

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RICHARD M. CLARK,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 96-11-P-C
)	
DAVID L. CULBERSON,)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON
DEFENDANT'S MOTIONS TO DISMISS
AND FOR VENUE TRANSFER**

This diversity-based case presents allegations of breach of contract and fiduciary duty, as well as a demand for an accounting. The defendant has moved pursuant to Fed. R. Civ. P. 12(b)(2) to dismiss the complaint for lack of *in personam* jurisdiction and to transfer the proceeding to the District of the Virgin Islands pursuant to 28 U.S.C. § 1404(a). Under the particular circumstances of this case, I recommend that the defendant's motion to dismiss be denied, and that his motion for transfer of venue be granted.

I. APPLICABLE LAW

The plaintiff seeks an accounting and distribution of corporate profits, compensatory and punitive damages, costs, attorney fees and other relief on his complaint alleging that the defendant, a fellow shareholder in Culberson Development Corporation, a Virgin Islands corporation, failed to deliver to him the 15% of corporate profits to which he was entitled. Subject matter jurisdiction is premised on 28 U.S.C. § 1332 (diversity jurisdiction); the parties are residents of different states.

The defendant, a resident of Virginia, contends that this court lacks *in personam* jurisdiction over him. In his second motion, he seeks transfer of this action to the District of the Virgin Islands, contending that this court should exercise its discretion under 28 U.S.C. § 1404 to serve the convenience of witnesses and the parties.

A. Personal Jurisdiction

Maine's long-arm statute, 14 M.R.S.A. § 704-A, defines the *in personam* jurisdictional reach of the court; this reach is coextensive with that which is permissible within the constitutional confines of due process. *McCain Foods, Ltd. v. Lamb-Weston, Inc.*, 23 U.S.P.Q. 2d (BNA) 1307, 1308 (D. Me. 1992). “Generally, due process requires that the defendant have 'minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'” *Archibald v. Archibald*, 826 F. Supp. 26, 29 (D. Me. 1993) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (brackets in original).

The due process inquiry requires the court to determine whether the claim or cause of action arises out of, or is related to, the defendant's contacts with Maine and whether the defendant purposefully directed his activities at residents of Maine. *Smirz v. Fred C. Gloeckner & Co.*, 732 F. Supp. 1205, 1207 (D. Me. 1990). The plaintiff carries the burden of proof at this first stage of inquiry, which he may meet with a *prima facie* showing supported by the pleadings, affidavits and any exhibits. *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 979 (1st Cir. 1986). The Maine statute provides for specific jurisdiction; that is, only the causes of action enumerated may be asserted against a defendant when the statute provides the basis for jurisdiction. In a contract case, the defendant's forum-based activities must be "instrumental in the formation of the contract." *Hahn v. Vermont Law Sch.*, 698 F.2d 48, 51 (1st Cir. 1983).

Even if the plaintiff has not demonstrated that the acts at issue in the litigation were sufficiently directed at the forum, jurisdiction may still lie in this court if the defendant has had other contacts with the forum that are “continuous and substantial.” *Talus Corp. v. Browne*, 775 F. Supp. 23, 26 (D. Me. 1991) (citation omitted). The defendant may defeat an otherwise valid assertion of jurisdiction by demonstrating that his contacts with the forum are so minimal that submitting to suit in the forum would not comport with notions of fair play and substantial justice. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985). Finally, jurisdiction does not lie even where these constitutional conditions are met in certain circumstances. These cases “are limited to the rare situation in which the plaintiff’s interest and the state’s interest in adjudicating the dispute in the forum are so attenuated that they are clearly outweighed by the burden of subjecting the defendant to litigation within the forum.” *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1568 (Fed. Cir.), *cert. dismissed*, 115 S.Ct. 18 (1994).

B. Transfer of Venue

The defendant asserts in his answer to the complaint that venue is improper in this case. Answer ¶ 4 and Third Defense (Docket No. 3). He moves for transfer under 28 U.S.C. § 1404, which states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The parties agree that this action might have been brought in the Virgin Islands. Defendant's Motion for Venue Transfer and Incorporated Memorandum of Law (Docket No. 7) at 3; Plaintiff's Opposition to Defendant's Motion for Venue Transfer (Docket No. 10) at 2. Determination of proper venue under section 1404 is a matter left to the discretion of the court. *Bayside Enter., Inc. v. Mattern's Hatchery, Inc.*, 741 F.Supp. 21, 22 (D. Me. 1990).

The factors to be considered by a court in the exercise of this discretion include the convenience of the parties and witnesses, the order in which jurisdiction was obtained by the district court, the availability of documents, and the possibilities of consolidation. No single factor, however, is determinative.

Ashmore v. Northeast Petroleum Div. of Cargill, Inc., 925 F. Supp. 36, 38 (D. Me. 1996) (citation omitted). The evidence presented by the party seeking a transfer must predominate in favor of transfer before the court will disturb a plaintiff's choice of forum. *Id.* Substantial deference will be given to a plaintiff's choice of forum. *Id.* at 39; *Berrigan v. Greyhound Lines, Inc.*, 560 F. Supp. 165, 169 (D. Mass. 1982), *aff'd*, 782 F.2d 295 (1st Cir. 1986).

II. FACTUAL BACKGROUND

The record, including the affidavits of the parties, with attached exhibits, establishes the following facts. The plaintiff is a resident of Maine. Affidavit of Richard M. Clark ("Clark Aff.") (Docket No. 12) ¶ 3. The defendant is a resident of Virginia. Answer ¶ 2. The plaintiff seeks an accounting concerning the affairs of Culberson Development Corporation ("CDC"), a Virgin Islands corporation. Clark Aff. ¶¶ 2, 4. He alleges that he holds 15% of the shares of CDC. *Id.* ¶ 2. He also asserts claims for breach of fiduciary duty arising from the alleged failure to account and for breach of an oral contract, of which a written "Agreement to Effect a Corporate 'Spin-Off' under I.R.C. Section 355," dated May 5, 1990, concerning a subsidiary of CDC, is offered as evidence. *Id.* ¶¶ 2, 11; Complaint, Exh. A.

CDC was initially formed in 1984. Clark Aff. ¶ 4. It engaged in managing and leasing properties located in the Virgin Islands and developing residential and commercial real estate there. *Id.* ¶ 6; Complaint ¶ 8; Answer ¶ 8. Between 1986 and 1990 CDC maintained offices in

Scarborough and Falmouth, Maine, as well as in the Virgin Islands, and employed at least one person in Maine. Clark Aff. ¶¶ 6-7. The defendant was the direct supervisor of this employee. *Id.* ¶ 9. He traveled to Maine for this purpose "on an annual basis." *Id.* During this period, the plaintiff sought financing and buyers in Maine on behalf of CDC. *Id.* ¶ 10.

The Spin-Off Agreement was negotiated between the parties by telephone, while the plaintiff was in Maine, and in person outside Maine. *Id.* ¶ 11. By its terms, it is to be governed by the laws of the Virgin Islands. Exh. A to Complaint. The defendant also entered into a 1990 stock purchase agreement with two residents of Maine and the plaintiff concerning CDC Management Company, the subsidiary that is the subject of the Spin-Off Agreement. Clark Aff. ¶ 12; Exh. A to Complaint. All payments to the defendant pursuant to the stock purchase agreement, with one exception, were made by checks drawn on Maine-based banks. Clark Aff. ¶ 14. The defendant has traveled to Maine to visit friends "on multiple occasions from 1986 through the present." *Id.* ¶ 9.

The plaintiff lists four potential witnesses for trial, three of whom live in Maine and one in Massachusetts. Plaintiff's Pretrial Memorandum (Docket No. 15) at 4. The defendant lists nine potential witnesses, of whom three reside in the Virgin Islands, three in Virginia, two in Florida, and one in Massachusetts. Defendant's Pretrial Memorandum (Docket No. 16) at [2]-[3].

III. ANALYSIS

A. Personal Jurisdiction

The defendant contends that specific *in personam* jurisdiction is lacking because none of the events giving rise to the complaint took place in Maine, he is not a resident of Maine, and the

contacts with Maine upon which the plaintiff relies are those of CDC, rather than those of the defendant as an individual. The plaintiff counters that he has made the requisite *prima facie* showing of specific personal jurisdiction because he is a resident of Maine, and because the defendant created continuing relationships and obligations with residents of Maine, travels to Maine for business and personal reasons, and engaged in significant activities within Maine by directing the business activities of CDC in Maine between 1986 and 1990.

The first inquiry is whether the claims against the defendant arise out of, or are related to, his contacts with Maine. His unspecified personal visits to which the plaintiff refers are not the source of the claims raised in the complaint, nor are they shown to be related to those claims. Nor has the separate stock purchase agreement been shown to be related to the claims raised in the complaint. The alleged oral and written agreements giving rise to the plaintiff's ownership interest in CDC, which is the basis of the claims for an accounting and for breach both of fiduciary duty and of contract, arise out of telephone conversations between the parties while the plaintiff was in Maine and personal contact outside the state. Clark Aff. ¶¶ 5, 11.

The First Circuit subscribes to "the general rule . . . that jurisdiction over the individual officers of a corporation may not be based merely on jurisdiction over the corporation." *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 906 (1st Cir. 1980). There must be an independent basis for asserting long-arm jurisdiction over the individual, a showing that the defendant has transacted personal business within the forum. *Id.*

The mere fact that a corporate officer may direct the corporation's affairs in another district does not necessarily subject the officer to personal jurisdiction there. Even physical presence on some prior occasion for the limited purpose of conducting the corporation's affairs may not be sufficient to confer personal jurisdiction. At a minimum, the activities the officer directed must be those that gave rise to the suit.

Banque de la Mediterranee-France, S.A. v. Thergen, Inc., 780 F. Supp. 92, 94 (D. R.I. 1992).

Here, the activities directed by the defendant in Maine did not give rise to this action. Some telephone calls, unspecified in number, for "approximately two months prior to April 25, 1985" and for four months prior to May 5, 1990, are the only contacts with Maine offered by the plaintiff to support specific jurisdiction. Clark Aff. ¶¶ 5, 11. There is no indication in the record that the defendant initiated these calls. See *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 212 (1st Cir. 1994) (when telephone call provides basis for claim, identity of party who initiated call is important consideration). These contacts are not sufficient to meet the "arising out of" element of specific jurisdiction. See, e.g., *United Elec., Radio & Mach. Workers of America v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089-90 (1st Cir. 1992).

That, however, does not end the inquiry. When a lawsuit does not arise out of a defendant's activities within the forum, specific *in personam* jurisdiction may still lie if the lawsuit is sufficiently related to other forum-based activities of the defendant. *Ticketmaster*, 26 F.3d at 206. The relatedness requirement "authorizes the court to take into account the strength (or weakness) of the plaintiff's relatedness showing in passing upon the fundamental fairness of allowing the suit to proceed." *Id.* at 207. The plaintiff contends that the defendant's visits to Maine and the stock purchase agreement with two Maine residents are sufficiently related to the lawsuit so as to create specific jurisdiction. Yet he has offered no evidence to show that the defendant's personal social visits to Maine are related in any way to this lawsuit. The defendant's annual visits to supervise CDC's employee in Maine are related to this action only because a demand for an accounting of CDC's profits is at issue. The stock purchase agreement concerns a subsidiary of CDC. The supervisory visits are related to the subject matter of this action only in a very attenuated way. On

balance, the "relatedness showing" is too weak to create specific jurisdiction. *Id.*; *see also Nowak v. Tak How Inv., Ltd.*, 94 F.3d 708, 717 (1st Cir. 1996).

The remaining question is whether the defendant's activities within Maine are sufficient to create in the courts of this district general jurisdiction over the defendant. "General jurisdiction is established over a nonresident when a defendant's activities within the state are 'substantial' or 'continuous and systematic.'" *Archibald*, 826 F. Supp. at 29 (quoting *International Shoe*, 326 U.S. at 317). On this record, the defendant's activities within Maine are not sufficiently continuous and systematic to warrant a state's assertion of *in personam* jurisdiction over a nonresident in a cause of action not directly related to those activities. *See generally Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984); *Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1260 (1st Cir. 1990). Nor would it comport with notions of fairness and reasonableness to subject the defendant to general *in personam* jurisdiction within this district based on the work the plaintiff did for CDC prior to 1990. The defendant's contacts, as set forth by the plaintiff, were too few and too limited in duration to permit this court to exercise general jurisdiction based on those activities. *See Cives Corp. v. American Elec. Power Co.*, 550 F. Supp. 1155, 1158 (D. Me. 1982) (contacts limited to mail and telephone calls insufficient to establish long-arm jurisdiction); *Archibald*, 826 F. Supp. at 28-29 (defendant placed weekly telephone calls to plaintiff, wrote letters to plaintiff twice a month, sent packages to plaintiff, and visited Maine annually or bi-annually; not sufficient substantial and regular contact to establish general jurisdiction).

B. Transfer of Venue

The absence of personal jurisdiction is no impediment to transfer of an action to another district if venue was erroneously laid initially. *Freund v. Fleetwood Enter., Inc.*, 745 F. Supp. 753,

755 (D. Me. 1990). The defendant has alleged that venue is improper in this case. Under 28 U.S.C. § 1391(a), when jurisdiction is founded only on diversity of citizenship, as is the case in this action, venue is proper only in the judicial district (1) where any defendant resides, (2) in which a substantial part of the events giving rise to the claim occurred, or (3) in which any defendant is subject to personal jurisdiction if there is no other district in which the action may be brought. The parties agree that this action may be brought in the District of the Virgin Islands, making the third option inapplicable. The sole defendant does not reside in Maine, so the first option does not apply. Analysis of the question of personal jurisdiction has revealed, based on the existing record, that a substantial part of the events giving rise to the plaintiff's claim did not occur in Maine. Therefore, venue in the District of Maine is improper. Transfer to the District of the Virgin Islands, as requested by the defendant, is appropriate under the circumstances, although the authority for that transfer is found at 28 U.S.C. § 1406(a), rather than 28 U.S.C. § 1404, upon which the defendant relies. Such a transfer is particularly appropriate where the parties have agreed that the action could have been brought in the district to which the action is to be transferred. In order to effectuate the transfer, it is necessary to deny the motion to dismiss, even though personal jurisdiction does not exist in this court.

IV. CONCLUSION

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **DENIED**, that his motion for transfer of venue be **GRANTED**, and that this matter be transferred to the United States District Court for the District of the Virgin Islands.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 17th day of November, 1996.

*David M. Cohen
United States Magistrate Judge*