

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

HERBERT FEINZIG : CIVIL ACTION
 :
 v. :
 :
 DOYON SERVS., INC. d/b/a :
 KANTISHNA ROADHOUSE CO., :
 DOYON, LTD., GOLDEN TUNDRA CO. :
 formerly known as KANTISHNA :
 ROADHOUSE CO., and KANTISHNA :
 ROADHOUSE CO. : NO. 97-4638

M E M O R A N D U M

WALDMAN, J.

April 17, 1998

This is a personal injury action. Plaintiff is suing the current and former owners of the Kantishna Roadhouse resort in Fairbanks, Alaska for negligence that allegedly caused injuries to him in a bicycle accident on July 20, 1995 while he was staying at the resort.

Plaintiff is a citizen of Pennsylvania. Defendants are corporations organized under the laws of Alaska and maintain their principal places of business in that state. Subject matter jurisdiction is predicated on diversity of citizenship.

Presently before the court is defendants' Motion to Dismiss for lack of personal jurisdiction and for improper venue. See Fed. R. Civ. P. 12(b)(2), 12(b)(3).

While the allegations of the complaint are taken as true, once a defendant asserts a jurisdictional defense the

plaintiff bears the burden of proving, through affidavits or other competent evidence, sufficient contacts with the forum state to establish personal jurisdiction over each defendant. Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir. 1996), cert. denied, 117 S. Ct. 583 (1996); North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 689 (3d Cir. 1990) (per curiam), cert. denied, 498 U.S. 947 (1990); Provident Nat'l Bank v. California Fed. Savs. Ass'n, 819 F.2d 434 (3d Cir. 1987); Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539, 542 (3d Cir. 1985). 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. 1992); Provident Nat'l Bank, 819 F.2d at 437.

Plaintiff presents no evidence and makes no argument to support a finding of personal jurisdiction or proper venue with regard to defendants Doyon Services, Doyon, Limited or Golden Tundra. The court can discern no basis for exercising jurisdiction over those defendants. The court will consider the evidence which has been submitted regarding defendant Kantishna Roadhouse Company ("Kantishna").¹

A federal district court may exercise personal jurisdiction over nonresidents of the forum state to the extent

¹ It appears that at the time of plaintiff's accident Kantishna Roadhouse Company had signed a sale agreement with Doyon Services and Doyon, Limited for the resort property. The latter defendants contend that this was solely a purchase of assets and they did not assume the seller's liabilities. The Golden Tundra Company's relationship to the Kantishna Roadhouse resort is not explained to the court by any party.

authorized by the law of that state. See Fed. R. Civ. P. 4(e); North Penn Gas Co., 897 F.2d at 689; Provident Nat'l Bank, 819 F.2d at 436. In exercising personal jurisdiction, the court must determine whether jurisdiction exists under the forum state's long-arm jurisdiction statute and, if it does, whether the exercise of jurisdiction would violate the due process clause of the Fourteenth Amendment. Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481, 489-90 (3d Cir. 1985). Pennsylvania merges this two-part inquiry by providing that a court may exercise personal jurisdiction to the full extent permitted by the Constitution. Id. at 490; 42 Pa. Cons. Stat. Ann. § 5322(b).

The law provides two bases for a court to exercise in personam jurisdiction over a nonresident corporate defendant -- general jurisdiction and specific jurisdiction. See Provident Nat'l Bank, 819 F.2d at 437; 42 Pa. Cons. Stat. Ann. § 5301, 5322.

To invoke specific jurisdiction, the plaintiff's cause of action must arise from the defendant's forum related activities. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); North Penn Gas, 897 F.2d at 690; Bork v. Mills, 329 A.2d 247, 249 (Pa. 1974). To establish specific jurisdiction, a plaintiff must show that a defendant has sufficient minimum contacts with the forum state "such that [the defendant] should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); North Penn Gas, 897 F.2d at 690.

Plaintiff does not suggest that there is a basis for specific personal jurisdiction over defendant Kantishna and no such basis is apparent. Plaintiff allegedly suffered personal injuries in Alaska as a result of defendant's negligence in that state. His injuries did not arise from any activities of defendant in Pennsylvania. There is no specific jurisdiction.

General jurisdiction may be exercised even when the claim arises from the defendant's non-forum related activities. Helicopteros Nacionales de Columbia, S.A., 466 U.S. at 414 n.9; Gehling, 773 F.2d at 541. To establish general jurisdiction over a defendant, however, the plaintiff "must show significantly more than minimum contacts." Provident Nat'l Bank, 819 F.2d at 434. See also Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 589 (3d Cir. 1982). The nonresident defendant's contacts with the forum must be "continuous and systematic." Fields v. Ramada Inn, Inc., 816 F. Supp. 1033, 1036 (E.D. Pa. 1993); 42 Pa. Cons. Stat. Ann. § 5301(a)(2)(iii). See also Provident Nat'l Bank, 819 F.2d at 437; Gehling, 773 F.2d at 541; Reliance Steel Prods. Co., 675 F.2d at 589. Contacts are continuous and systematic if they are "extensive and pervasive." Fields, 816 F. Supp. at 1036. See also Reliance Steel, 675 F.2d at 589.

Many of the factors that typically support the exercise of general personal jurisdiction are notably absent in this case.

Kantishna has never been licenced or qualified to do business in Pennsylvania and has never owned real property or maintained a place of business in the Commonwealth. There is no evidence that defendant has ever employed an agent, maintained a mailing address, maintained a bank account or paid any tax in Pennsylvania.

Plaintiff argues that nevertheless the court has general personal jurisdiction over Kantishna because the company advertised its resort in the State of Alaska Vacation Planner and Alaska Magazine which are distributed world-wide, because it advertised in Alaska Airline Magazine which is available to passengers on Alaska Airline flights and thus distributed "outside the state of Alaska," because it maintained a national toll-free number for reservations from out-of-state travelers and because plaintiff's Pennsylvania-based travel agent retained a ten percent commission for arranging his travel plans to the Kantishna Roadhouse resort.²

Plaintiff correctly notes that a nonresident corporation may subject itself to general personal jurisdiction through substantial promotional activities in the forum. Plaintiff relies on three cases in which courts cited such promotional activity in finding the presence of personal

² The travel agency in question is in Wexford in the Western District of Pennsylvania.

jurisdiction. See Weintraub v. Walt Disney World Co., 825 F. Supp. 717, 721 (E.D. Pa. 1993); Gavigan, *supra*; Sider v. Homowack Lodge, 75 D.&C.2d 312, 318 (C.P. Phila. 1975). In those cases, however, the promotional activity was extensive and targeted specifically at the forum.

In Weintraub, the defendant had "extensive public relations activities in Pennsylvania, advertising directed at Pennsylvania -- not the general public, and a toll-free telephone number for Pennsylvania travel agents." 825 F. Supp. at 721. In Gavigan, the defendant participated in promotional activity with a local hotel and department store, and purchased substantial local television and print advertising. 646 F. Supp. at 787-89. In Sider, a New York resort "actively and directly" solicited business within Pennsylvania. 75 D.&C.2d at 318.

There is no evidence that Kantishna directed advertising efforts specifically at Pennsylvania. Defendant never sent agents to Pennsylvania to encourage local residents to visit the resort. Defendant never placed magazine, newspaper, television or radio advertisements in Pennsylvania. Defendant never conducted direct mail solicitation of Pennsylvania residents. The three identified publications in which it did advertise were not targeted at the Pennsylvania market. There is no evidence that Alaska Airlines even has any flights into or from Pennsylvania.

The lack of advertising directed towards Pennsylvania "is a crucial factor, for it is precisely this lack of local advertising which courts have emphasized in finding that the quality and quantity of advertising were insufficient." Gavigan v. Walt Disney World, Inc., 646 F. Supp. 786, 789 (E.D. Pa. 1986). See also Peek v. Golden Nugget Hotel and Casino, 806 F. Supp. 555, 559 (E.D. Pa. 1992). Defendant's modest general promotional activity does not support a finding that it engaged in extensive and pervasive business activity in Pennsylvania. See Gehling, 773 F.2d at 554 (defendant's advertisements in non-Pennsylvania publications with international circulation does not constitute continuous and substantial contacts with forum); Brandon v. Belmont Motel Corp., 1990 WL 90123, *5 (E.D. Pa. June 26, 1990) (supply of promotional materials by defendant motel to Maine Publicity Bureau which sent them to prospective vacationers in Pennsylvania does not support exercise of general personal jurisdiction); Slota v. The Moorings, Ltd., 494 A.2d 1, 6 (Pa. Super. 1985) (no personal jurisdiction where defendant's promotional material appeared in national publications including Yachting Magazine, Sail Magazine, and Cruising World). See also Schulman v. Walt Disney World Co., 1992 WL 38390, *2 (E.D. Pa. Feb. 25, 1992) (citing cases on insufficiency of general advertising and solicitation).

Defendant's maintenance of a national toll-free

telephone number is also not a significant forum contact. See Cooperman v. Island Hotel Co., 1991 WL 147493, *1 (E.D. Pa. July 26, 1991), aff'd, 958 F.2d 362 (3d Cir. 1992); Brandon, 1990 WL 90123 at *4 ("although [the motel] maintained a toll-free number for making reservations, it was not for the exclusive use of Pennsylvania residents"); Slota, 494 A.2d at 6 ("there is no toll-free number which Pennsylvania residents exclusively can use to reserve accommodations"). There is no evidence that the toll-free number was listed in any Pennsylvania telephone directory or that it was intended for use exclusively by Pennsylvania residents. There is also no evidence that Pennsylvania residents regularly used the number.

The addition of evidence that one Pennsylvania travel agent on one occasion withheld a standard ten-percent commission when reserving accommodations at the Alaska resort still does not demonstrate continuous and systematic contact with the forum. See Cooperman, 1991 WL 147493 at 1 ("Such agents are not employees or agents of the defendant, and the bare fact that such a business arrangement exists is insufficient to prove that defendant has 'continuous and systematic' contacts in the forum"); Brandon, 1990 WL 90123 at *5 (evidence that defendant had paid four referral fees to Pennsylvania travel agents "is outweighed by the lack of any evidence that defendants engaged in advertising specifically directed towards Pennsylvania").

The Courts in Gehling, Cooperman, Brandon and Slota found that general personal jurisdiction could not be exercised over defendants who had substantially similar or greater contacts with Pennsylvania than Kantishna. The observation of the Court in Brandon is equally applicable in this case:

if defendant[’s] promotional activities aimed at attracting out-of-state guests in general were sufficient to enable this court to exercise personal jurisdiction over defendant in this case, defendant would be potentially subject to personal jurisdiction in every state where [its] guests reside, even if defendant made no efforts to specifically target [its] advertising toward residents of those states.

Brandon, 1990 WL 90123 at *5.

The court does not have personal jurisdiction over any defendant in this case. Thus, no defendant “resides” in this district for purposes of venue. See 28 U.S.C. § 1391(c). Also, a “substantial part of the events or omissions giving rise to the claim” clearly did not occur here. See 28 U.S.C. § 1391(a). Accordingly, venue for this action does not lie in this district.

Despite the absence of personal jurisdiction and lack of venue, dismissal of plaintiff’s action is not mandated. When it is in the “interest of justice,” a federal court in which venue is improper may transfer a case to another district in which the case could have been brought. See 28 U.S.C. § 1406(a). The District of Alaska is clearly one in which this action could have been brought and appears on the record presented to be the

only district in which venue and personal jurisdiction over each defendant can be ensured. A court need not have personal jurisdiction to transfer a case because of improper venue.

Goldlawr, Inc. v. Heiman, 369 U.S. 463, 465-66 (1962).

Goldlawr also has been read to permit the transfer of a case for lack of personal jurisdiction. See Porter v. Groat, 840 F.2d 255, 257 (4th Cir. 1988); Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77, 80 (2d Cir. 1978); Taylor v. Love, 415 F.2d 1118, 1120 (6th Cir. 1969), cert. denied, 397 U.S. 1023 (1970); Mayo Clinic v Kaiser, 383 F.2d 653, 656 (8th Cir. 1967); Dubin v. U.S., 380 F.2d 813, 815 (5th Cir. 1967); Shaw v. Boyd, 658 F. Supp. 89, 92 (E.D. Pa. 1987). Also, 28 U.S.C. § 1631 which directs that a court which lacks jurisdiction "shall" transfer an action if that is in the interest of justice has been construed to encompass transfers for lack of personal, as well as subject matter, jurisdiction. See Ross v. Colorado Outward Bound School, Inc., 822 F.2d 1524, 1527 (10th Cir. 1987); Carty v. Beech Aircraft Corp. 679 F.2d 1051, 1065-66 & n.17 (3d Cir. 1982); Jaffe v. Julien, 754 F. Supp. 49, 53 (E.D. Pa. 1991); Nolt & Nolt, Inc. v. Rio Grande, Inc., 738 F. Supp. 163, 166 (E.D. Pa. 1990). See also Hill v. U.S. Air Force, 795 F.2d 1067, 1070-71 (D.C. Cir. 1986).

A dismissal of this action without prejudice would effectively bar plaintiff's claim. See Alaska Stat. § 09.10.070

(two year statute of limitations for personal injury claims under Alaska law). It is in the interest of justice to transfer an action where a dismissal for lack of personal jurisdiction or venue would result in statute of limitations problems. Peek, 806 F. Supp. at 560; Wims v. Beach Terrace Motor Inn, Inc., 759 F. Supp. 264, 270 (E.D. Pa. 1991). The court will thus transfer rather than dismiss the action.³ An appropriate order will be entered.

³ As there has been absolutely no showing that venue is proper for the other three defendants, this case would be subject to transfer even if plaintiff had established jurisdiction and venue as to Kantishna as the claims against all of the defendants appear to be inextricably intertwined. See Cottman Transmissions Systems, Inc. v. Martine, 36 F.3d 291, 296 (3d Cir. 1994).

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O R D E R

AND NOW, this day of April, 1998, upon
consideration of defendants' Motion to Dismiss Complaint for Lack
of Personal Jurisdiction and for Improper Venue pursuant to Fed.
R. Civ. P. 12(b)(2) & 12(b)(3) (Doc. #4), and plaintiff's
response thereto, consistent with the accompanying memorandum, **IT**
IS HEREBY ORDERED that said Motion is **DENIED** and, pursuant to 28
U.S.C. §§ 1406(a) & 1631, in lieu of dismissal the above-
captioned case is **TRANSFERRED** to the U.S. District Court for the
District of Alaska at Anchorage.

BY THE COURT:

JAY C. WALDMAN, J.