

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

99¢ STORES, INC. : CIVIL ACTION
 :
 v. :
 :
 DYNAMIC DISTRIBUTORS, and :
 MARK ENGEL : NO. 97-3869

MEMORANDUM AND ORDER

Norma L. Shapiro, J.

August 1, 2003

99¢ Stores, Inc ("Stores") brought this breach of contract and fraud action against Dynamic Distributors, Inc. ("Dynamic") through its President Mark Engel ("Engel"). Because they failed to answer the complaint, Stores moved for default against both Dynamic Distributors, Inc. and Engel (collectively "Distributors"). After the default was entered but before it was reduced to judgment, Distributors moved to set the default aside. Because default is a sanction of last, not first resort, and because the defendants have sufficiently alleged the required elements to set aside a default, the motion will be granted. Distributors also claims this court lacks subject matter jurisdiction over the action, and personal jurisdiction over Engel. The court rejects these claims, and will not dismiss for lack of jurisdiction.

BACKGROUND

Stores, a Pennsylvania corporation, contracted with Distributors, a New York Corporation, through Engel, a resident of New York, for the sale and delivery of stationary in the

amount of \$62,465.25, paid in advance. Because Distributors only shipped \$15,151.50 worth of goods, Stores sued Distributors for the balance and lost profits. Rather than answering the complaint, Distributors attempted to negotiate a settlement. Stores moved for entry of default, and then for entry of judgment on the default. Distributors filed a motion to set aside the default before the hearing on Stores' damages; it claimed the court lacked subject matter jurisdiction and personal jurisdiction over Engel. The court held oral argument on whether the default should be set aside.

DISCUSSION

Subject Matter Jurisdiction

Plaintiff brought this claim under diversity jurisdiction, 28 U.S.C. § 1332. That section requires complete diversity of citizenship between the plaintiff and the defendants and at least \$75,000 in controversy. The parties are diverse because the plaintiff is a Pennsylvania corporation; Dynamic is a New York corporation; and Engel is a citizen of New York. However, Distributors claims the amount in controversy does not exceed \$75,000.

The amount in controversy claimed by the plaintiff, if made in good faith, must be accepted unless it appears "to a legal certainty that the claim is really for less than the jurisdictional amount." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). In its most recent affidavit, Stores alleges that damages total \$152,461.45: \$47,313.75 in

advance payment for unshipped merchandise, and \$105,147.70 in lost profits. Since it cannot be said to a legal certainty that the claim can only be for a lesser amount, the court has subject matter jurisdiction over the action.

Personal Jurisdiction

Engel claims this court lacks personal jurisdiction over him. To exercise personal jurisdiction, the Pennsylvania long-arm statute must allow for the exercise of jurisdiction, and that exercise must satisfy the Due Process Clause of the Constitution. Pennsylvania's long arm statute allows for the exercise of personal jurisdiction over anyone "[c]ausing harm or tortious injury by an act or omission in this Commonwealth [or] [c]ausing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth." 42 Pa. Cons. Stat. § 5322(a)(3), (4). Stores' complaint alleges that Engel committed fraud in the contract negotiations in Pennsylvania. The commission of fraud alleged by Stores is an adequate basis for personal jurisdiction under Pennsylvania's long-arm statute.

This exercise of personal jurisdiction must be consistent with the Due Process Clause of the Fourteenth Amendment: "the defendant must have made constitutionally sufficient minimum contacts with the forum" and the court's exercise of personal jurisdiction must "comport with traditional notions of fair play and substantial justice." Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prods. Co., 75 F.3d 147, 150 (3d Cir. 1996).

Minimum contacts exist when "the defendant has purposefully

directed its activities toward residents of the forum. 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." Id. Engel allegedly made fraudulent statements in Pennsylvania to Pennsylvania residents, with the expectation that those Pennsylvania residents would act upon them. These acts in the forum are sufficient to meet the requisite minimum contacts. See Calder v. Jones, 465 U.S. 783, 789-90 (1984) (publication of an allegedly libelous story concerning California residents by a Florida newspaper, where the reporter had no other relevant contact is sufficient contact with California).

The exercise of personal jurisdiction over a defendant who allegedly committed fraud in the forum state satisfies "traditional notions of fair play and substantial justice." Carteret Savings Bank, FA v. Shushan, 954 F.2d 141, 146-147 (3d Cir.) cert. denied, 506 U.S. 817 (1992); Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539 (3d Cir. 1985). Engel's claim that this court cannot exercise personal jurisdiction over him is meritless.

Setting Aside the Default

In determining whether to set aside a default, a court must consider: (1) whether vacating the default would prejudice the plaintiff; (2) whether the defendant has a prima facie meritorious defense; and (3) whether the defaulting defendant's conduct is excusable or culpable. Emcasco Ins., Co., v.

Sambrick, 834 F.2d 71, 73 (3d Cir. 1987); 55,518.05 in U.S. Currency, 728 F.2d 192 (3d Cir. 1984); Feliciano v. Reliant Tooling Co., 691 F.2d 653, 656 (3d Cir. 1982); Spurio v. Choice Sec. Sys., Inc., 880 F. Supp. 402, 404 (E.D. Pa. 1995).

Prejudice can be shown through loss or destruction of evidence, increased potential for fraud and collusion, or substantial reliance upon the entry of default. Feliciano, 691 F.2d at 657; Gross v. Stereo Component Systems, Inc., 700 F.2d 120, 123 (3d Cir. 1983). Distributors argued that setting aside the default would not prejudice Stores. Stores, in its memorandum in opposition to the motion to set aside the default, presented no argument in opposition to Distributors' contention. No evidence of prejudice has been presented.

"The showing of a meritorious defense is accomplished when allegations of defendant's answer, if established at trial would constitute a complete defense." Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984). To determine whether the defendant's defense is meritorious, the court considers the plaintiff's allegations. See, 55,518.05 in U.S. Currency, 782 F.2d at 195. Stores alleges that Distributors breached the contract by not delivering the goods, and that Distributors committed fraud.

Distributors argues that the contract was breached by Stores when it did not accept the delivery of the goods. Engel's affidavit, attached to Distributors' motion, states that Distributors attempted to deliver the goods, but the delivery was rejected by Stores for lack of warehouse space. Under the

Uniform Commercial Code, a contract obligates the seller to deliver to the buyer the goods called for under the contract, and it obligates the buyer to accept delivery and pay for such goods. 13 Pa. Con. Stat. § 2301. Although the affidavit does not state when and where delivery was attempted, it does specifically allege that Stores did not accept the goods when Distributors sought to deliver them. If proved at trial, this might constitute a complete defense to the breach of contract claim.

Distributors also alleges it has a defense to the fraud claim. To prevail on its claim of fraud, Stores must prove that: Distributors made a representation or omission, material to the transaction, with knowledge or recklessness as to its falsity and with the intent of misleading Stores into relying on it; Stores justifiably relied on it; and injury was proximately caused by the reliance. See Protocomm Corp. v. Fluent, Inc., 1994 WL 719674, *15 (E.D. Pa. Dec. 27, 1994) (citing Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994)). Stores' allegations of fraud are based on two representations by Distributors: that Distributors had the merchandise for immediate shipment, and that Distributors was financially sound. In its motion to set aside the default, Distributors asserts it had the goods at the time of contracting, and the parties discussed Distributors' difficult financial situation. If both of these statements are true, Stores will be unable to show that Distributors knowingly or recklessly made a false representation or that Stores' alleged reliance was reasonable. These two assertions, made in Distributors'

affidavit, serve as a complete defense to the fraud claim.

Distributors alleges that its failure to answer was not culpable. Distributors was under the impression that ongoing negotiations and the possibility of settlement obviated the need for prompt response. Culpable conduct is more than mere negligence. Wilfulness or bad faith is required. Atlas Communications, Ltd. v. Waddill, 1997 WL 700492, *2 (E.D. Pa., Oct 31, 1997). Distributors' failure to answer because it was negotiating a settlement cannot be characterized as "flagrant bad faith" or "callous disregard of [its] responsibilities." National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976).

Default is not favored and doubt should be resolved in favor of setting aside a default and reaching a decision on the merits. Gross, 700 F.2d at 122 (citing Farnese v. Bagnasco, 687 F.2d 761, 764 (3d Cir. 1982)). The default will be set aside.

CONCLUSION

It appears from the plaintiff's complaint that the court has subject matter jurisdiction; the action will not be dismissed for failure to meet the requisite amount in controversy. There is also personal jurisdiction over Engel; the action will not be dismissed as against him. Distributors has met the requirements for setting aside the default: no prejudice to Distributors has been shown; Distributors has alleged a complete defense to Stores' claims; and the failure to answer did not result from Distributors' culpable conduct. The default will be set aside.

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

99¢ STORES, INC. : CIVIL ACTION
 :
 v. :
 :
 DYNAMIC DISTRIBUTORS, and :
 MARK ENGEL : NO. 97-3869

ORDER

AND NOW this 21st day of January, 1998, upon consideration of defendants' motion to set aside the default, plaintiff's response in opposition thereto, it is **ORDERED** that:

1. Defendants' Motion to Set Aside the Default is **GRANTED**.
2. Plaintiff's Motion for Entry of Judgment by Default is **DENIED**.
3. Defendants shall answer plaintiff's complaint on or before February 6, 1998.

Norma L. Shapiro, J