Holdings Ltd., 292 F.3d 361, 368 (3d Cir. 2002) (quoting Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 142 n.1 (3d Cir. 1992)). However, once a jurisdictional defense is raised, the plaintiff bears the burden of proving, through affidavits, or competent evidence, sufficient contacts with the forum state to establish personal jurisdiction. See Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir. 1996), cert. denied, 519 U.S. 1028 (1996). The plaintiff must establish those contacts with reasonable particularity. See Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1996). Once

the plaintiff makes out a *prima facie* case in favor of personal jurisdiction, the burden shifts to the defendant to establish that the presence of some other considerations would render jurisdiction unreasonable. See Carteret Sav. Bank, 954 F.2d at 150.

Plaintiff asserts that this Court has general personal jurisdiction over Defendant because it maintains “continuous, systematic and substantial contacts in the Commonwealth of Pennsylvania” and regularly conducts business here.<sup>3</sup> (Plaintiff’s Response Br. 4). Specifically, Plaintiff claims Defendant regularly advertises in Pennsylvania, and contracts with bus companies to transport Pennsylvania residents to its casino in Atlantic City, New Jersey. In support of these allegations, Plaintiff attaches a six-page news article from the website [www.philly.com](http://www.philly.com), discussing the high rate of casino gambling among older adults. (Plaintiff’s Response, Exhibit C).<sup>4</sup> The article notes that many senior citizens are attracted to Atlantic City by the “low-cost bus rides” offered by casinos: the Showboat Casino Hotel, for example, subsidizes rides from Pennsylvania, making the round-trip cost only \$2.00.

The documents submitted by Plaintiff in no way support the allegations in her brief regarding Defendant’s contacts with Pennsylvania. An internet news article by an Inquirer staff writer which mentions the Showboat Casino Hotel does not establish that the Defendant advertises in the Inquirer. Likewise, the article’s reference to a subsidized bus ride to the casino is not evidence that “Defendant regularly contracts with bus companies and other means of transportation from the Commonwealth of Pennsylvania.” (Plaintiff’s Response Br. 5). Plaintiff

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<sup>3</sup> Plaintiff does not contend that this Court has specific jurisdiction over Defendant. (Plaintiff’s Response 1).

<sup>4</sup> The article was written by a Philadelphia Inquirer staff writer, and presumably was also published in a print edition of the Inquirer.

clearly has not met her burden of proving through affidavits, or competent evidence, sufficient contacts with the forum state to establish personal jurisdiction over Defendant. Accord Rushton v. Marina Assoc., No.Civ.A. 04-1889, 2005 WL 2176835, at \*3 (W.D. Pa. Aug. 18, 2005) (Plaintiff’s “vague assertion, made in a brief with no supporting affidavit or other evidence” that defendant casino “regularly receives business invitees by way of tour buses” was insufficient to establish continuous and systematic contacts with Pennsylvania).

Moreover, even if we accepted Plaintiff’s assertions as true, they do not establish that Defendant’s forum activities are sufficiently extensive and pervasive for general jurisdiction purposes. Plaintiff has alleged only two contacts with Pennsylvania: advertisements in the Inquirer and transportation contracts with bus companies. Courts in this circuit have declined to exercise jurisdiction over defendants with significantly greater forum contacts than those alleged by Plaintiff. See, e.g., Time Share Vacation v. Atlantic City Resorts, 735 F.2d 61 (3d Cir. 1984) (declining to exercise specific jurisdiction over Maryland resort that advertised in Philadelphia Inquirer, and sent a private airplane to transport people from their marketing firm in Philadelphia to the resort in Maryland); Grenada v. St. George’s School of Medicine, 773 F.2d 539 (3d Cir. 1985) (medical school advertised extensively in non-Pennsylvania newspapers that were circulated in Pennsylvania; 6% of its students were Pennsylvania residents; it participated in a joint program with a Pennsylvania college, and Pennsylvania residents paid several hundred thousand dollars worth of tuition to the school each year).<sup>5</sup>

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<sup>5</sup> See also Johnson v. Summa Corp., 632 F.Supp. 122 (E.D. Pa. 1985) (Nevada hotel maintained a toll-free number and mailed a brochure to Pennsylvania resident; promotional materials were also available through one Pennsylvania travel agency); Wims v. Beach Terrace Motor Inn, 759 F.Supp. 264 (E.D. Pa. 1991) (motel mailed yearly brochures to 1,133 Pennsylvania residents; 25-27% of annual guests and 10% of its employees were from

### **III. Motion to Dismiss Under Rule 12(b)(3)**

Because this Court does not have personal jurisdiction over Defendant, venue is not proper in this district under 28 U.S.C. § 1391(a).<sup>6</sup> However, instead of dismissing the case, we will exercise our discretionary power under 28 U.S.C. § 1406(a)<sup>7</sup> and transfer this action to the District of New Jersey. Jurisdiction and venue are clearly proper in New Jersey because Defendant is incorporated there, and the events leading to Plaintiff's personal injury suit occurred in New Jersey. Transferring the case will also serve the Court's "interests in judicial economy . . . by obviating the need for plaintiff to refile [her] claim in New Jersey." Blackwell v. Marina Assoc., No.Civ.A. 05-5418, 2006 WL 573793, at \*7 (E.D. Pa. Mar. 9, 2006).

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Pennsylvania); Driscoll v. Matt Blatt Auto Sales, No.Civ.A. 95-5314, 1996 WL 156366 (E.D. Pa. Apr. 3, 1996) (New Jersey car dealer advertised in New Jersey edition of Philadelphia Inquirer and the Philadelphia Daily News; 1-3% of its business was based on sales to Pennsylvania residents; it dealt with a number of financial institutions with offices in Pennsylvania, and as part of its transactions involving Pennsylvania customers, it paid the Pennsylvania sales tax); Feldman v. Bally's Park Place, Inc., No.Civ.A. 05-5345, 2006 WL 1582331 (E.D. Pa. June 5, 2006) (casino advertised once or twice a month in print sources such as the Philadelphia Inquirer or Philadelphia magazine, and on at least 5 Pennsylvania radio stations during the spring and summer months; in 2003, it spent 8.5% of its advertising budget on media that would reach Philadelphia and surrounding counties; it sent direct mailings to Pennsylvania residents offering food and coin redemption coupons; defendant also made non-contractual arrangements with Pennsylvania bus companies to encourage daily transportation of Pennsylvania residents to the casinos, and paid for advertising for select bus companies in various Pennsylvania papers).

<sup>6</sup> Section 1391(a) provides that in diversity cases, venue is proper in a judicial district: (1) where any defendant resides, if all defendants reside in the same State, (2) where a substantial part of the events or omissions giving rise to the claim occurred, or (3) where 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.

<sup>7</sup> Section 1406(a) provides that a district court may "in the interest of justice" transfer a "case laying venue in the wrong division or district . . . to any district or division in which it could have been brought."

#### **IV. Conclusion**

For the reasons stated above, we conclude that this Court does not have personal jurisdiction over Defendant in this matter. However, rather than dismiss the case, we will transfer it to the District of New Jersey pursuant to 28 U.S.C. § 1406(a). An appropriate Order follows.

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v.	:	
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ATLANTIC CITY SHOWBOAT INC.	:	
d/b/a/ SHOWBOAT CASINO HOTEL	:	NO. 07-0407

**ORDER**

AND NOW, this 25<sup>th</sup> day of May 2007, it is hereby ORDERED, for the reasons stated in the foregoing Memorandum, that:

1. Defendant's Motion to Dismiss (Doc. No. 7) is DENIED to the extent it seeks dismissal of Plaintiff's complaint.
2. Defendant's Motion is GRANTED to the extent it seeks a transfer of this matter under 28 U.S.C. § 1406(a). This action is hereby TRANSFERRED to the United States District Court for the District of New Jersey.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.