

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FORUM ADMINISTRATIVE)
SERVICES LIMITED LIABILITY)
COMPANY, et al.,)
)
Plaintiffs)
)
v.)
)
WESTWOOD VENTURES, LTD., et al.,)
)
Defendants)

Docket No. 97-82-P-H

**RECOMMENDED DECISION ON MOTION OF DEFENDANTS MILLER AND
ZALTA TO DISMISS THE AMENDED COMPLAINT**

Defendants Gary Miller and Adam Zalta move to dismiss the amended complaint as it relates to them pursuant to Fed. R. Civ. P. 12(b)(2), on the grounds that this court lacks personal jurisdiction over them. I recommend that the court deny the motion.

I. Standard of Review

A motion to dismiss for lack of personal jurisdiction raises the question whether the controversy or the defendant has sufficient contact with the forum to give the court the right to exercise judicial power over the defendant. *See, e.g., Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992). The burden is on the plaintiff to establish jurisdiction, *Talus Corp. v. Browne*, 775 F. Supp. 23, 25 (D. Me. 1991), but where, as here, the court rules on the Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing is sufficient, *Nowak v. Tak*

How Invs., Ltd., 94 F.3d 708, 712 (1st Cir. 1996) (*prima facie* standard preferred where jurisdictional facts are undisputed); *Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). For the purposes of such a review, the allegations of the nonmoving party are taken as true. *Archibald*, 826 F. Supp. at 28. The required *prima facie* showing may be based upon specific facts alleged in the pleadings, affidavits and exhibits. *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 979 (1st Cir. 1986).

II. Analysis

The arguments raised in the Motion of Defendants Gary Miller and Adam Zalta to Dismiss the Amended Complaint (“Motion”) (Docket No. 34) are identical to those raised by Defendant Westwood Ventures, Ltd.’s (“Westwood”) Opposition to Plaintiffs’ Motion for Leave to Amend Complaint (Docket No. 14), the amendment which added Miller and Zalta as named defendants.¹ I granted that motion over Westwood’s objection. Endorsement, Plaintiffs’ Motion for Leave to Amend Their Complaint (Docket No. 11), at 2.

In order for this court to exercise specific jurisdiction² over the defendants, “the claim or cause of action must arise out of or be related to [the] defendant[s]’ forum contacts and the defendant[s] must have purposefully directed [their] activities at residents in the forum state.” *Talus*

¹ In their Reply . . . in Further Support of Their Motion to Dismiss the Amended Complaint (Docket No. 40), Miller and Zalta present for the first time an argument that the “fiduciary shield” doctrine bars this court’s assertion of jurisdiction over them under the circumstances of this case. *Id.* at 3. Aside from the fact, acknowledged by Miller and Zalta, that the doctrine has not been adopted by the Maine Law Court, this court will not address an argument that is raised for the first time in a reply memorandum. *In re The One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991).

² Under the circumstances of this case, it is not necessary to consider whether the court could subject these defendants to general *in personam* jurisdiction, in which the controversy is unrelated to the defendants’ contacts with the forum and those contacts are continuous and systematic. *See Sandstrom v. Chemlawn Corp.*, 727 F. Supp. 676, 682 (D. Me. 1989).

Corp., 775 F. Supp. at 26, quoting *Smirz v. Fred C. Gloeckner & Co.*, 732 F. Supp. 1205, 1207 (D. Me. 1990). In construing Maine’s long-arm jurisdictional statute, 14 M.R.S.A. § 704-A, the Law Court defined the parameters of the inquiry as follows:

In order to exercise personal jurisdiction over a non-resident defendant consistent with the requirements of due process, we must determine that 1) Maine has a legitimate interest in the subject matter of the controversy; 2) the defendant, by its conduct, should reasonably have anticipated litigating in Maine; and 3) the exercise of jurisdiction by Maine’s courts would comport with “traditional notions of fair play and substantial justice.”

Interstate Food Processing Corp. v. Pellerito Foods, Inc., 622 A.2d 1189, 1191 (Me. 1993) (citation omitted). The determination of fairness for purposes of personal jurisdiction requires consideration of “the number, nature, and purpose of the defendant’s contacts with Maine, the connection between those contacts and the cause of action, the interest of Maine in the controversy, and the convenience to both parties.” *Jackson v. Weaver*, 678 A.2d 1036, 1039 (Me. 1996).

Miller and Zalta, neither of whom is a resident of Maine, do not argue that Maine has no legitimate interest in the subject matter of this controversy. They contend that the amended complaint merely alleges an injury within Maine resulting from actions outside the state, and that this injury is insufficient as a matter of law to sustain the exercise of long-arm jurisdiction, relying on *Martin v. Deschenes*, 468 A.2d 618 (Me. 1983). This contention addresses the second element of the *Interstate* test. The individual defendants argue that the only claim asserted against them is one for fraudulent conveyance, and that the alleged fraudulent conveyance occurred outside Maine. However, the full test set forth in *Martin* actually supports the exercise of jurisdiction in this case. “The commission outside the forum state of an act that has consequences in the forum state is by itself an insufficient contact *where all the events necessary to give rise to a tort claim occurred outside the forum state.*” *Id.* at 619 (emphasis added). Here, as the plaintiffs point out, some of the

events necessary to give rise to their claim occurred in Maine.

The fraudulent conveyance alleged in the amended complaint is from Westwood, a corporation of which Miller and Zalta are alleged to be the founders and principals, First Amended Complaint (Docket No. 17) ¶¶ 7-8, to Miller and Zalta with the intent to hinder, delay or defraud one of the plaintiffs, *id.* ¶¶ 58-64. Westwood was created to assist Miller and Zalta with the development and management of Sportsfund. Affidavit of David I. Goldstein (Docket No. 16) ¶¶ 4-6. Miller contacted the plaintiffs in Maine to solicit their involvement in Sportsfund; traveled to Maine twice to conduct meetings concerning Sportsfund, resulting in the written agreement between Westwood and the plaintiffs; and spoke repeatedly with the plaintiffs' employees in Maine by telephone to give them directions, to negotiate the written agreement and to make requests of the plaintiffs, as often as three times per week between March 1996 and December 1996. *Id.* ¶¶ 3-7, 9. Miller was acting on behalf of Zalta, who also corresponded directly with the plaintiffs in Maine. *Id.* ¶¶ 4, 9. Miller and Zalta's alleged subsequent receipt of a fraudulent conveyance from Westwood could not have occurred but for these activities in Maine and is clearly related to the contacts of Miller and Zalta with the plaintiffs in the state of Maine. It cannot reasonably be argued that Miller and Zalta did not purposefully direct their activities toward Maine. Their contacts with Maine were more than merely random, fortuitous or attenuated. *Harriman v. Demoulas Supermarkets, Inc.*, 518 A.2d 1035, 1037 (Me. 1986). Miller and Zalta should reasonably have anticipated litigation in Maine.

Accordingly, the burden shifts to Miller and Zalta to provide compelling evidence that this court's exercise of jurisdiction over them would be unreasonable.³ *Smirz*, 732 F. Supp. at 1208. Miller and Zalta have made no attempt to do so in their submissions to the court in support of their

³ The reasonableness inquiry involves consideration of factors commonly referred to as "gestalt factors." *See Nowak*, 94 F.3d at 717.

motion.

III. Conclusion

For the foregoing reasons, I recommend that the motion of defendants Miller and Zalta to dismiss this action as to them for lack of personal jurisdiction be denied.

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 this 10th day of March, 1998.

*David M. Cohen
United States Magistrate Judge*