

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SHEER BEAUTY, INC.,)
)
 Plaintiff,)
) C.A. No. 05C-02-174 MMJ
 v.)
)
 MEDIDERM PHARMACEUTICALS)
& LABORATORIES,)
)
 Defendant.)

MEMORANDUM OPINION

*Upon Defendant's Motion to Dismiss for Lack of Personal Jurisdiction
Pursuant to Superior Court Civil Rule 12(b)(6)*

GRANTED

Submitted: July 21, 2005
Decided: October 27, 2005

Kevin A. Guerke, Esquire, Seitz, Van Ogtrop & Green, P.A., Wilmington,
Delaware, Attorneys for Plaintiff

Douglas A. Shachtman, Esquire, Douglas A. Shachtman & Associates,
Wilmington, Delaware, Attorney for Defendant

JOHNSTON, J.

Defendant Medidem Pharmaceuticals & Laboratories has moved pursuant to Superior Court Civil Rule 12(b) to dismiss this action for lack of personal jurisdiction. In order to find a basis for personal jurisdiction over a non-resident, the Court must determine: (A) whether Defendant's actions fall under either the general or specific jurisdictional criteria of a statute; and (b) whether exercising personal jurisdiction over Defendant is constitutionally permissible.¹

STATUTORY PERSONAL JURISDICTION

Delaware's long-arm service of process statute, 10 *Del. C.* § 3104(c), provides:

(c) As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:

- (1) Transacts any business or performs any character of work or service in the State;
- (2) Contracts to supply services or things in this State;
- (3) Causes tortious injury in the State by an act or omission in this State;
- (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent

¹*McKamey v. Vander Houten*, 744 A.2d 529, 531 (Del. Super. 1999).

course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;

(5) Has an interest in, uses or possesses real property in the State; or

(6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

Plaintiff has the burden of demonstrating a factual basis for asserting jurisdiction over Defendant not only under Delaware's long-arm statute, but also consistent with due process.²

Defendant claims that none of the acts enumerated in 10 *Del. C.* § 3014(c) apply in this case. Defendant asserts that the complaint does not allege: that personal injury resulted; that Defendant has an interest in Delaware real estate; that Defendant acted as a surety; that Defendant transacted business or performed services in Delaware; or that Defendant contracted to supply services or things in this State.

The complaint alleges that Defendant's product was defective. Specifically, the product was a skin-whitening cream manufactured by Defendant. Plaintiff produces and distributes cosmetics around the world. After Plaintiff distributed

²*State ex rel. Brady v. Preferred Florist Network, Inc.*, 791 A.2d 8, 13 (Del. Ch. 2001).

Defendant's product to distributors and customers, Plaintiff received complaints that the cream was not effective. Analysis of the cream showed that the cream did not contain a sufficient percentage of the active ingredient, contrary to the certificate of analysis provided by Defendant. Plaintiff seeks damages on the grounds of breach of contract, fraudulent misrepresentation, negligent misrepresentation, consumer fraud, and breach of Uniform Commercial Code express and implied warranties.

Defendant's principal place of business is in California, which is where Plaintiff's agent contacted Defendant. Defendant claims that the product was shipped "F.O.B.³ Murietta California or Ontario California." If the product was indeed shipped F.O.B., title to the goods passed in California, not Delaware. Thus, the title and risk of loss would have passed to the buyer when the seller put the goods in the possession of the commercial carrier.⁴

Additionally, Defendant states that before this transaction, Defendant never shipped product to Delaware either directly or indirectly, and did not regularly

³See 6 *Del. C.* § 2-319 ("Free on Board").

⁴*Donnelly v. Kirkwood Fitness & Racquetball Clubs, Inc.*, 1986 WL 9926, at *2 (Del. Super. 1986).

engage in or solicit business, or engage in any other persistent course of conduct in Delaware or derive substantial revenue from services in Delaware.⁵

Plaintiff disputes that the product was shipped F.O.B. Instead, Plaintiff saw Defendant's advertisement on the internet, from Plaintiff's Delaware office, and purchased the product. Defendant shipped the product directly from its laboratories in California to Plaintiff in Delaware.

Attached to Defendant's Motion to Dismiss is an affidavit of Defendant's President. The Affidavit states: "The parties agreed, and the invoice confirmed, that the cream being sold was [sic] and the product was shipped FOB Murietta California or Ontario California; Plaintiff was responsible for the product thereafter and directing where it would be delivered or forwarded." Although the invoice lists "F.O.B.," the box underneath the F.O.B. label is left blank, as are the boxes underneath the labels "P.O. Number," "Via," and "Project." In contrast, the other boxes are labeled and have entries as follows: "Terms - 50% now," "Rep - WB," and "Ship - 4/26/2004."

Therefore, it appears to the Court that the shipping terms are in dispute. Viewing the facts in the light most favorable to the non-moving party for purposes

⁵See *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1155 (Del. Super. 1997).

of resolving this motion, the Court cannot find that the product was shipped F.O.B.

Defendant contracted to supply product in Delaware. Plaintiff's claim arose from the performance of business or the discharge of the contract. Under such circumstances, the Delaware Supreme Court has held that "no further inquiry is required concerning any other indicia of the defendant's activity in this State."⁶ Construing the facts in the manner most favorable to Plaintiff, Plaintiff has made a *prima facie* showing that Defendant contracted to supply product in Delaware. Therefore, this Court has specific personal jurisdiction over Defendant pursuant to 10 *Del. C.* § 3194(c)(2).⁷

DUE PROCESS

Having concluded that Delaware's Long-Arm Statute confers specific personal jurisdiction over Defendant, the next question is whether assertion of jurisdiction is consistent with constitutional due process. The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which the defendant has no meaningful contacts, ties or relationships. Individuals must have fair warning that a particular activity may

⁶*Kane v. Coffman*, 2001 WL 914016, at *3 (quoting *LaNuova D &B, S.p.A. v. Bowe Co. Inc.*, 513 A.2d 764, 768 (Del. 1986)).

⁷*Enterprise Publishing, Inc. V. Janov*, 1990 WL 96569, at *5 (Del. Super.).

subject them to the jurisdiction of a foreign sovereign. Constitutional due process provides a degree of predictability to the legal system that allows potential defendants to conduct themselves with some minimum assurance as to what actions will and will not render them liable to suit.⁸

Determining whether the exercise of personal jurisdiction is compatible with due process involves a two-part inquiry. First, does the defendant have the requisite minimum contacts with Delaware? Second, would assertion of personal jurisdiction over the defendant be fair and reasonable?⁹ Using a “stream of commerce” analysis, it is not sufficient that a defendant manufacturer placed a product in the stream of commerce, knowing that the product would enter the forum state. There must be some additional act by the manufacturer, “purposefully directed to the forum State,” indicating an “intent or purpose to serve the market in the forum State,” as evidenced by some “additional conduct” by the manufacturer. Such additional conduct may include designing the product for the forum state market, advertising in the forum state, regularly advising

⁸*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985); *Shaffer v. Heitner*, 443 U.S. 186, 204 (1977); *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1158 (1998), *aff'd*, 707 A.2d 765 (Del. 1998); *cert. denied*, 524 U.S. 939 (1998).

⁹*Asahi Metal Industry Co., Ltd. v. Super. Ct. of Cal., Solano County*, 480 U.S. 102, 103-104 (1987).

customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state.¹⁰

In this case, although Plaintiff distributed Defendant's product, the distribution was not as a result of any distribution agreement with Defendant. Plaintiff cannot be construed as Defendant's agent. Communications between Plaintiff and Defendant were all by fax and telephone, with Defendant remaining in California. A defendant's internet posting made from out-of-state, and received by a plaintiff in Delaware, has been held not to constitute sufficient minimum contacts to allow this Court to exercise personal jurisdiction.¹¹

This case is primarily a breach of contract action. The tort claims are for financial injuries allegedly resulting from Defendant's breach of contract. No bodily injury to any Delaware resident has been alleged. When Delaware residents have been injured, such as in asbestos cases, "Delaware has a strong interest in protecting the health and welfare of its citizens. Exercising jurisdiction over the manufacturer of dangerous products will provide an effective and

¹⁰*Id.*; *Boone*, 724 A.2d at 1159.

¹¹*Bank of America Nat'l Trust and Sav. Ass'n. V. BAC Prop. Credit Inc.*, 389 A.2d 1304, 1310 (Del. Ch. 1978).

efficient forum for its citizens while deterring the introduction of other dangerous products to this State.”¹²

Plaintiffs have failed to demonstrate facts sufficient to confer personal jurisdiction upon this Court over Defendant in a manner consistent with constitutional due process. In a case grounded in breach of contract, without bodily injury claims, mere shipment of goods into Delaware, without additional contact with Delaware, is not adequate evidence of the requisite minimum contacts with Delaware. Thus, assertion of personal jurisdiction over Defendant would not be fair or reasonable.

CONCLUSION

Construing the facts in the manner most favorable to Plaintiff, Plaintiff has made a *prima facie* showing that Defendant contracted to supply product in Delaware and that the means of shipping did not pass title to Plaintiff in California. However, this case is based on breach of contract claims, without allegations of bodily injuries to any Delaware resident. The mere shipment of goods into Delaware, without additional contact with Delaware, is not adequate evidence of the minimum contacts required by the Due Process Clause. Thus, assertion of personal jurisdiction over Defendant would not be fair or reasonable.

¹²*Boone*, 724 A.2d at 1161.

THEREFORE, the Court, having found statutory specific personal jurisdiction, but having found insufficient minimum contacts for constitutional due process to be accorded to Defendant, holds that **Defendant's Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Superior Court Civil Rule 12(b)(2)** is hereby **GRANTED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

cc: Prothonotary - Civil Division