

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SUSSEX FARMS LIMITED,)
)
Plaintiff,)
)
v.) C.A. No. N21C-10-041 WCC
)
CHARLES OSELOKA MBANEFO,)
)
Defendants.)
)
)

Submitted: February 21, 2022

Decided: June 9, 2022

Defendants’ Motion to Dismiss – GRANTED

MEMORANDUM OPINION

Charles J. Brown, III, Esquire, Gellert Scali Busenkell & Brown LLC, 1201 North Orange Street, Suite 300, Wilmington, Delaware 19801. Attorney for Plaintiff.

Brian E. Farnan, Esquire, and Michael J. Farnan, Esquire, Farnan LLP, 919 North Market Street, 12th Floor, Wilmington, Delaware 19801. Christopher G. Kuhn, Esquire, Rolf Goffman Martin Lang LLP, 30100 Chagrin Blvd, Suite 350, Cleveland, Ohio 44124. Attorneys for Defendant.

CARPENTER, J.

Before the Court is Defendant Charles Oseloka Mbanefo’s (“Defendant” or “Mbanefo”) Motion to Dismiss the Complaint pursuant to Rules 12(b)(2) and 12(b)(6). For the reasons set forth in this Opinion, Defendant’s Motion is **GRANTED**.

I. Factual & Procedural Background

This matter arises from a contract dispute between Plaintiff, Sussex Farms Limited (“Sussex Farms”), a Nigerian Corporation, and the Defendant, a resident of Ohio, and former director of Sussex Farms.¹ At some time, Sussex Farms was placed into a receivership in Nigeria and, as a result, Defendant faced certain liabilities to Sussex Farms.²

On or about November 18, 2018, the Parties entered into a Mutual Release Agreement (the “Agreement”) whereby Sussex Farms agreed to release Defendant from all claims in exchange for a payment of \$325,000.³ The Agreement contains a Delaware choice of law provision and provides that any party that breaches the Agreement will be liable for attorney’s fees.⁴

After execution of the Agreement, Sussex Farms demanded payment from the Defendant, but allegedly has been unsuccessful.⁵ As a result, Sussex Farms asserts

¹ Compl., D.I. 1, ¶1 (Oct. 6, 2021).

² *Id.* at ¶¶3-4.

³ *Id.* at ¶6.

⁴ *Id.* at ¶7.

⁵ *Id.* at ¶9.

that Defendant has breached his obligations under the Agreement and seeks payment and attorney's fees.⁶

On October 6, 2021, Sussex Farms filed a complaint against the Defendant for one count of breach of contract.⁷ On January 10, 2022, Defendant moved to dismiss the complaint asserting lack of personal jurisdiction and failure to state a claim.⁸ Plaintiff responded on February 21, 2022.⁹

II. Standard of Review

On a motion to dismiss for lack of personal jurisdiction, the plaintiff has the burden of showing a basis for the trial court's exercise of jurisdiction over a nonresident defendant.¹⁰ In Delaware, "courts will apply a two-prong analysis to the issue of personal jurisdiction over a nonresident."¹¹ First, the court must determine whether Delaware's long arm statute, 10 Del. C. § 3104(c), is applicable.¹² Title 10, section 3104(c) of the Delaware Code enumerates an exhaustive list of contracts through which a Delaware court can exercise personal jurisdiction over a nonresident defendant who has not consented to suit here.¹³ Under the statute, a court

⁶ *Id.* at ¶¶10-11.

⁷ *Id.* at p. 3.

⁸ Def.'s Mot. to Dismiss, D.I. 3, p. 1, 4 (Jan. 10, 2022)(hereinafter "Def.'s Mot.").

⁹ Pl.'s Resp. to Def.'s Mot. to Dismiss, D.I. 6, 7 (Feb. 21, 2022)(hereinafter "Pl.'s Resp.").

¹⁰ *Herman v. BRP, Inc.*, 2015 WL 1733805, at *3 (Del. Super. Ct. Apr. 13, 2015) (citing *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005)).

¹¹ *Id.*

¹² *Id.*

¹³ *Green America Recycling, LLC v. Clean Earth, Inc.*, 2021 WL 2211696, at *4 (Del. Super. Ct. June 1, 2021).

may exercise personal jurisdiction over any non-resident defendant...who in person or through agent:

- (1) transacts any business or performs any character of work or service in the State;
- (2) contracts to supply services or things in the State;
- (3) causes tortious injury in the State by an act or omission in the State;
- (4) causes tortious injury in the State or outside of the State by an act or omission outside of 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 acts 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.¹⁴

The Court then must consider whether subjecting the nonresident to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment.¹⁵ The Due Process Clause requires the defendant to have minimum contacts with the forum state, and “it must be ‘fair and reasonable’ for the court to exercise jurisdiction over the nonresident party.”¹⁶

¹⁴ 10 *Del. C.* §3104.

¹⁵ *Id.*

¹⁶ *Id.*

III. Discussion

A. Personal Jurisdiction

Defendant contends that the Court does not have personal jurisdiction over the Defendant because he is not a Delaware citizen or resident, and Sussex Farms has failed to allege any facts that would satisfy the Delaware long-arm statute.¹⁷ Defendant alleges that Plaintiff's only basis for filing suit in Delaware is a choice-of-law provision in the Agreement requiring Delaware law to be applied in any dispute.¹⁸

Conversely, Sussex Farms contends that Defendant waived his personal jurisdiction claim by requesting affirmative relief in his favor on the merits of the case and awarding him attorney's fees pursuant to the Agreement.¹⁹ Sussex Farms asserts if the Court find that Defendant has not consented to personal jurisdiction then it should be permitted to conduct some limited jurisdictional discovery.²⁰

The Court finds that the Defendant has not waived his challenge to personal jurisdiction for two reasons. First, Rule 12(h)(1) provides for the waiver of the lack of personal jurisdiction defense if it is not raised in the initial motion or responsive pleading.²¹ Here, the Defendant's lack of personal jurisdiction defense is raised in

¹⁷ Def.'s Mot. at p. 3.

¹⁸ *Id.* at 3-4.

¹⁹ Pl.'s Resp. at ¶5.

²⁰ *Id.* at ¶11.

²¹ *Plummer v. Sherman*, 861 A.2d 1238, 1243 (Del. Nov. 16, 2004)(citing Del. Super. Ct. R. 12(h)).

his first motion in this case, and he has yet to file a responsive pleading. Moreover, Defendant has not engaged in any discovery with Sussex Farms or filed any other motions or responsive pleadings that would deem him an “active actor” in this litigation.²² The only significant action Defendant has taken is filing his Motion to Dismiss based on two Rule 12(b) defenses, an action clearly allowed under the rule. Defendant has not presented any evidence on the merits of this case nor filed an answer.

Second, the plain language of Delaware Superior Court Civil Rule 12 provides that “[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.”²³ And, the purposes of the Delaware Superior Court Rules encourage “the just, speedy and inexpensive determination of every proceeding.”²⁴ Accordingly, the joining of Defendant’s 12(b)(2) defense and his 12(b)(6) defense is the proper procedural posture anticipated and encouraged by the Court’s rules and, alone, is insufficient to constitute a waiver of the personal jurisdiction.

When a defendant moves to dismiss a complaint pursuant to Delaware Superior Court Rule 12(b)(2), the plaintiff bears the burden of showing a basis for

²² *Conn. Gen. Life Ins. Co. v. Pinkas*, 2011 WL 5222796, at *3 (Del. Ch. Oct. 28, 2011); *Ross Holding and Mgmt. Co. v. Advance Realty Grp., LLC*, 2010 WL 1838608, at *11 (Del. Ch. Apr. 28, 2010).

²³ Del. Super. Ct. R. 12(b).

²⁴ *Id.* at R. 1.

the trial court's exercise of jurisdiction over a nonresident defendant.²⁵ In this case, Plaintiff appears to rely on the choice of law provision that designates that the laws of Delaware control over any disputes arising from the Agreement. Specifically, the provision states that, "[t]his release shall be construed under and in accordance with the laws of...Delaware."²⁶

But, it is well settled Delaware law that "a contract...to transact business outside of Delaware, which has been negotiated without any contacts with this State, cannot alone serve as a basis for personal jurisdiction over the nonresident for actions arising out of that contract."²⁷ And, although "there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court,"²⁸ "[a] choice of Delaware law provision in a contract is not, of itself, a sufficient transaction of business in the State to confer jurisdiction under (c)(1)."²⁹

Here, the parties have not contractually obliged where this dispute would be litigated, just what law will be applied. Without more, the Sussex Farms fails to meet their burden to establish how the Delaware long-arm reaches the Defendant.

²⁵ *Herman*, 2015 WL 1733805, at *3 (citing *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005)).

²⁶ Compl. Ex. A., D.I. 1, at 2 (Mutual Release Agreement).

²⁷ *Mobile Diagnostic Grp. Holdings, LLC v. Suer*, 972 A.2d 799, 805 (Del. Ch. Mar. 24, 2009).

²⁸ *Burger King v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985).

²⁹ *Mobile Diagnostic*, 972 A.2d at 805.

There are no other jurisdictional allegations in the complaint nor the Plaintiff's response and, reliance on the choice of law provision alone is insufficient.

B. Jurisdictional Discovery is Unwarranted.

Lastly, Sussex Farms requests jurisdictional discovery if the Court deems that Defendant has not waived his challenge to personal jurisdiction.³⁰ Specifically, Sussex Farms argues that Defendant drafted the Agreement which included a Delaware choice of law provision, and the mere fact that he may currently reside in Ohio in no way establishes that he does not have the requisite contacts within Delaware to establish jurisdiction.³¹

Generally, “[w]here the plaintiff’s claim is not clearly frivolous, the [] court should ordinarily allow discovery on jurisdiction in order to aid the plaintiff in discharging that burden.”³² However, a plaintiff is not entitled to jurisdictional discovery where the assertion of personal jurisdiction “lacks the minimal level of plausibility needed to permit discovery to go forward.”³³ In other words, “[a] plaintiff may not go on a ‘fishing expedition’ in search of a jurisdictional hook.”³⁴ Moreover, a “Plaintiff cannot establish a right to...discovery simply by alleging that

³⁰ Pl.’s Resp. at ¶11.

³¹ *Id.*

³² *Degregorio v. Marriott Int’l, Inc.*, 2018 WL 3096627, at *7 (Del. Super. Ct. June 20, 2018).

³³ *Id.*

³⁴ *Id.*

the Defendant ‘might’ have engaged in the activities enumerated in the long-arm statute or that ‘it is possible’ that the Defendant has sufficient minimum contacts in Delaware.’³⁵

Here, Sussex Farms baldly asserts that Defendant may have engaged in activities sufficient under the long arm statute because he chose the Delaware choice of law provision and drafted the Agreement. Such allegations are mere speculation and Sussex Farms has not established a plausible basis for personal jurisdiction sufficient to justify the discovery sought. It is also not uncommon for litigants to choose to apply Delaware law due to its national reputation and abundant case law in resolving corporate disputes. This case involves a foreign Nigerian Corporation, an Ohio resident, and an agreement that was executed outside of the State and does not involve any transactions therein. Accordingly, this Court does not have personal jurisdiction over the Defendant nor is there any good faith bases to allow jurisdictional discovery. Having concluded that this court lacks personal jurisdiction, this decision need not reach Defendant’s arguments under Rule 12(b)(6).³⁶

³⁵ *Picard v. Wood*, 2012 WL 2865993, at *2 (Del. Ch. July 12, 2012).

³⁶ *SDF Funding LLC v. Fry*, 2022 WL 1521309, at *4 (Del. Ch. May 13, 2022).

IV. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss pursuant to Rule 12(b)(2) is **GRANTED**. To the extent legal fees are requested by either party, that request is denied. The Court has made no finding in this Opinion that either party has breached the Agreement justifying attorney's fees.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.