



THE FAMILY COURT OF THE STATE OF DELAWARE

G----- K-----,)	FILE NO.: CN17-03287
Petitioner,)	CPI NO.: 17-16093
)	(Petition for Divorce)
vs.)	
)	
G----- M. D-----,)	
Respondent.)	

ORDER ON MOTION TO DISMISS

Before the Court is a second Motion to Dismiss, filed by G----- M. D----- (hereinafter “Husband”), requesting that the Court dismiss the Petition for Divorce filed by G----- K----- (hereinafter “Wife”) on May 30, 2017. Husband is represented by Gretchen Knight, Esquire and Jill Speveck, Esquire and Wife is represented by Marie Crossley, Esquire and Patrick Boyer, Esquire.

PROCEDURAL HISTORY

This is the second Motion to Dismiss that Husband has filed in this proceeding. Husband filed his first Motion to Dismiss on June 20, 2017 in which he argued that the Family Court of the State of Delaware lacked jurisdiction to consider the pending Petition for Divorce as Wife was not a resident of Delaware for the six months preceding the filing of her Petition for Divorce. Husband further argued that service upon him was insufficient because it was not made in accordance with the requirements of The Hague Service Convention, which was required because Husband was a resident of Greece at the time of the filing of the petition. On August 8, 2017, a Family Court Commissioner denied Husband’s Motion to Dismiss and found that service of Husband was proper. Husband immediately appealed this decision to a Family Court Judge by filing a Motion for Review of the Commissioner’s Order (hereinafter “ROCO”). This Court

denied Husband's ROCO, having found that Wife's affidavit established she had been a resident of Delaware for the requisite period of time and Husband had been duly served under 13 *Del. C.* §1508(d). On November 3, 2017 a final decree of divorce was issued. Husband promptly applied for certification of an interlocutory appeal of this Court's November 1, 2017 Order which was certified by this Court and accepted by the Supreme Court of the State of Delaware.

On September 6, 2018, the Supreme Court of the State of Delaware issued a decision vacating in part and remanding in part this Court's November 1, 2017 Order, the final decree of divorce, and the Commissioner's August 8, 2017 Order denying Husband's Motion to Dismiss.¹ With regard to Husband's contention that the Family Court lacked subject matter jurisdiction, the Supreme Court found that there was a material issue of fact as to whether Wife was a citizen of Delaware or of Greece in the six months preceding her filing for divorce. As such, the Delaware Supreme Court found there was no basis for this Court to conclusively render a decision on that issue without first conducting an evidentiary hearing to weigh both parties' arguments. Accordingly, the Delaware Supreme Court, vacated this Court's finding that the Family Court had subject matter jurisdiction and further directed this Court to revisit this issue through a full evidentiary hearing, contingent on Husband being properly served with a copy of the petition.

The Delaware Supreme Court also agreed with Husband's second argument that the Family Court lacked personal jurisdiction over Husband due to insufficient service of process. After a thorough discussion of the proper process for serving a resident of Greece in a way which would comply with The Convention on Service Abroad for Judicial and Extrajudicial Documents in Civil and Commercial Matters (hereinafter "The Hague Service Convention" or "The Convention"), the Delaware Supreme Court found that Wife had not properly served Husband with the Petition for Divorce in Greece because she had not complied with these requirements. The Delaware Supreme Court suggested that, in order to properly serve Husband under Greek law and The Hague Service Convention, she would need to go through the Central Authority of Husband's region in Greece, which was the proper procedure required by The Convention. The Delaware Supreme Court thus reversed this Court's finding that service or process was proper and remanded all matters back to this Court.

¹ See *Daskin v. Knowles*, Del. Supr. No. 513, 2017, Vaughn, J. (September 6, 2018).

HUSBAND'S SECOND MOTION TO DISMISS

On February 21, 2019, Husband filed the instant Motion to Dismiss in which he argued three main issues. First, Husband argued this Court lacks subject matter jurisdiction to consider Wife's Petition for Divorce because she was not a resident of the State of Delaware for the six months prior to the filing of her petition.

Second, Husband argues that Wife failed to acquire jurisdiction over him because she still had not properly served Husband. Husband contends that Wife has not demonstrated that she has properly served Husband through the Central Authority, as stated by the Delaware Supreme Court and required by Greek law and The Hague Service Convention. Husband also argued that Greece is a party to The Hague Apostille Convention and, because Wife did not use an Apostille to serve Husband, service of process was insufficient.

Husband's third, and final argument, is that the Court lacks *in personam* jurisdiction over him because Wife has not established that Husband has sufficient minimum contacts with the state of Delaware for this Court to exercise jurisdiction for the purposes of dividing the marital property of the parties, as most of the parties' assets are located in Greece.

WIFE'S RESPONSE TO HUSBAND'S MOTION TO DISMISS

On March 4, 2019, Wife filed a Response opposing Husband's Motion to Dismiss. With regard to the issue of subject matter jurisdiction, Wife contends that the Court must hold an in person evidentiary hearing for the purposes of resolving that issue, as directed by the Delaware Supreme Court in its' decision.

As to Husband's arguments about insufficiency of service, Wife contends that Husband was properly served in Greece through the Central Authority on January 2, 2019, in accordance with the requirements of The Hague Service Convention. In support of this, Wife submitted a Certificate of Service which confirms that Husband has been served with the Petition for Divorce in accordance with The Hague Service Convention. As to Husband's argument that Wife's service is insufficient because she did not use an Apostille, Wife argues that The Hague Apostille Convention is a separate treaty which governs the transmission of public records between foreign jurisdictions. Wife states that the operative convention here is the distinct and separate Hague Service Convention, which governs service for civil lawsuits, such as the one at issue here.

Finally, with regard to Husband's argument on the lack of *in personam* jurisdiction, Wife cites Del. Fam. Ct. Civ. R. 12(g)-(h) and argues that Husband cannot now raise the defense of lack of minimum contacts because this argument, which is personal jurisdiction defense, was not raised in Husband's first responsive pleading and is, therefore, waived. Wife then goes on to argue that, even if Husband had raised this argument in his first Motion to Dismiss, the Court would still have *in personam* jurisdiction over Husband as he has sufficient "minimum" contacts with the State of Delaware by virtue of entering into marriage in this state and own real estate held by the parties' LLC which was incorporated in Delaware.

DISCUSSION

With regard to the issue of subject matter jurisdiction, the Court agrees with Wife. The Delaware Supreme Court made clear in its' decision that the only way for this Court to resolve the issue of material fact as to whether Wife was a resident of the state of Delaware for the six months prior to her filing the petition, the Court must hold an evidentiary hearing on the matter. As such, the Court will be holding a hearing as to this limited issue of fact which will be scheduled at a later date.

With regard to the issue of insufficient service of process, the Court finds that Wife has properly served Husband in accordance with The Hague Service Convention. Wife has submitted a certificate from the Central Authority in Greece which affirms that on January 2, 2019 Husband was properly served with, among other documents, the Petition for Divorce, at his residence in Ekali, Greece. While Husband argues that service was insufficient because Wife did not use an Apostille, The Hague Apostille Convention "applies only to public documents. These are documents emanating from an authority or official connected with a court or tribunal of the state."² At this time, the documents of import which Wife has served on Husband are the Petition for Divorce, a document which emanates from a private individual, namely Wife, and not a Court or tribunal. This is not the type of document which requires the service of an Apostille, but rather, Wife should have, and correctly has, served Husband with a civil pleading through the use of the Central Authority, as required by The Hague Service Convention.

² See this Outline of The Hague Apostille Convention which was created by the Hague Conference on Private International Law at <https://assets.hcch.net/docs/80d0e86f-7da8-46f8-8164-df046285bcdd.pdf>.

With regard to Husband's contention that the Court lacks *in personam* jurisdiction, the Court is, again, persuaded by the arguments of Wife with a few additional comments. Delaware Family Court Rule of Civil Procedure Rule 12(g) states that "if a party makes a motion under this Rule but omits therefrom any defense or objection then available which this Rule permits to be raised by motion, that party shall not thereafter make a motion based on the defense or objection so omitted." Rule 12(h) then outlines certain defenses that, if omitted from a motion filed under Rule 12, are effectively waived and barred from being made at a later juncture in the case, which includes "a defense of lack of jurisdiction over the person."

Husband is filing his Motion to Dismiss pursuant to Family Court Rule of Civil Procedure Rule 12(b)(2) and (5). Thus, the Court finds that Husband has filed a Motion under Rule 12, as required by Rule 12(g). In his initial Motion to Dismiss, Husband made absolutely no mention of a defense on the basis of a lack of *in personam* jurisdiction. While Husband did argue that the Court lacked personal jurisdiction over him, Husband supported this argument merely by citing a lack of service of process. While it is arguably true that a lack of service of process and a lack of *in personam* jurisdiction are both defenses sounding in personal jurisdiction, these defenses differ from one another in particularly crucial ways within actions for divorce and ancillary relief.

In *Cottone v. Cottone*, the Court explained that, in the context of a petition for divorce and request for ancillary relief, having personal jurisdiction over a respondent requires two distinct types of jurisdiction: *in rem* and *in personam* jurisdiction.³ *In rem* jurisdiction refers to the Court's jurisdiction over the marriage and grants the Court the authority to grant a divorce and the Court in *Cottone* found that it had jurisdiction to grant divorce after service of process had been perfected as to the respondent.⁴ The Court went on to explain, however, that because the parties also requested the resolution of ancillary matters, the Court further needed to acquire *in personam* jurisdiction over the opposing party. The Court explained that in order to find that the Court has *in personam* jurisdiction over a respondent, the Court must find that that respondent has "minimum contacts" with the State, as required and defined by the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).⁵

³ *Cottone v. Cottone*, 547 A.2d 625, 628 (Del. Fam. Ct. 1988).

⁴ *Id.*

⁵ *Id.*

While it is true that Husband asserted a lack of personal jurisdiction on the basis of insufficiency of process (hence, an attack on the Court having *in rem* jurisdiction under *Cottone v. Cottone*), Husband made no mention of the Court having lacking *in personam* jurisdiction until this second Motion to Dismiss. Because this defense was omitted from Husband's first responsive pleading (i.e. his first Motion to Dismiss), Husband has waived this defense of lack of personal jurisdiction and cannot now raise the argument for the first time in his second responsive pleading.

However, even if Husband had raised the defense of personal jurisdiction on the basis of a lack of *in personam* jurisdiction, Husband's argument still would have failed as there is enough information in the pleadings to find that the Court has *in personam* jurisdiction over Husband. *Cottone v. Cottone* articulates that the Court has *in personam* jurisdiction over a respondent if "such respondent has 'the minimum contacts' with the State as defined by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)."⁶ Minimum contacts has been defined as such interactions with the state "such that the maintenance of the suit does not offense 'traditional notions of fair play and substantial justice.'"⁷ Here, Husband and Wife were married in Delaware and Husband has purposefully availed himself to the marriage laws of this, including the regulation and dissolution of the parties' marital status.

Additionally, the Court can also acquire *in personam* jurisdiction over a respondent through the Long Arm Statute⁸ of this state, provided that such exercise comports with the Due Process Clause. One provision of the Long Arm Statute allows the Court to exercise personal jurisdiction over a respondent if that individual "(1) transacts any business or performs any character of work or service in the State...(5) Has an interest in, uses or possesses real property in the State."⁹ One component of the parties' financial matters ancillary to the divorce is an LLC

⁶ *Id.*

⁷ *Sternberg v. O'Neill*, 550 A.2d 1105, 1118 (Del. 1988). *Citing International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

⁸ 10 *Del. C.* § 3104(c).

⁹ 10 *Del. C.* § 3104(c) specifically provides that:

(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

which the parties' jointly formed and incorporated in the state of Delaware. Wife further contends that this LLC owns real estate within Delaware. In his Motion, Husband reported that he is currently unaware of any real estate owned by the LLC in the state of Delaware, and, to the extent that there is, Husband is unsure whether this property constitutes marital property. Because the parties have operated a business venture together in the State of Delaware, which would be an asset subject to the Court's resolution of the parties' ancillary matters, it appears that this Court would also have jurisdiction over Husband pursuant to the Long Arm Statute.

Although the Court finds that Husband has waived his defense of a lack of *in personam* jurisdiction by failing to raise it in his first Motion to Dismiss, there appears to be sufficient evidence within the pleadings that, even if he had, Husband has sufficient minimum contacts with the state of Delaware by choosing to be married here and purposefully availing himself to the laws of this state by incorporating and operating a business here. As such, Husband's Motion to Dismiss on the grounds of lack of *in personam* jurisdiction should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED THIS 14TH DAY OF MAY, 2019 AS FOLLOWS:

1. Husband's Motion to Dismiss on the basis of insufficiency of service of process is ***denied*** as Wife has submitted documentation demonstrating that she has properly served Husband in Greece by use of the Central Authority, as required by The Hague Service Convention.
2. Husband's Motion to Dismiss on the basis of a lack of *in personam* jurisdiction is ***denied*** as Husband failed to raise this defense in his first Motion to Dismiss filed under Rule 12(b)(2) and (5) of the Delaware Family Court Rules of Civil Procedure.
3. Husband's Motion to Dismiss on the basis of subject matter jurisdiction is ***stayed*** pending an evidentiary hearing on the issue of whether Wife was a resident in the state of Delaware for a period of no less than six months prior to the filing of the Petition for Divorce. The Court's staff will contact counsel at a later time to schedule this hearing.

(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 parties otherwise provide in writing.

IT IS SO ORDERED.

ROBERT BURTON COONIN, JUDGE

Date e-mailed to Counsel: _____

RBC/jr