

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

PARKER SQUARE PEH, LLC,	:	October Term 2009
	:	
Plaintiff,	:	
	:	
v.	:	No. 3014
	:	
JOSEPH C. MCDOWELL, JR. and MARY PAT	:	
MCDOWELL,	:	COMMERCE PROGRAM
	:	
Defendants.	:	
	:	Control Number 09123428

ORDER

AND NOW, this 4th day of October 2010, upon consideration of defendants Joseph C. McDowell, Jr. and Mary Pat McDowell's Preliminary Objections, plaintiff's response in opposition, supplemental submissions, after oral argument and in accord with the attached Memoranda, it is **ORDERED** that the Preliminary Objections as they pertain to personal jurisdiction are **OVERRULED**.

It is further ordered that Defendants' Motion to Strike for failure to conform to a rule of court is **Denied**.

BY THE COURT,

ALBERT W. SHEPPARD, JR. J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

PARKER SQUARE PEH, LLC,	:	October Term 2009
Plaintiff,	:	
v.	:	No. 3014
JOSEPH C. MCDOWELL, JR. and MARY PAT	:	
MCDOWELL,	:	COMMERCE PROGRAM
Defendants.	:	
	:	Control Number 09123428

OPINION

This action was filed by plaintiff, Parker Square PEH, LLC (“Plaintiff” or “Lender”), headquartered in Philadelphia, Pa. to enforce personal guaranties signed by defendants, Joseph C. McDowell, Jr. and Mary Pat McDowell (“defendants”), Texas residents. Plaintiff was assigned the loan secured by defendants personal guaranties by the original lenders in the transaction at issue, LEM 2Q, LLC and LEM 2P, LLC. Defendants are real estate investors and are the only limited partners in CMP Family Limited Partnership (“CMP-LP”), a Texas limited partnership.

In 2006, CMP-LP, through a broker, Holliday Fenoglio Fowler, L.P., and directly through Joseph McDowell contacted plaintiff by phone and e-mail to obtain financing in connection with a real estate development in Flower Mount, Texas. The lender conducted due diligence from January 31, 2007 to March 9, 2007. The due diligence consisted of communicating with the CMP-LP, its broker and with Mr. McDowell. Additionally, in response to plaintiff’s request, CMP-LP and its principals including Mr. and Mrs. McDowell provided copies of their joint tax returns for 2005 and 2004, Schedule K-1 for CMP Management, LLC in which both defendants were members, Schedule K-1 for 2004 for both defendants from CMP-LP in which both defendants maintain a 49.5% limited partnership interest, Schedule K-1 for 2004

for Joseph McDowell and for 2003 and 2004 for various entities. Additionally during the due diligence period personal information was provided regarding the experience and other matters relating to Joseph McDowell, including but not limited to a biography of Joseph McDowell. While conducting due diligence, the lender discovered that Mary Pat McDowell was involved in the capital structure of CMP- LP and a number of its affiliates.

On or about March 9, 2007, the lender loaned defendants \$2,574,350.00. In connection with the loan, the individual defendants executed guaranties. The guaranties were transmitted to the lender in Philadelphia. All payments under the loan have been made in Philadelphia. In addition to the guaranties both defendants pledged 100% of their limited partnership interests in CMP-LP to the lender. The pledge agreement and other documents were transmitted at closing to the lender in Philadelphia.

CMP-LP defaulted on the loan. On October 19, 2009, the lender issued demand upon CMP-LP to transfer control of rental collections and other cash collections of the partnership to lender. On November 20, 2009, the lender issued another cash management demand letter and informed defendants that their failure to comply with the cash management demand caused each of them to be fully liable for the debt pursuant to the provisions of section 9.3.2 of the loan agreement and section 1.2(b) of the guaranty. The defendants refused to comply. As a result, plaintiff issued a demand under the pledges and the various instructions to register pledges and acknowledgements and consents entered into in connection to the issuers of the pledged interests.

In September 2009, plaintiff filed this action against defendants seeking to enforce the personal guaranties. On December 7, 2009, plaintiffs filed an amended complaint. Defendants filed preliminary objections alleging lack of personal jurisdiction and lack of capacity to sue. On January 21, 2010, the court ordered the parties to engage in discovery on the sole issue of

jurisdiction and file supplemental submissions on April 30, 2010 and May 4, 2010. Oral argument on the objections was also heard.

DISCUSSION

Pennsylvania confers jurisdiction over persons by general jurisdiction or specific jurisdiction. General jurisdiction is founded upon the defendant's general activities within the forum, as evidenced by systematic contacts with the state. Specific jurisdiction is premised upon the particular acts of the defendant that give rise to an underlying cause of action.¹ Specific jurisdiction is narrower in scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action.²

For a court to exercise specific personal jurisdiction over a non resident, “(1) the nonresident defendant must have sufficient minimum contacts with the forum state and (2) the assertion of *in personam* jurisdiction must comport with fair play and substantial justice.”³ Whether sufficient minimum contacts exist for the assertion of *in personam* jurisdiction defendant’s conduct and his connection with the forum State must be such that he should reasonably anticipate being haled into court there.⁴

As the Pennsylvania Supreme Court articulated:

Critical to the analysis of whether a defendant should reasonably anticipate being haled into court in the forum state is the determination that the defendant purposefully directed his activities at residents of the forum and purposefully availed himself to the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. Contacts with the forum that are “random,” “fortuitous” or “attenuated” are not sufficient for the assertion of

¹ Nutrition Management Services. Co. v. Hinchcliff, 926 A.2d 531, 535 (Pa. Super. 2007).

² Fidelity Leasing Inc. v. Limestone County Board of Educ., 758 A.2d 1207, 1210 (Pa. Super. 2000).

³ Kubik v. Letteri, 532 Pa. 10, 614 A.2d 1110, 1114 (Pa. 1992), *citing* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86, 105 S.Ct. 2174, 85 L.ED. 2d 528 (1985).

⁴ Id., *citing* Burger King, 471 U.S. at 474.

personal jurisdiction nor is unilateral activity in the forum by others who claim some relationship with the defendant.⁵

In evaluating an objection to personal jurisdiction, the objecting party initially bears the burden of proof. However once the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it.⁶ Regardless of whether general or specific *in personam* jurisdiction is asserted, the propriety of such an exercise must be tested against the Pennsylvania Long Arm Statute, 42 Pa.C.S.A. § 5322, and the Due Process Clause of the Fourteenth Amendment.

In this case, plaintiff relies exclusively on specific jurisdiction as the basis to extend personal jurisdiction over defendants.⁷ It is settled that "an individual's contract with an out-of-state party alone cannot automatically establish sufficient minimum contacts in the other party's home forum."⁸ Rather, the totality of the parties' dealings, including the contract negotiations, contemplated future consequences of the contract, and actual course of dealing must be evaluated in order to determine whether the foreign defendant is subject to suit in the plaintiff's chosen forum.⁹

Defendants rely heavily upon the fact that they had no physical contact with or presence in the Commonwealth.¹⁰ They stress that they did not solicit, nor negotiate any of the terms of the contract while in Pennsylvania. Standing alone, defendants agreement to make loan

⁵ *Id.* citing Burger King, 471 U.S. at 474.

⁶ Barr v. Barr, 749 A.2d 992, 994 (Pa. Super. 2000).

⁷ See Plaintiff's brief in opposition p. 8 fn 1.

⁸ Kubik v. Letteri, 532 Pa. 10, 18, 614 A.2d 1110, 1114 (emphasis in original) (citing Burger King Corp., 471 U.S. 462 at 478-80, 105 S. Ct. 2174, 2185-86, 85 L. Ed. 2d at 545..

⁹ *Id.*

¹⁰ Defendants argue that this court lacks jurisdiction because plaintiff, a partnership was organized in Delaware. A review of the record before this court demonstrates that plaintiff conducts business in Philadelphia, Pa. and that all the contacts occurred in Philadelphia, Pa. Hence defendants' argument is without merit.

repayments to a company doing business in Pennsylvania might not constitute sufficient forum contacts to sustain personal jurisdiction.¹¹ This court however cannot ignore that defendants had contacts with Pennsylvania both before and after the contract. Defendants purposefully submitted documents for the lender's review during the due diligence period and submitted payments on the present contract to a Pennsylvania address. Defendants supplied the lender in Philadelphia, Pa., numerous financial records regarding the limited partnership¹² and defendant McDowell submitted a biography setting forth his talent and experience in the real development arena. The lender relied upon the representations contained therein and the financial information to make the loan.¹³

Defendants purposefully availed themselves of the privileges and benefits of conducting business in the Commonwealth. Defendants sought the lender out and chose to finance the real estate with plaintiff. They clearly had the option to seek financing with another lender in any number of other states, including Texas. The actions of defendants knowingly created continuing obligations with a Pennsylvania company as demonstrated by defendants making payments to Philadelphia, Pa. These circumstances lead this court to conclude that defendants purposefully directed their activities toward a Pennsylvania resident and thereby availed themselves of the opportunity to do business here.

Once it has been determined that defendants purposefully established minimum contacts with the forum state, those contacts may be considered in light of other factors to determine whether the exercise of personal jurisdiction will comport with fair play and substantial justice.¹⁴

¹¹ See Burger King Corp., 471 U.S. at 482, 105 S. Ct. at 2185, 85 L. Ed. 2d at .

¹² Affidavit of Marcus Duley ¶¶ 6-8.

¹³ Id. ¶¶ 10-12.

¹⁴ Burger King, 471 U.S. at 476-77, 105 S. Ct. at 2184, 85 L. Ed. 2d at 612.

Those factors include the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the "several States in furthering fundamental substantive social policies."¹⁵

Here, the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. Plaintiff's interest in obtaining relief in our courts is obvious: its office and the witnesses and records relevant to this matter are in Pennsylvania. Defendants had fair notice from the personal guarantee that they may be haled into court in the forum state, and the burden placed on defendants to litigate in this jurisdiction is not too onerous. Defendants derived benefit from their activities in Pennsylvania, and, as such, it would be unfair to allow them to escape having to account in Pennsylvania for consequences resulting from such activities.¹⁶ Based on the foregoing, the assertion of jurisdiction over defendants in this case would be consistent with Pennsylvania's long-arm statute, as well as constitutional limitations on state power.¹⁷

CONCLUSION

Based on the foregoing, defendants' preliminary objections are denied.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

¹⁵ *Id.*

¹⁶ Kubik, 614 A.2d at 1115.

¹⁷ In addition to objection to personal jurisdiction, defendants also ask the court to strike the first amended complaint for failing to conform to the rules of court. Defendants' motion to strike is denied.