

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

AUTOMATED MEDICAL	:	
PRODUCTS CORPORATION	:	CIVIL ACTION
	:	
vs.	:	
	:	
	:	
INTERNATIONAL HOSPITAL	:	NO. 97-2328
SUPPLY CORPORATION	:	

MEMORANDUM AND ORDER

AND NOW, to wit, this 29th day of January, 1998, upon consideration of the Motion of Defendant International Hospital Supply Company to Dismiss the Complaint for Lack of Personal Jurisdiction, For Failure to State a Claim and For Improper Venue (Document No. 6, filed June 6, 1997); the Memorandum of Law of Plaintiff, Automated Medical Products Corp., In Opposition to the Motion of Defendant, International Hospital Supply Corp.'s Motion to Dismiss the Complaint for Lack of Personal Jurisdiction, for Improper Venue, and for Failure to State a Claim (Document No. 9, filed July 3, 1997); and the Reply of Defendant International Hospital Supply Company to Plaintiff's Response to Defendant's Motion to Dismiss (Document No. 17, filed August 15, 1997); and upon consideration of the Motion of Plaintiff, Automated Medical Products Corp., to Compel Discovery and for Sanctions Against Defendant, International Hospital Supply Corp. (Document No. 15, filed August 11, 1997) and the Response of Defendant International Hospital Supply Company to Plaintiff's Motion to Compel (Document No. 16, filed August 15, 1997) **IT IS ORDERED** that:

1. That part of defendant's Motion to Dismiss based on lack of personal jurisdiction is **DENIED**;

2. That part of defendant's Motion to Dismiss pursuant to 28 U.S.C. § 1406(a) based on improper venue under 28 U.S.C. § 1391 is **DENIED**;

3. That part of defendant's Motion to Transfer the case to the District Court for the Central District of California pursuant to 28 U.S.C. § 1406(a) based on improper venue under 28 U.S.C. § 1391 is **DENIED**;

4. That part of defendant's Motion to Transfer the case to the District Court for the Central District of California pursuant to 28 U.S.C. § 1404(a) is **DENIED WITHOUT PREJUDICE**;¹

5. That part of defendant's Motion to Dismiss based on failure to state claims upon which relief can be granted is **DENIED**;

6. Plaintiff's Motion to Compel Discovery is **DENIED AS MOOT**.

7. Plaintiff's Motion for Sanctions Against Defendant is **DENIED WITHOUT PREJUDICE** at this time. The Court will schedule a hearing at the conclusion of this case for the purpose of determining whether sanctions should be imposed on either counsel based on his or her conduct during the deposition of Dr. George Shecter on August 5, 1997.²

IT IS FURTHER ORDERED that defendant shall file and serve its Answer within twenty (20) days. A preliminary pretrial conference will be scheduled in due course.

The decision of the Court is based on the following:

¹ In the Reply of Defendant International Hospital Supply Company to Plaintiff's Response to Defendant's Motion to Dismiss, defendant supplemented this part of the Motion by adding a new ground -- that the stroke Dr. George O. Shecter, president of defendant, reportedly suffered during his deposition in this case, "compels the transfer" of this matter to California.

² In the event that defendant files an amended motion to transfer to case to the Central District of California under 28 U.S.C. §1404(a), and the motion is granted, the Court will schedule the hearing before the transfer.

I. Factual and Procedural Background

On June 24, 1995, the Defense Personnel Support Center (“DPSC”), an agency of the United States Department of Defense, located in Philadelphia, Pennsylvania, published a solicitation for bids to provide DPSC with automatic retractor holder sets, a medical device. The retractor holders sets were to be delivered to government facilities in Utah, Georgia, and California. The solicitation for bids was published in Business Daily Commerce, a publication of the United States Department of Commerce with nationwide distribution.

In late 1995 and 1996, plaintiff, Automated Medical Products, a Delaware corporation with its principal place of business in New York, and defendant, International Hospital Supply, a California corporation, both submitted bids to supply DPSC with the retractors. Plaintiff and defendant were the only companies to submit bids. The bids were submitted to DPSC in Philadelphia, which then amended the solicitation specifications several times, analyzed the two bids, and requested “best and final offers” from both companies. On August 23, 1996, DPSC awarded the contract to defendant.

In September, 1996, plaintiff filed a protest with DPSC on the ground that the award of the contract to defendant was improper. In December, 1996, DPSC denied that protest. In December, 1996, plaintiff filed a second protest with the United States General Accounting Office. That protest was denied in February, 1997.

Plaintiff filed the instant action on April 3, 1997, claiming that defendant had interfered with existing and prospective contractual relationships between plaintiff and DPSC, and that defendant had engaged in commercial disparagement by stating falsely in its bid that plaintiff’s surgical

retractor holder was not patented. On June 6, 1997, defendant filed a motion under Federal Rule of Civil Procedure 12(b) to dismiss the suit for lack of personal jurisdiction over defendant or for improper venue, or, in the alternative, to transfer the action to federal court in California due to improper venue in this Court or for the convenience of the parties and the interests of justice, or to dismiss the suit for failure to state claims upon which relief could be granted.

On August 5, 1997, plaintiff's attorney took the deposition of Dr. George O. Shecter, president of International Hospital Supply, on the issues of personal jurisdiction and venue. On August 11, 1997, plaintiff filed a Motion for Sanctions and to Compel Discovery, based on actions and statements during the deposition. In its Response, defendant stated, inter alia, that Dr. Shecter had suffered a stroke during the deposition and had been hospitalized upon his return to California.

II. Personal Jurisdiction

Under Federal Rule of Civil Procedure 4(e), a federal court may exercise personal jurisdiction to the extent allowed by the state in which the court sits. In Pennsylvania, the reach of personal jurisdiction is co-extensive with the due process clause of the United States Constitution. See, 42 P.S.A. § 5308 (1981). Jurisdiction may be exercised to “the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contacts allowed under the Constitution of the United States.” Time Share Vacation Club v. Atlantic Resorts, 735 F.2d 61, 63 (3d Cir. 1984).

A court may obtain personal jurisdiction over a defendant in one of two ways. First, “general jurisdiction” is established when the defendant has engaged in “systematic and continuous” contacts with the forum state and the exercise of jurisdiction is “reasonable.” See, e.g., Helicopteros

Nacionales De Columbia v. Hall, 466 U.S. 408, 416 (1984). Second, specific jurisdiction exists when the “claim is related to or arises out of the defendant’s contacts with the forum.” Mesalic v. Fiberfloat Corp., 897 F.2d 696, 699 (3d Cir. 1990).

Once a defendant has filed a motion to dismiss for lack of personal jurisdiction, “the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence. . . . [P]laintiff must respond with actual proofs, not mere allegations.” Time Share, 735 F.2d at 67 n.9.

A. General Jurisdiction

To obtain general jurisdiction over a corporation in Pennsylvania, the corporation must either (1) be incorporated in Pennsylvania or licensed as a foreign corporation in the Commonwealth, (2) consent to jurisdiction, or (3) carry on a “continuous and systematic part of its general business” within the Commonwealth. 42 P.S.A. § 5301(a)(2)(I)-(iii) (1981).

Defendant, a California corporation, is not licensed to conduct business in Pennsylvania, nor did defendant consent to jurisdiction in this matter. Therefore, the only possible basis for exercising general jurisdiction over defendant is that it maintained a “continuous and systematic” presence in Pennsylvania.

In analyzing whether it may exercise general jurisdiction over defendant, the Court should consider whether defendant’s activities in the forum are “extensive and pervasive,” Fields v. Ramada Inn, Inc., 816 F.Supp. 1033, 1036 (E.D. Pa.1993) (citations omitted), and are a “continuous and central part” of defendant’s business. Provident Nat’l Bank v. California Fed. Savings and Loan Ass’n, 819 F.2d 434, 438 (3d Cir. 1987). Factors the Court should consider in this analysis include: “the nature and quality of business contacts the defendant has initiated with the forum; direct sales

in the forum, maintenance of a sales force in the state, [and] advertising targeted at the residents of the forum state. . .” Allied Leather Corp. v. Altama Delta Corp., 785 F. Supp. 494, 498 (M.D. Pa. 1992). See, also, Driscoll v. Matt Blatt Auto Sales, 1996 WL 156366 at *3-4 (E.D. PA. April 3, 1996) (holding same); Strick Corp. v. A. J. F. Warehouse Distributors, 532 F.Supp. 951, 956 (E.D. Pa. 1982) (“Generally, this type of jurisdictional basis is found where a non-resident defendant makes a substantial number of direct sales in the forum, solicits business regularly and advertises in a way specifically targeted at the forum market.”).

Plaintiff contends that defendant’s contacts with Pennsylvania have been “continuous and systematic” and therefore allow the Court to exercise general jurisdiction over defendant. In support of this contention, plaintiff cites the following activities: during the past five years defendant has been awarded six contracts by DPSC in Philadelphia, including the one at issue in this litigation, and each contract involved the submission of a bid and negotiation between defendant and DPSC in Philadelphia. Memorandum in Opposition to Motion to Dismiss at 16. DPSC submitted at least five supply orders to defendant and administered at least four of those orders. See, Dep. at 135, 143-45. Defendant has shipped goods to Pennsylvania based on its contracts with DPSC, and mailed a sample retractor to DPSC in Philadelphia with its bid for the contract at issue in this litigation. Memorandum in Opposition at 20. In addition, between January 1996 and July 1997, employees of defendant made at least 139 telephone calls to DPSC in Philadelphia. See, Mot. for Sanctions at 9.

In opposition, defendant argues that it has no employees, agents, or representatives in Pennsylvania, and it does not own real estate or maintain a place of business here. Amended Verification of George O. Shecter (“Verification”) at ¶¶ 4-8. DPSC is defendant’s only client in Pennsylvania, and all of defendant’s business with DPSC is conducted by telephone, facsimile and

mail. Verification at ¶¶ 20, 21. In its Motion to Dismiss, defendant also stated that: “The performance of the contract after the award is made [by DPSC] is always administered by a branch of the Department of Defense located in . . . California and there are no further dealings with Pennsylvania.” Motion to Dismiss at 6. George Shecter made the same statement in his Amended Verification in support of the Motion to Dismiss. See, Verification at ¶ 10. However, in his deposition, Dr. Shecter identified four orders for supplies submitted to defendant by DPSC which were administered by DPSC in Philadelphia.³ The connection between a contract and a supply order is not clear from the Record.⁴ Defendant also stated that it was always paid for contracts with DPSC by the Defense Finance Administration in Columbus, Ohio. Verification at ¶ 10. In addition, according to defendant, only 1.6 percent of defendant’s revenues were derived from goods which were shipped to Pennsylvania pursuant to contracts with DPSC, Verification at ¶ 11, and defendant’s contracts with DPSC have constituted only six percent of its business during the past five years. Defendant’s Reply to Plaintiff’s Response to the Motion to Dismiss at 5 n.1.

Given the above facts, the Court concludes that while defendant has done business with DPSC in Philadelphia, defendant has not maintained the “continuous and systematic part of its general business within this Commonwealth” which is needed for the Court to exercise general jurisdiction over defendant. See, 42 P.S.A. § 5301(a)(2)(iii) (1981). Thus, the Court will not

³ The supply orders administered by DPSC were: (1) an order for Yasargil aneurysm clips dated April 25, 1994, Dep. at 133, (2) an order for knee supports dated November 5, 1994, Dep. at 135, (3) an order for twelve Holinger laryngoscopes (no date for the order was given), Dep. at 143, and (4) an order for 20,160 mouth mirrors dated October 25, 1995, Dep. at 143-44.

⁴ During his deposition, Dr. Shecter testified that he thought a contract must exist before DPSC would submit an order to defendant. Dep. at 110. Later in the deposition he testified that an underlying “inquiry” from DPSC could also be the basis for an order. Dep. at 136.

exercise general jurisdiction over defendant in this case.

B. Specific Jurisdiction

The focus for determining whether specific jurisdiction exists is “the relationship among the defendant, the forum and the litigation.” Shaffer v. Heitner, 433 U.S. 186, 204 (1977). “Specific jurisdiction is invoked when the cause of action arises from the defendant's forum related activities,” North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 690 (3d Cir.1990), cert. denied, 498 U.S. 847 (1990), such that the defendant “should reasonably anticipate being haled into court there.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). In addition, the finding of jurisdiction should comport with “fair play and substantial justice.” See, International Shoe, 326 U.S. 310, 320 (1945).

In this case, defendant purposely and voluntarily associated itself with Pennsylvania by bidding on the retractor holder set contract. After reading the advertisement for the solicitation of bids, defendant faxed a request for the solicitation documents to DPSC in Philadelphia. Dep. at 150. Defendant thereafter sent approximately ten faxes and letters to DPSC in Philadelphia in relation to its bid on the retractor contract. Verification at ¶ 18. Defendant mailed its bid, and a sample retractor, to DPSC, and after further interaction with DPSC, mailed its “best and final offer” to the agency. All the mailings were to Philadelphia.

Contrary to defendant’s argument, it is not relevant that DPSC is an agency of the federal government. For the purposes of jurisdiction, DPSC’s location in Pennsylvania is the crucial fact, not its status as a federal agency. See, e.g., H. Landau & Co. v. Glenn Berry Manufacturers, 1986 WL 7420 at *3 (E.D. Pa. June 25, 1986) (exercising general jurisdiction over defendant which did

\$56 million of business with DPSC) (“The relevant inquiry is not with whom you do business, but rather where you do business.”).

The Court concludes that defendant voluntarily associated itself with Pennsylvania, and could have reasonably expected to be haled into court in the Commonwealth in an action related to the retractor contract. Therefore, the Court will exercise specific personal jurisdiction over defendant in this action, and defendant’s Motion to Dismiss for lack of personal jurisdiction is denied.

III. Venue

A. Venue under 28 U.S.C. § 1391

A civil suit in federal court based on the diversity of the parties, such as this case, may be brought, inter alia, in “a judicial district where any defendant resides, if all defendants reside in the same State.” 28 U.S.C. § 1391(a)(1) (1993). A corporate defendant is deemed to reside “in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.” 28 U.S.C. § 1391(c) (1993). Given the Court’s conclusion, supra, that it may exercise specific personal jurisdiction over defendant, the Court also concludes that venue is proper under 28 U.S.C. § 1391. Therefore, defendant’s Motion to Dismiss or Transfer this case to the Central District of California based on improper venue pursuant to 28 U.S.C. §1406(a) is denied.

B. Change of Venue Under 28 U.S.C. § 1404(a)

Under 28 U.S.C. § 1404(a), the Court may transfer an action “for the convenience of parties and witnesses [or] in the interest of justice” to any judicial district where the action may have been brought. 28 U.S.C. § 1404(a) (1993). The burden of establishing that transfer is appropriate under 28 U.S.C. §1404(a) rests with the party requesting the transfer. See, Jumara v. State Farm Ins. Co.,

55 F.3d 873, 879 (3d Cir. 1995). “In deciding a motion under § 1404(a), the Court must consider both the public and private interests affected by the transfer. Id. Those private interests include: the plaintiff’s original choice of forum, which should not be lightly disturbed; the defendant’s preference; the place where the claim arose; the relative physical and financial condition of the parties; whether witnesses will be unavailable in one forum; and the location of relevant books and records. Id. The public interests which the Court should consider include: the enforceability of the judgment; practical considerations that would make the trial “easy, expeditious, or inexpensive;” an interest in resolving local controversies in a local court; court congestion in each forum; and in diversity cases such as this one, the judge’s familiarity with the applicable state law. Id. at 879-80 (citations omitted).

Defendant contends in its Motion under 28 U.S.C. § 1404(a) that this case should be transferred to the Central District of California, arguing that all relevant actions occurred in California, all employees of defendant who would be witnesses are located in California, and all of defendant’s books and records are located in California. Motion to Dismiss at 16. According to defendant, Pennsylvania has no institutional interest in adjudicating the case in the Commonwealth because the case is a dispute between a California corporation and a Delaware corporation with its principal place of business in New York. Motion to Dismiss at 16. In its Reply, defendant supplemented this part of its Motion based on a new ground: that Dr. Shecter’s reported stroke during his deposition “compels the transfer” of this matter to California. Reply Brief at 8.

In response, plaintiff asserts that the events giving rise to the cause of action occurred in Pennsylvania, and DPSC employees, who are non-party witnesses, and DPSC records are located in Philadelphia. Plaintiff’s Memorandum in Opposition at 25-29.

The Record before the Court is insufficient to enable the Court to address all of the issues that must be considered in deciding defendant's request to transfer the action for the convenience of the parties. As an example, the Court notes that neither party has identified specific witnesses who would be unavailable if the trial were held in California or Pennsylvania. Similarly, the Court does not know the current state of Dr. Shecter's health or whether he can travel to Philadelphia for a trial. Accordingly, defendant's Motion to Transfer is denied without prejudice.

IV. Failure to State a Claim Upon Which Relief Can Be Granted

Defendant has moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss plaintiff's complaint for failure to state claims upon which relief can be granted. In considering this Motion, the Court may not consider anything outside the allegations of the Complaint. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir.1988). Furthermore, the Court must "accept all factual allegations in the Complaint as true and give the pleader the benefit of all reasonable inferences that can be fairly drawn therefrom." Ditri v. Coldwell Banker, 954 F.2d 869, 871 (3d Cir.1992) (citation omitted). "However, [the Court is] not required to accept legal conclusions either alleged or inferred from the pleaded facts." Id. (citation omitted). The question before the Court is not whether plaintiffs will ultimately prevail, but whether they can support their claim by proving any set of facts that would entitle them to relief. See, Hishon v. King & Spalding, 467 U.S. 69, 73, (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A. Count I: Intentional Interference with Existing and Prospective Contractual Relations

1. Intentional Interference with Existing Contractual Relations

To establish a claim of intentional interference with existing contractual relations, plaintiff must prove that: (1) there is an existing contractual relationship between plaintiff and a third party, (2) it was defendant's intent that its actions cause the third party to violate its contract with plaintiff, (3) defendant's actions were improper, i.e., there was no privilege or justification for the actions, and (4) plaintiff suffered damages as a result of defendant's actions. Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1388 (3d Cir. 1991).

Plaintiff alleges in the Complaint that it had a contract to supply DPSC with retractor holder sets from August 19, 1992 to December 31, 1996, but that DPSC did not order any retractors from plaintiff after the retractor contract at issue in this litigation was awarded to defendant on August 23, 1996. Accepting the factual allegations in the Complaint as true for the purposes of deciding this Motion, the Court concludes that plaintiff has stated a claim of intentional interference with existing contractual relations upon which relief can be granted. Therefore, defendant's Motion to Dismiss plaintiff's claim of intentional interference with existing contractual relations is denied.

2. Intentional Interference with Prospective Contractual Relations

To prove a claim of intentional interference with prospective contractual relations, plaintiff must show that (1) a reasonable probability of a contract between plaintiff and a third party existed, (2) it was defendant's intention that its actions interfere with that probable contract, (3) there was no privilege or justification for defendant's actions, and (4) plaintiff incurred actual damages as a result of defendant's actions. Nathanson, 926 F.2d at 1392.

Plaintiff contends that defendant stated untruthfully in its bid that plaintiff's retractor was not patented, and that except for that statement, DPSC would have awarded the contract at issue to plaintiff, not defendant. Accepting the factual allegations in the Complaint as true for the purposes

of deciding this Motion, the Court concludes that plaintiff has stated a claim of intentional interference with prospective contractual relations upon which relief can be granted. Therefore, defendant's Motion to Dismiss the claim of intentional interference with prospective contractual relations is denied.

B. Count II: Commercial Disparagement

To maintain an action for commercial disparagement, plaintiff must prove that "(1) the disparaging statement of fact is untrue or that the disparaging statement of opinion is incorrect; (2) that no privilege attaches to the statement; and (3) that the plaintiff suffered a direct pecuniary loss as the result of the disparagement." U.S. Healthcare v. Blue Cross of Greater Philadelphia, 898 F.2d 914 (3rd Cir. 1990) cert. denied 498 U.S. 816 (1990).

Plaintiff has alleged that defendant falsely stated in its bid that plaintiff's retractor was not patented and as a result, DPSC did not award the retractor contract to plaintiff. Accepting the factual allegations in the Complaint as true for the purposes of deciding this Motion, plaintiff has stated a claim of commercial disparagement upon which relief can be granted. Therefore defendant's Motion to Dismiss the claim of commercial disparagement is denied.

V. Plaintiff's Motion to Compel Discovery and for Sanctions

In its Motion to Compel Discovery and for Sanctions, plaintiff requested that the Court compel Dr. Shecter to return to Philadelphia to continue his deposition, and order defendant to search for records not located during discovery and submit those records to plaintiff's attorney. As the Court has denied defendant's Motion to Dismiss, plaintiff's Motion to Compel a continuation of the deposition which was limited to the issues of jurisdiction and venue and to compel discovery on

those issues is denied as moot.

Plaintiff also requested that the Court sanction defendant and/or its attorney by requiring them to pay the attorney fees and expenses associated with the continued deposition, or in the alternative, to sanction them by denying defendant's Motion to Dismiss. In its Response to plaintiff's Motion to Compel Discovery, defendant contended that plaintiff's attorney had not tried to resolve the discovery issues before filing its Motion, and therefore plaintiff was in violation of Local Rule 26.1(f). Defendant requested that plaintiff be ordered to pay the costs and counsel's fees of defendant's Response to the Motion to Compel Discovery as a sanction for plaintiff's violation of the local rules and for the behavior of plaintiff's counsel during Dr. Shecter's deposition.

After reviewing the transcript of the deposition of Dr. Shecter, the Court concludes that the attorneys for both parties acted inappropriately during the deposition. Such behavior must stop immediately. However, in preference to addressing the Motion for Sanctions on the merits at this time, the Court denies the Motion without prejudice and will schedule a hearing at the conclusion of the case for the purpose of determining whether sanctions should be imposed on counsel for either party. In the event defendant files an amended motion to transfer to case to the Central District of California under 28 U.S.C. §1404(a), and the motion is granted, the Court will schedule the hearing before the transfer.

The Court also notes that Dr. Shecter's conduct during the deposition fell short of what is expected of a deponent. Dr. Shecter did not answer questions directly, and he spoke rudely to plaintiff's attorney on multiple occasions. However, because Dr. Shecter reportedly suffered a stroke during the deposition, the Court will only note his actions for the Record, and will take no further action against him on the present state of the Record.

BY THE COURT:

