

When a party moves for dismissal under Fed. R. Civ. P. 12(b)(2), the burden is on the plaintiff to prove the facts necessary to sustain jurisdiction. *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9, 10 (1st Cir. 1986). To meet that burden, the plaintiff may not rely on the pleadings but must submit affidavits or other competent evidence on the jurisdictional issue. 5 C. Wright & A. Miller, *Federal Practice and Procedure* ' 1351 at p. 565 (1969). At the pretrial stage, the plaintiff need only make out a *prima facie* showing; any conflicts between the plaintiff's and the movant's affidavits must be resolved in favor of the plaintiff. *Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.*, 655 F. Supp. 513, 533-34 (D. Me. 1987), *rev'd on other grounds*, 832 F.2d 214, *cert. denied*, 108 S. Ct. 1111 (1988); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2nd Cir. 1981).

The following relevant facts are established by the parties' affidavits. The plaintiff is a resident of Berwick, Maine and an osteopathic physician licensed to practice in this state. He is presently and has been since mid-1988 medical director of the Kennebunk Walk-In Clinic in Kennebunk. The defendant is a resident of Massachusetts and a medical doctor licensed to practice in that state. He is employed in Massachusetts by the University of Massachusetts Medical Center as director of the family practice residency program. He owns no property in Maine, is not licensed to practice medicine here and has never engaged in any business in this state.

The parties met in the spring of 1987 when the plaintiff was interviewed by the defendant for a position in the Medical Center's residency program. The plaintiff was accepted and commenced employment as an intern at the Center in July of 1987. However, by fall he became displeased with the program and expressed his dissatisfaction to the defendant and his other immediate supervisor. It was agreed among the three that the plaintiff would take a two-week leave of absence to decide whether he wanted to continue. During that time he was offered and accepted a position at the Kennebunk Walk-In Clinic. He began working at the Clinic on November 16, 1987.

In the fall of 1988 the plaintiff applied for admitting privileges at the Osteopathic Hospital of Maine. The Credentials Committee of the hospital sent an unsolicited request for information to the defendant in the form of a four-page document entitled "Professional Reference Questionnaire." The defendant completed and returned the questionnaire, believing that he was obligated by Massachusetts law to do so. In his response the defendant stated, *inter alia*, that the plaintiff "was suffering from mental health problems which, if resolved, would probably make him an average candidate for your medical staff. If not resolved, however, I would have serious reservations about accepting him." The plaintiff learned of the contents of the defendant's response and, viewing the same to be false and defamatory, demanded of the defendant a retraction. The defendant replied to the demand by sending a letter to the Credentials Committee which the plaintiff asserts contains additional defamatory statements. This suit followed.

Because this is a diversity case, Maine's long-arm statute, 14 M.R.S.A. § 704-A, determines the scope of the court's jurisdictional reach within the limits of constitutional due process. *Ganis Corp. v. Jackson*, 822 F.2d 194, 196 (1st Cir. 1987). It is well settled that Maine's long-arm statute permits the exercise of jurisdiction over nonresidents to the same extent allowed by the Fourteenth Amendment. *See Triple-A Baseball*, 655 F. Supp. at 534. In determining whether the exercise of personal jurisdiction comports with due process, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). "[T]he 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present. . . ." *Ganis Corp. v. Jackson*, 822 F.2d at 197 quoting *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978). "[T]he defendant's conduct and

connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

If the suit arises out of or relates to the defendant's forum contacts, it is a case of *specific* jurisdiction which requires simply that the relationship among the defendant, the forum and the litigation form a fair and reasonable foundation for the exercise of jurisdiction over the defendant. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984); *Hughes v. K-Ross Building Supply Center*, 624 F. Supp. 1136, 1137 (D. Me. 1986). Where the suit is unrelated to or does not arise out of the defendant's forum contacts, the stricter standard for *general* jurisdiction must be met, which requires "continuous and systematic" contacts with the forum state. *Helicopteros*, 466 U.S. at 414-16; *Hughes*, 624 F. Supp. at 1137.

This is a *specific* jurisdiction case. The plaintiff's claim arises out of the only contacts the defendant is asserted to have with the State of Maine. The relevant portion of Maine's long-arm statute is that which provides for jurisdiction over any person who commits a tort or "caus[es] the consequences of a tortious act to occur within this State." 14 M.R.S.A. § 704-A(2)(B). The plaintiff alleges that the defendant committed an intentional tort in Maine by communicating false and defamatory statements about him to individuals here. Directly implicated are the plaintiff's professional reputation, standing and well being. Immediately affected is his ability to secure or retain admitting privileges at the Osteopathic Hospital of Maine. Whether or not the defendant believed he was under a legal obligation to respond to the request for information, he purposefully sent the completed questionnaire and the follow up letter to the hospital's Credentials Committee in Maine. He had to have known that his communications would impact upon the plaintiff in this state. Thus, he

¹ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

should reasonably anticipate being haled into court here to defend the truthfulness of his statements. I conclude that the defendant's contacts with the State of Maine are sufficient to satisfy due process requirements for asserting personal jurisdiction over him in this action. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Hugel v. McNell*, No. 88-1528 (1st Cir. Sep. 21, 1989); *Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.*, 655 F. Supp. at 534.

Accordingly, treating the defendant's motion as one to dismiss under Fed. R. Civ. P. 12(b)(2), I recommend that the motion be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate'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 10th day of October, 1989.

***David M. Cohen
United States Magistrate***