

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

BAIN'S DELI CORPORATION	: OCTOBER TERM, 2001
Plaintiff	
v.	: No. 0294
C&L FOODS, INC., JAY LEVINS and	: Commerce Program
CLARK GNANN	
Defendants.	:Control No. 061440

O R D E R

AND NOW, this 11th day of September 2002, upon consideration of the Motion for Summary Judgment of C&L Foods, Inc. ("C&L"), the response in opposition of Bain's Deli Corporation ("Bain's"), and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that C&L's Motion for Summary Judgment is **Granted**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. September 11, 2002

C&L Foods, Inc. (“C&L”) seeks summary judgment relative to the Complaint of Bain’s Deli Corporation (“Bain’s”). For the reasons discussed, the Motion for Summary Judgment is granted.

BACKGROUND

This case arises from a dispute over terms in a Franchise Agreement between Bain's, located in Pennsylvania, and C&L, a Florida corporation. In 1994, C&L contracted with Bain's for the operation of a Bain's Deli franchise at the Towne Center Mall in Boca Raton, Florida. C&L operated the franchise in Florida until July 1999.

On October 2, 2001, Bain's commenced this action in Pennsylvania alleging that C&L breached the Franchise Agreement in failing to remit royalty payments and in using substandard products in its Florida delicatessen. On November, 30, 2001, based on the then record, this court denied the preliminary objections of C&L asserting inter alia, lack of personal jurisdiction. On June 17, 2002, C&L filed this Motion for Summary Judgment.

DISCUSSION

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Basile v. H & R Block, Inc., 777 A.2d 95 (Pa. Super Ct. 2001). Under Pa.R.C.P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entry of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action. Id. The non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the non-moving party, "summary judgment is improper if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory [he] has pled." Id. However, "[s]ummary judgment is proper when the pleadings, depositions, answers to interrogatories,

admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Horne v. Haladay, 728 A.2d 954 (Pa.Super.Ct. 1999) (citing Pa.R.C.P. 1035.2). Summary judgment may only be granted in cases where it is “clear and free from doubt that the moving party is entitled to judgment as a matter of law.” Id. (citations omitted).

I. C&L’s Motion for Summary Judgment is Granted In That This Court Lacks Personal Jurisdiction Over It.

C&L asserts that this court lacks personal jurisdiction over it. Bain’s counters and argues C&L has sufficient minimum contacts with Pennsylvania making jurisdiction proper. This court agrees with the position of C&L.¹

In evaluating an objection to personal jurisdiction, the objecting party initially bears the burden of proof. Barr v. Barr, 749 A.2d 992, 994 (Pa.Super.Ct.2000); Grimes v. Wetzler, 749 A.2d 535, 538 (Pa.Super.Ct.2000); King v. Detroit Tool Co., 682 A.2d 313, 315 (Pa. Super. Ct.1996) (the objecting party must "meet its burden of showing jurisdictional infirmities that are 'clear and free from doubt" '). However, "[o]nce the moving party supports its objections to personal jurisdiction, the burden of proving

¹ Bain’s argues that C&L may not raise an objection based on personal jurisdiction at this stage in the proceedings since “[o]bjections to in personam jurisdiction can only be raised at the preliminary objection stage.” Pl’s Mem. of Law at 1. (emphasis in original). However, Bain’s does not offer nor can this court find case law supporting such a limited reading of the Pennsylvania Rules of Civil Procedure. Admittedly, had C&L not raised its personal jurisdiction objection at the preliminary objection stage, it would have waived its right to raise it now. However, C&L did raise the issue and the court, based on the then record, denied the preliminary objection.

Further, there is no rule or case law which this court could find that would prohibit it from re-visiting this issue. In fact Pa.R.Civ.P.126 provides that the Pennsylvania Rules of Civil Procedure are to be "liberally construed to secure the just, speedy and inexpensive determination of every action...."; that a court may disregard any error or defect of procedure which does not affect the substantial rights of the parties; and that the Rules are to be " 'interpreted with common sense to carry out the purposes for which they were adopted.' " Id. at 863 (quoting Usner v. Duersmith, 31 A.2d 149, 150 (Pa.1943)).

personal jurisdiction is upon the party asserting it." Barr, 749 A.2d at 994. See also Grimes, 749 A.2d at 538 ("[o]nce the movant has supported its jurisdictional objection, ... the burden shifts to the party asserting jurisdiction to prove that there is statutory and constitutional support for the court's exercise of in personam jurisdiction").

In order for a Pennsylvania court to exercise jurisdiction over a non-resident defendant: (1) the Commonwealth's long-arm statute ("Long-Arm Statute") must authorize jurisdiction, and (2) the exercise of jurisdiction must satisfy constitutional principles of due process. Graham v. Machinery Distrib., Inc., 599 A.2d 984, 985-86 (Pa. Super. Ct. 1991). Because the Long-Arm Statute allows for personal jurisdiction "to the fullest extent allowed under the Constitution of the United States," any discussion of personal jurisdiction must focus on constitutional due process constraints. Temtex Products, Inc. v. Kramer, 479 A.2d 500, 505-06 (Pa. Super. Ct. 1984).

Under the United States Constitution, a court "may exercise two types of personal jurisdiction over out-of-state defendants: (1) specific jurisdiction, based upon the specific acts of the defendant which gave rise to the cause of action, and (2) general personal jurisdiction, based upon a defendant's general activity within the state." McCall v. Formu-3 Int'l, Inc., 650 A.2d 903, 904 (Pa. Super. Ct. 1994) (citations omitted).

For a court to exercise specific jurisdiction: (1) the non-resident 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. The determination of whether this standard has been met is not susceptible of any talismanic jurisdictional formula. The facts of each case must always be weighed in determining whether jurisdiction is proper. Kubik v. Letteri, 614 A.2d 1110, 1114 (Pa. 1992) (citing Burger King

Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1985)).

The minimum contacts requirement is not satisfied by contacts "that are 'random,' 'fortuitous' or 'attenuated' " or by "unilateral activity in the forum by others who claim some relationship with the defendant." Id., 614 A.2d at 1114 (citing Burger King, 471 U.S. at 475). Rather, it must be shown that the "defendant's conduct and [its] connection with the forum state are such that [it] should reasonably anticipate being haled into court there." Id., 614 A.2d at 1114 (quoting Burger King, 471 U.S. at 474-75). This requires that a court make "the determination that the defendant purposefully directed [its] activities at residents of the forum and purposefully availed [itself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." Id. In addition, "the cause of action must arise from the defendant's activities within the forum state." Id., 614 A.2d at 1115 (citation omitted).

A court's exercise of specific jurisdiction must also conform to notions of fair play and substantial justice. In reviewing whether an exercise of jurisdiction meets this requirement, a court should consider:

- (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies and (5) the shared interest of the several states in furthering fundamental substantive social policies.

Id., 614 A.2d at 1114 (citing Burger King, 471 U.S. at 477). Even where specific jurisdiction is not proper, "Pennsylvania courts may still be able to exercise general personal jurisdiction if the defendant has carried on a continuous and systematic part of its general business within the Commonwealth." McCall, 650 A.2d at 904. Such jurisdiction is valid "regardless of whether the cause of action is related to the defendant's activities in Pennsylvania, as long as the corporate defendant's activities in this Commonwealth are 'continuous and substantial.'" Garzone v. Kelly, 593 A.2d 1292, 1296 (Pa. Super. Ct.1991) (citation

omitted).

Here, it is clear and free from doubt that C&L is entitled to judgment as a matter of law as the grounds for general jurisdiction have not been met. C&L is a Florida corporation and operated the Bain's Deli franchise in Boca Raton, Florida. Def's Mem. of Law at 8 (citing to Affidavit Clark Gnann at ¶3-¶4). Neither C&L, nor any of its employees, were ever authorized, licensed or registered to conduct any business in Pennsylvania. Id. at 9 (citing Gnann Aff. at ¶¶8,10,11). Further, C&L has not had to pay taxes in Pennsylvania, nor has it maintained a Pennsylvania mailing address. Id. The totality of these circumstances demonstrate that the grounds for general jurisdiction over C&L have not been met.

This court also lacks specific in personam jurisdiction over C&L, in that C&L lacks the sufficient continuous and systematic minimum contacts with Pennsylvania. Here, C&L did not purposefully direct its activities at residents in Pennsylvania. On the contrary, C&L responded to an advertisement placed in Florida for the eventual purchase of a Bain's Deli franchise in Florida. Id. (citing Jolles Depos. 84-91). Further, all the negotiations and the execution of the Franchise Agreement occurred in Florida. Id. at 9-10 (citing Gnann Aff. ¶¶5,6,16). Moreover, the Franchise Agreement does not contain a forum selection clause. It does contain a provision providing for the application of Pennsylvania law, but only if the law of the state where the franchise is located does not override Pennsylvania law. Complaint, Ex. A.

Bain's counters and urges that C&L's phone calls and correspondence to Pennsylvania during the negotiating of the Franchise Agreement and its tender of royalty payments to Bain's in Pennsylvania "clearly vests personal jurisdiction over the defendants in Pennsylvania." Pl's Mem. of Law at 7-8. This court disagrees. This conduct, in and of itself, does not demonstrate that C&L purposefully availed itself of the privilege of acting within Pennsylvania. Mere phone calls in attempts to execute a contract with a

Pennsylvania resident are insufficient to meet the stringent minimum contacts standards espoused by the Supreme Court in Burger King. See also, Fidelity Leasing, Inc. v. Limestone County Board of Education, 758 A.2d 1207, 1121 (Pa.Super 2000) (executing a contract alone is insufficient to give rise to personal jurisdiction); Lynch v. N.J. Auto Full Ins. Underwriting Ass'n, 762 F.Supp. 101, 104 (E.D.Pa. 1991) (“The placing of telephone calls or the sending of letters into the forum by a party to a contract is not sufficient”(citations omitted)). Further, although C&L sent royalty payments to Bain’s in Pennsylvania, there is evidence that these payments were sporadic and not as “continuous and substantial” to meet the standard. In fact, C&L was also required to submit royalty payments at different times to either Colorado, New York or New Jersey addresses. Def’s Mem. of Law at 11 (citing Gnann Aff. ¶17); Lynch, 762 F.Supp. at 104 (“The tendering of a payment by a contracting party to another contracting party in the forum is not sufficient.”).

Bain’s argues that the present case is similar to Crown-Globe Inc. v. Grenoble Mills Inc., 593 A.2d 906 (Pa. Super. Ct. 1991), Kenneth H. Oaks, Ltd. v. Josephson, 568 A.2d 215 (Pa. Super. Ct. 1989), and Eastern Continuous Forms, Inc v. Island Business Forms, Inc., 513 A.2d 466 (Pa. Super. Ct. 1986) where our Superior Court held that the trial court in each case had specific personal jurisdiction over a foreign defendant. Pl’s Mem. of Law at 6. However, although these cases all involved foreign defendants contracting with Pennsylvania residents, all these cases are distinguishable from the present matter in that performance of the respective contracts occurred almost entirely in Pennsylvania. Crown-Globe, 593 A.2d at 907 (holding that court had jurisdiction where, inter alia, contract required that it be “delivered” and “performed” in Pennsylvania); Kenneth H. Oaks, 568 A.2d at 217 (finding that, inter alia, where pursuant to contract all printing work was performed in Pennsylvania, court had jurisdiction over foreign defendant);

Eastern Continuous, 513 A.2d at 468 (where, inter alia, contract was performed by representative of foreign defendant in Pennsylvania, and proofs of work were delivered to Pennsylvania office of foreign defendant's representative, court had jurisdiction over foreign defendant). Here, although ¶20.8 of the Franchise Agreement reads that it "has been made and accepted in . . . Pennsylvania," there is no requirement that the Franchise Agreement be performed in Pennsylvania, nor is there evidence that the contract was actually performed in Pennsylvania. Def's Mem. of Law, Ex. A.

Finally, for this court to exercise personal jurisdiction over C&L would also violate the traditional notions of fair play and substantial justice. C&L would be burdened if it is being forced to defend itself in Pennsylvania. Specifically, the court cannot ignore the fact that C&L's Bain's Deli franchise was located exclusively in Boca Raton, Florida. Further, the alleged breach of contract in allegedly using substandard products would have occurred in Florida.

CONCLUSION

For the reasons discussed, this court concludes that it lacks personal jurisdiction over C&L. Therefore, C&L's Motion for Summary Judgment is granted.

The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.