

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

DE LAGE LANDEN FINANCIAL)
SERVICES, INC.)
Plaintiff)
)
v.)
)
DONNER MEDICAL MARKETING, INC.)
BRUCE DONNER and ALLIED HEALTH)
CARE SERVICES, INC.)
Defendants)
)


Civil Action No. 10-4108

**DEFENDANTS DONNER MEDICAL MARKETING, INC. AND BRUCE DONNER'S
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

Defendants Donner Medical Marketing, Inc. and Bruce Donner, by its undersigned counsel, hereby move to dismiss the Complaint for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2). In further support of this motion, defendants incorporate by reference their Memorandum of Law.

MARKS & SOKOLOV, LLC

By:



 BRUCE S. MARKS, ESQ.
 THOMAS C. SULLIVAN, ESQ.

Of Counsel
BIEBELBERG & MARTIN

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MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION**

PRELIMINARY STATEMENT

Defendants Donner Medical Marketing, Inc. and Bruce Donner have moved to dismiss for lack of personal jurisdiction because Plaintiff fails to allege that either defendant has the requisite “minimum contacts” with Pennsylvania to bring them within this Court’s jurisdiction.

STATEMENT OF ALLEGED FACTS¹

According to the Complaint, plaintiff DeLage Landen Financial Services, Inc. (“Plaintiff”) is a Michigan corporation with an office in Pennsylvania. (Complaint, ¶1). According to the Complaint, defendant Donner Medical Marketing, Inc. (“Donner”) is a New Jersey corporation with its principal place of business in New Jersey (Complaint, ¶¶ 2 , 3); and defendant Bruce Donner (“Donner”) is a resident of New Jersey.

The operative agreements between the Plaintiff and a co-defendant known as Allied Healthcare Services, Inc. were rental and leasing agreements for respiratory equipment.

¹ Defendants accept the well pled jurisdictional facts of the Complaint, but not mere conclusory allegations, as true. Intercon, Inc. v. Bell Atl. Internet Solutions, Inc., 205 F.3d 1244, 1247 (10th Cir. 2000)

(Complaint, ¶11). Nonetheless, it is not alleged in the Complaint that the moving Defendants were signatories to such rental and leasing agreements.

The Complaint goes on to set forth a “Factual Background”, stating that there was a business relationship between Donner Medical and Allied Health, and that it was structured by Donner Medical selling the equipment to Plaintiff and delivering it to Allied. (Complaint, ¶¶ 9 to 14). The Complaint goes on to refer to certain Master Lease Schedules. The said documentation purports to be attached to the Complaint, but is largely illegible. Nonetheless, it appears that the only signatories to such agreements were the Plaintiff and co-defendant Allied Health.

According to the Complaint, Donner Medical submitted certain invoices to the Plaintiff, and received payment. There is no allegation that Donner Medical did anything more than, presumably, send the invoices in the mail to the Plaintiff, albeit it is not clear whether the invoices were allegedly sent to Michigan or Pennsylvania. There is no allegation that Donner Medical did anything else to constitute doing business in Pennsylvania.

The Complaint, ¶43, alleges that, “upon information and belief”, Donner was “personally involved” in preparing a certain invoice and “presenting it” to the Plaintiff. This allegation is repeated thereafter as to other invoices, likewise “upon information and belief”.

The ensuing pages of the Complaint set forth the counts and legal theories against the various defendants based on the factual allegations as aforesaid.

ARGUMENT

THE MOTION BY DEFENDANTS DONNER MEDICAL AND DONNER TO DISMISS THE COMPLAINT FOR LACK OF PERSONAL JURISDICTION PURSUANT TO FED.R.CIV.P. 12(b)(2) SHOULD BE GRANTED

For a Court to exercise personal jurisdiction, the defendants must have requisite

“minimum contacts” with the forum state, such that subjecting the defendants to jurisdiction comports with “traditional notions of fair play and substantial justice”. Marten v. Godwin, 499 F.3d 290, 296 (3d Cir. 2007). Once a jurisdictional defense is raised, “the plaintiff bears the burden of demonstrating contacts with the forum state sufficient to give the Court *in personam* jurisdiction”. Time Share Vacation Club v. Atl. Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984). The reach of Pennsylvania’s long-arm statute is co-extensive with the Due Process Clause of the Fourteenth Amendment to United States Constitution, which is applicable in cases based on diversity jurisdiction, as here. Id.; 42 Pa. C.S.A. 5322 (b).

Two types of jurisdiction comport with the Due Process Clause, applicable in the case of diversity jurisdiction: general and specific. General jurisdiction exists when a defendant has maintained systematic and continuous contacts with the forum state. Marten, 499 F.3d. at 296. Specific jurisdiction exists when the claim arises from or relates to conduct purposely directed at the forum state. Id.; see also IMO Indus., Inc. v. Kietert AG, 155 F.3d 254, 259 (3d Cir. 1998).

For purposes of a motion to dismiss for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2), the well pled jurisdictional allegations are accepted as true, however “only the well pled facts of plaintiff’s complaint, as distinguished from mere conclusory allegations, must be accepted as true.” Intercon, Inc. v. Bell Atl. Internet Solutions, Inc., 205 F.3d 1244, 1247 (10th Cir. 2000) “[A]t no point may a plaintiff rely on the bare pleadings alone to withstand a defendant’s Rule 12(b)(2) motion to dismiss for lack of *in personam* jurisdiction.” Time Share Vacation Club v. Atl. Resorts, Ltd., 733 F.2d 61, 64-66 n.9 (3rd Cir. 1984).²

I. Plaintiff Fails to Allege General Jurisdiction

² Defendants disregard the conclusory allegations at paragraphs 7 and 8 because they are legal conclusions stating simply that “venue is proper” and “the defendants are subject to personal jurisdiction in this district”; or because they are ambiguous, simply saying that there were “multiple agreements providing for jurisdiction in Pennsylvania”, without reference to such terminology as it would pertain to the moving Defendants.

The Complaint does not make any allegations against Donner Medical and Donner as to general jurisdiction. The allegations do not assert that such defendants have had continuous and systematic contacts with Pennsylvania.

II. **Plaintiff Fails To Allege Specific Jurisdiction**

Analysis of specific jurisdiction involves a three-part inquiry. First, the defendant must have “purposefully directed his activities at the forum”. Marten, 499 F.3d. at 296. Second, the plaintiff’s claim must “arise out of or relate to at least one of those specific activities”. Id. Third, courts may consider additional factors to ensure that the assertion of jurisdiction otherwise “comport[s] with fair play and substantial justice”. Id. Plaintiffs’ allegations fail to satisfy one these requirements.

A. **There is No Specific Jurisdiction Based on A Forum Selection Clause**

There is an allegation that the master lease documents, which are illegible insofar as the copies attached to the Complaint, set forth that jurisdiction shall be in Pennsylvania. However, it is not alleged that moving Defendants were signatories to the master lease documents. If the illegible copies of the master lease documents provide that jurisdiction shall be in Pennsylvania, then such a clause might be binding upon the parties who signed such contractual documents, i.e., Plaintiff and the co-defendant Allied Health, but not moving Defendants.

B. **There is No Specific Jurisdiction Based on Contract**

Although the Complaint alleges a contract between Plaintiff and Donner Medical (but not Donner), merely contracting with a forum resident is insufficient to establish specific personal jurisdiction. Mellon Bank (East) v. DiVeronica Bros., Inc., 983 F.2d 551, 557 (3d Cir. 1993) (“Contracting with a resident of the forum state does not alone justify the exercise of personal jurisdiction over a non-resident defendant.”)

C. There Is No Specific Jurisdiction Based on Tort: Calder v. Jones

Defendants recognize that a plaintiff may satisfy the specific jurisdiction threshold if the effects test set forth in Calder v. Jones, 465 U.S. 783 (1984) is met. IMO, 155 F.3d at 256. Specifically, plaintiff must show: (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum state, such that the forum can be said to be the focal point of the harm suffered by plaintiff as a result of that tort; and (3) the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity. Id. at 265-66. All three prongs are required for a showing of jurisdiction. Id. at 256.

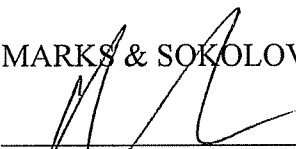
First, Defendants concede that Plaintiff alleges an intentional tort, i.e. fraud, satisfying the first prong.

Second, Plaintiff has not alleged that it suffered the brunt of the harm in Pennsylvania. To the contrary, given that Plaintiff is a Michigan corporation, harm is presumed to occur there. businesses endure harm where they are based. Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, fn. 2 (9th Cir. 1998) (“the brunt of the harm suffered by Panavision was in the state where it maintained its principal place of business.”) Alternatively, to the extent that Plaintiff alleges that the medical devices were not delivered by Donner Medical to Allied Health in New Jersey, the harm to plaintiff occurred there, not in Pennsylvania. See Martin v. Clemson Univ., 2007 U.S. Dist. LEXIS 93703, (E.D. Pa. 2007) (Baylson, J.) (“harm” occurred in South Carolina with no expressly aimed tortious activity at Pennsylvania). See also General Electric Capital Corp. v. Grossman, 991 F.2d 1376, 1387-88 (8th Cir. 1993) (concluding that Calder is of little help to a plaintiff where the "focal point of the alleged wrongdoing" occurred outside of the forum); Noonan v. Winston Co., 135 F.3d 85, 90-91 (1st Cir. 1988) (holding that Calder was not satisfied because defendants did not target forum).

Third, Plaintiff has not demonstrated, even by way of allegation, that Pennsylvania is the focal point of the harm that it suffered. Again, according to the Complaint, the Plaintiff is a corporation of Michigan. The Complaint does not allege that the Defendants expressly aimed their alleged tortious conduct - - which is pled only upon information and belief as to defendant Donner - - at Pennsylvania such that the forum can be said to be the focal point of the tortious activity. There is no allegation Defendant intended to harm Plaintiff in Pennsylvania, Remick v. Manfredy, 238 F.3d 248, 259 (3rd Cir. 2001) (“[I]t cannot be said that the defendants here expressly aimed their conduct at Pennsylvania so that Pennsylvania was the focal point of the tortious activity”); Plaintiff “has not asserted that Pennsylvania has a unique relationship” with lending or medical device industry, Id.; and there is no allegation of a “unique relations among the defendant, the forum, the intentional tort”. IMO, 155 F.3d at 264 n.7.

CONCLUSION

For the foregoing reasons, the motion to dismiss of defendants Donner Medical and Donner should be granted.

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Defendants.

No. 10-4108-MMB

Certificate of Service

I, Bruce S. Marks, Esquire, do hereby certify that the foregoing Defendants Donner Medical Marketing, Inc. and Bruce Donner's Motion to Dismiss for Lack of Personal Jurisdiction was filed electronically via the ECF system on the date set forth below and, therefore, made available to all counsel for record, as follows:

C. Lawrence Holmes, Esq.
Matthew Faranda-Diedrich, Esq.
Dilworth Paxon LLP
1500 Market Street
Suite 3500EE
Philadelphia, PA 19103
Counsel for Plaintiff De Lage Landen Financial Services, Inc.

Allied Health Care Services, Inc.
89 Main Street
Orange, NJ 07050

Dated: October 7, 2010

/s/ Bruce S. Marks
Bruce S. Marks, Esq.