

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ARTHUR W. BREWER,	:	
	:	C.A. No. K12C-04-008 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
PEAK PERFORMANCE	:	
NUTRIENTS INCORPORATED,	:	
	:	
Defendant.	:	

Submitted: May 15, 2012
Decided: August 16, 2012

ORDER

Upon Defendant's Motion to Dismiss.
Denied without prejudice.

Gary F. Traynor, Esquire of Prickett Jones & Elliott, P.A., Wilmington, Delaware;
attorney for Plaintiff.

Douglas T. Walsh, Esquire of Marshall dennehey Warner Coleman & Goggin,
Wilmington, Delaware; attorney for Defendant.

WITHAM, R.J.

Arthur Brewer v. Peak Performance Nutrients, Inc.

C.A. No. K12C-04-008 WLW

August 16, 2012

ISSUE

_____ Having received the parties' submissions on Defendant's motion to dismiss for lack of personal jurisdiction; this is the Court's decision.

FACTS

Arthur W. Brewer (hereinafter "Plaintiff") owns, trains, and races standardbred horses. In June of 2011, Plaintiff purchased products manufactured by Peak Performance Nutrients Incorporated. (hereinafter "Defendant"), a Florida corporation. Plaintiff administered those products to his horses in advance of races at Harrington Raceway & Casino on June 22, 2011 and June 28, 2011. Two of Plaintiff's horses that were administered the products won their respective races. Race officials conducted routine, post-race blood tests on these horses. The Delaware Harness Racing Commission subsequently informed Plaintiff that both horses tested positive for caffeine – a prohibited substance. On August 31, 2011, the Delaware Harness Racing Commission stripped Plaintiff of his winnings, fined him, and suspended him from horse training for two consecutive five-month periods. On or about September 27, 2011, Plaintiff spoke on the telephone with Defendant's President, Jeff Bielec. Bielec related to Plaintiff that several of Defendant's products sold between April and September 2011 had been contaminated with caffeine. On September 28, 2011 Defendant issued a letter warning horse trainers of caffeine tainting in some of its products. Mr. Bielec sent a letter to Scott Eggers, Presiding Judge at Harrington Raceway, explaining Defendant's product replacement program due to the presence of caffeine in some products and relating that Plaintiff claimed to have used Defendant's products during the period that

Arthur Brewer v. Peak Performance Nutrients, Inc.

C.A. No. K12C-04-008 WLW

August 16, 2012

the products were contaminated.¹ Testing of Defendant's products purchased by Plaintiff confirmed caffeine tainting. With new evidence coming to light, the Delaware Harness Racing Commission reinstated Plaintiff after he had served one month of his suspension and revoked his fine. The Delaware Harness Racing Commission still required Plaintiff to pay costs and to forfeit race winnings.

As a result of the events described above, Plaintiff brought an action for breach of implied warranty of fitness for a particular purpose and breach of implied warranty of merchantability. Defendant responded with a motion to dismiss for lack of personal jurisdiction.

Standard of Review

When personal jurisdiction is challenged under Superior Court Civil Rule 12(b)(2), the Plaintiff bears the burden of demonstrating a basis for the Court's exercise of jurisdiction over a nonresident defendant.² "This burden is met by a threshold prima facie showing that jurisdiction is conferred by the statute."³ The Court may consider necessary documents outside of the pleadings.⁴ All well-pleaded facts or allegations in the complaint are assumed to be true.⁵ Plaintiff must have "every reasonable factual

¹Pl. Resp. to Mot. to Dismiss Ex. G.

²*Crane v. Home Depot, Inc.*, 2008 WL2231472, at *1 (Del. Super. May 30, 2008).

³*Id.*

⁴*Whitwell v. Archmere Academy, Inc.*, 2008 WL 1735370, at *3 (Del. Super. Apr. 16, 2008) (citing *Sloan v. Segal*, 2008 WL 81513, at *6 (Del. Ch. Jan. 3, 2008)).

⁵*Crane*, 2008 WL 2231472, at *1 (citing *Plummer & Co. Realtors v. Crisafi*, 533 A.2d 1242, 1244 (Del. Super. 1987)).

Arthur Brewer v. Peak Performance Nutrients, Inc.

C.A. No. K12C-04-008 WLW

August 16, 2012

inference drawn in his favor.”⁶ “In making the determination, all factual disputes are drawn in the light most favorable to the plaintiff.”⁷

To establish personal jurisdiction over a nonresident defendant, a plaintiff must satisfy both the statutory and constitutional requirements of jurisdiction.⁸ The statutory requirements of personal jurisdiction are set forth in Delaware’s long-arm statute, 10 *Del. C.* § 3104. “Section 3104 is to be construed liberally, thus favoring the exercise of jurisdiction.”⁹ Section 3104(c) provides that a court may exercise personal jurisdiction over a nonresident 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 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

⁶*Id.* (citing *Harmon v. Eudaily*, 407 A.2d 232 (Del. Super. 1979)).

⁷*Whitwell*, 2008 WL 1735370, at *3 (citing *Sloan*, 2008 WL 81513, at *6).

⁸*Shoemaker v. McConnell*, 556 F. Supp. 2d 351, 353 (D. Del. 2008).

⁹*Tell v. Roman Catholic Bishops of Diocese of Allentown*, 2010 WL 1691199, at *8 (Del. Super. Apr. 26, 2010) (citing *Daily Underwriters of America v. Maryland Auto. Ins. Fund*, 2008 WL 3485807, at *3 (Del. Super. July 31, 2008)).

Arthur Brewer v. Peak Performance Nutrients, Inc.

C.A. No. K12C-04-008 WLW

August 16, 2012

parties otherwise provide in writing.¹⁰

The constitutional requirements mandate that the Court “determine whether the exercise of personal jurisdiction violates the Due Process Clause of the Fourteenth Amendment.”¹¹ “Under due process analysis, the Court must consider whether the nonresident party had sufficient ‘minimum contacts’ with the forum state so that jurisdiction over the party ‘does not offend traditional notions of fair play and substantial justice.’”¹² To establish minimum contacts a defendant must “deliberately . . . engage[] in significant activities within a State” or “create[] continuing obligations between [itself] and residents of the forum.”¹³ “The nonresident’s conduct and connection to the forum state must be such that the party ‘should reasonably anticipate being haled into court there.’”¹⁴

DISCUSSION

Plaintiff filed two invoices with the Court from Defendant for products purchased by Plaintiff and delivered to him via UPS, one for C.O.D., or cash on delivery,¹⁵ and the

¹⁰*Del. C.* § 3104(c).

¹¹*Tell*, 2010 WL 1691199, at *9.

¹²*Id.* (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158 (1945)).

¹³*AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 442 (Del. 2005) (quoting *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 475-76, 105 S.Ct. 2174 (1985)).

¹⁴*Tell*, 2010 WL 1691199, at *9 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 294, 297, 100 S.Ct. 559, 567 (1980)).

¹⁵Pl. Resp. to Mot. to Dismiss Ex. C.

Arthur Brewer v. Peak Performance Nutrients, Inc.

C.A. No. K12C-04-008 WLW

August 16, 2012

other due on receipt.¹⁶ Plaintiff also presents a receipt from Mast's Harness Shop in Clayton, DE listing 5 "Nitro Power Paks"¹⁷— a product listed on Defendant's invoice of June 28, 2011 as "Power Pak Nitro."¹⁸ There are no facts to indicate that Mast's Harness Shop has a contract to distribute Defendant's products. Six *Del. C.* § 2-401(b)(2) states,

"Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading . . . (b) if the contract requires delivery at destination, title passes on tender there."

The invoices indicated that the goods had to be shipped to Plaintiff's address via UPS. Viewing facts and inferences in a light most favorable to Plaintiff, title to the goods passed in Delaware. Plaintiff, therefore, satisfies 10 *Del. C.* § 3104(c)(2) in that Defendant contracted to supply goods in Delaware.¹⁹

For the purposes of this motion, Defendant concedes that if Plaintiff's allegations are accepted as true, he would satisfy jurisdiction under § 3104. Defendant, however, specifically attacks the minimum contacts prong of the personal jurisdiction analysis. In *Sheer Beauty, Inc. v. Mediderm Pharm. & Labs.*, this Court noted, "In a case grounded

¹⁶Pl. Resp. to Mot. to Dismiss Ex. D.

¹⁷Pl. Resp. to Mot. to Dismiss Ex. E.

¹⁸See Pl. Resp. to Mot. to Dismiss Ex. D.

¹⁹See *Sheer Beauty, Inc. v. Mediderm Pharm. & Labs.*, 2005 WL 3073670, at *2 (Del. Super. Oct. 27, 2005).

Arthur Brewer v. Peak Performance Nutrients, Inc.

C.A. No. K12C-04-008 WLW

August 16, 2012

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.”²⁰

Based on the above contacts, it is unclear whether Defendant has the requisite minimum contacts for the Court to exercise jurisdiction. Therefore, the Court will allow limited discovery for the purpose of determining the propriety of personal jurisdiction over Defendant.

CONCLUSION

Defendant’s motion to dismiss is denied without prejudice. The parties will engage in limited discovery for the purpose of determining personal jurisdiction over Defendant. The Prothonotary will issue a limited discovery scheduling order. At the close of this scheduling order, Defendant may re-file this motion if it sees fit.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

²⁰*Id.* at *3.