

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DAVID ANDREWS, et al.,)
)
 Plaintiffs)
)
 v.)
)
 EMERALD GREEN PENSION FUND,)
 et al.,)
)
 Defendants)

Docket No. 98-436-P-H

**RECOMMENDED DECISION ON MOTION OF DEFENDANTS SHAWVER,
EMERALD GREEN PENSION FUND, COMMERCIAL MORTGAGE &
ASSOCIATES, INC. AND JOBE TO DISMISS**

Four of the defendants in this action, Galen Shawver, Emerald Green Pension Fund, Commercial Mortgage & Associates, Inc. and Auman Jobe move, on the eve of the scheduled start of the trial list to which this action is assigned, to dismiss all claims asserted against them in the fifth amended complaint. I recommend that the court deny the motion.

I. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(1), (2), (3) and (6). Motion to Dismiss (Docket No. 135). However, the defendants' submissions in support of their motion discuss only subject-matter jurisdiction, personal jurisdiction and venue. Accordingly, the possibility that the fifth amended complaint fails to state a claim against any of these defendants on which relief may be granted, Rule 12(b)(6), will not be considered by the court.

When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden

of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). The court does not draw inferences favorable to the pleader. *Hodgdon v. United States*, 919 F. Supp. 37, 38 (D. Me. 1996). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); see *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

A motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) 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).

A motion to dismiss for lack of venue under Rule 12(b)(3) puts the burden on the plaintiff

to demonstrate that he has met his obligation to institute his action in a permissible forum. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1352 at 264-65 (2d ed. 1990). The procedure for analysis of such a motion is the same as that for a motion under Rule 12(b)(2). *M.K.C. Equipment Co. v. M.A.I.L. Code, Inc.*, 843 F. Supp. 679, 682-83 (D. Kan. 1994).

II. Factual Background

The fifth amended complaint includes the following relevant factual allegations. In 1997 defendant Cassidy solicited the plaintiffs' investment in defendant Emerald Green Pension Fund (the "Fund"). Consolidated Fifth Amended Complaint (Docket No. 103) ¶ 14. Cassidy told the plaintiffs that the Fund was about to conduct international trades of bonds or commercial paper that would allow investors to receive a large profit, which would be available to them on a monthly basis. *Id.* ¶¶ 15-16. Cassidy told the plaintiffs that investment in the Fund was secure, backed by a bank guarantee and hard assets in the form of precious gemstones; that the Fund was a qualified pension fund; and that their investments would be held in escrow until the trade occurred. *Id.* ¶ 16.

Plaintiff Andrews invested \$30,000 in the Fund on or about December 10, 1997 and another \$60,000 on February 2, 1998, as directed and arranged by Cassidy. *Id.* ¶¶ 17-18. An investment accounting form provided to Andrews stated that the investment was made pursuant to a joint venture that provided certain rights to defendant ShuKu International. *Id.* ¶ 18. Andrews invested another \$50,000 on or about May 5, 1998. *Id.* ¶ 19.

On or about December 10, 1997 plaintiff Raymond St. Laurent invested \$70,000 in the Fund, signing, at Cassidy's direction, a joint venture agreement providing that "the Cassidy group," "the Trade Group," and the "Pal Group" had certain rights to a division of earnings from the investment. *Id.* ¶ 20. On or about May 31, 1997 St. Laurent invested an additional \$187,500 in the Fund, through

Cassidy. *Id.* ¶ 21. A final investment accounting form provided to St. Laurent for this investment stated that it was made pursuant to a joint venture giving certain rights to defendant ShuKu International. *Id.*

On or about December 22, 1997 plaintiff Richard Dingwell invested \$20,000 in the Fund, signing, at Cassidy's direction, a joint venture agreement providing "the Cassidy Group," "the Trade Group," and "the Palladian Group" with certain rights to a division of earnings from the investment. *Id.* ¶ 22.

Prior to December 22, 1997 the defendants were aware that an investigation of the Fund for possible criminal wrongdoing had been begun by either the United States Attorney's Office for North Carolina or the North Carolina Attorney General's Office, or both, and that the Fund's bank accounts had been frozen by a receivership action brought by the state of North Carolina. *Id.* ¶¶ 23-24. These funds were later seized by the state in a forfeiture action. *Id.* ¶ 24. The defendants did not reveal these facts to the plaintiffs before they made their investments in the Fund. *Id.* ¶ 25. Despite demands, the defendants have failed to return the plaintiffs' investments. *Id.* ¶ 28.

The Fund was operated and designed so that early investors were paid with funds from later investors. *Id.* ¶ 29. The defendants, acting through Cassidy and Shawver, intentionally misrepresented the security of investment in the Fund and the likely return, as part of a fraudulent scheme, devised and implemented by all of the defendants acting in concert, involving the Fund. *Id.* ¶¶ 26-27. Defendants Shawver and the Fund used purported guarantees issued by the Bank of Bangkok that were not in fact authentic to attract investors and to induce the plaintiffs to leave their money in the Fund. *Id.* ¶¶ 30-31. Shawver and the Fund caused money belonging to the plaintiffs to be directed to Bromac Enterprises. *Id.* ¶ 32.

The Fund is not a bona fide pension fund. *Id.* ¶ 38. Shawver and defendant Jerry Revalee caused Fund moneys to be placed in bank accounts in their own names. *Id.* ¶ 39. Defendant Steven Brooks and Virgil Cowen also received some of money invested by the plaintiffs. *Id.* ¶ 40. At the time of each of the plaintiffs' investments, the defendants provided them with a written prospectus in the form of an investment transaction account, a joint venture agreement, and a Fund guarantee payorder. *Id.* ¶ 43. The defendants "or their agent/co-conspirators (Cassidy . . . and/or Shawver)" made certain knowing and intentionally false representations to the plaintiffs that led them to invest in the Fund. *Id.* ¶¶ 45-46. The defendants have commingled Fund moneys with other accounts and have made personal use of Fund moneys. *Id.* ¶ 47. The United States District Court for the Middle District of North Carolina has seized \$2,031,246.91 in Fund moneys at the behest of the United States Attorney for North Carolina. *Id.* ¶ 48.

The plaintiffs did not become aware that they had been defrauded by the defendants until November 1998 when they received a copy of a complaint of forfeiture, *id.* ¶ 51, presumably the one filed in the North Carolina court.

III. Discussion

The motion to dismiss appears to address all counts in the fifth amended complaint.¹ Following resolution of an earlier motion to dismiss filed by the same defendants (Docket Nos. 45 & 48), the following counts remain active concerning all four of the moving defendants, or some of

¹ Without requesting leave of court, the plaintiffs have filed a document entitled Plaintiffs' Further Response to Motion to Dismiss (Docket No. 152), in which they assert, *inter alia*, that the instant motion is untimely. This court's local rules do not provide for the filing of any memoranda concerning a given motion after the filing of a reply memorandum; given the absence of a request for leave to file such a document, the court will not consider it. *See* endorsement striking Docket No. 152.

them, where indicated: Count I (sale or delivery of unregistered securities in violation of 15 U.S.C. § 77e(a)); Count II (failure to provide a prospectus in violation of 15 U.S.C. § 77j); Count IV (controlling person liability under 15 U.S.C. § 77o) as to Shawver and Jobe; Count VI (controlling person liability under 15 U.S.C. § 78t) as to Shawver and Jobe; Count VII (fraud); Count VIII (misrepresentation) as to Shawver and the Fund; Counts IX-XI (fraud); Count XII-XIV (breach of contract) as to the Fund; Count XV (negligent misrepresentation); Count XVI (breach of fiduciary duty) as to Shawver; Count XVII (violation of the Maine Revised Security Act, 32 M.R.S.A. § 1030); and Count XVIII (conversion) as to Shawver.

A. Federal Securities Claims

The moving defendants contend that this court lacks subject-matter jurisdiction over the claims arising under the Federal Securities Act, which are set forth in Counts I-II, IV, and VI. Memorandum in Support of Motion to Dismiss (“Defendants’ Memorandum”), attached to Motion to Dismiss (Docket No. 135), at 9. They base their argument on two assertions: that the Fund is not a security as that term is used in the relevant statutes and that “[t]his Court has already determined that no security was sold under the Maine Securities Law,” leading to the apparently inevitable inference that “no security was purchased or sold as defined within the Federal Securities Act because the Maine statute and the federal statute are so similar.” *Id.* at 11.

The latter assertion, unaccompanied by citation to authority, rests on a clearly faulty premise. I earlier issued a recommended decision on the plaintiffs’ motion for summary judgment against defendant Cassidy, who is not one of the moving parties here.² The moving defendants refer to that document as the source of the “determination” that “no security was sold” under Maine law, but I

² This recommended decision was affirmed by Judge Hornby. Docket No. 124.

found only that the plaintiffs had failed to establish as a matter of law, based on the summary judgment record, that their investment in the Fund was a security under the state statute. Recommended Decision on Plaintiffs' Motion for Partial Summary Judgment Against Defendant Cassidy (Docket No. 113), at 12-13. That finding is a far cry from a determination that no security, as that term is defined by the state statute, was sold to any of the plaintiffs by any of the moving defendants. This asserted basis for dismissal of the federal securities counts against the moving defendants merits no further attention from the court.

In conclusory fashion, the moving defendants assert that an investment in the Fund could not involve the sale or purchase of a security as a matter of law because the Fund was an employee pension benefit plan "within the meaning of the Employment Retirement Security Act [sic] ("ERISA")," and a "qualified plan under 401(a) of the Internal Revenue Code." Defendants' Memorandum at 11-12.³ The plaintiffs respond that it is not the actual nature of the Fund that determines whether they have alleged a cognizable claim under federal securities law but rather whether they perceived that they were making investments "in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others," Plaintiffs' Response and Objection to Defendants Galen Shawver, Emerald Green Pension Fund, and Auman Jobe, Motion to Dismiss ("Plaintiffs' Objection") (Docket No. 146) at 8,⁴ citing

³ The defendants also contend that CMA bought and sold United States Treasury obligations on behalf of the Fund and that such obligations are not securities under the relevant federal statute. *Id.* at 12. Because there is no allegation in the fifth amended complaint that the plaintiffs bought such obligations from any of the defendants, the relevance of this assertion to the motion to dismiss is not readily apparent.

⁴ The moving defendants also argue that because they were not parties to the joint venture agreements to which the fifth amended complaint refers at paragraphs 20 and 22, this court lacks
(continued...)

United Housing Found., Inc. v. Forman, 421 U.S. 837, 852 (1975). In that case, the Supreme Court held that the definition of the term “security” in the Securities Act of 1933, now found at 15 U.S.C. § 77b(a)(1), demonstrated the intent of Congress that the definition be “sufficiently broad and general” to include “the many types of instruments that in our commercial world fall within the ordinary concept of a security.” *Id.* at 847-48. Indeed, nothing in the statutory definition excludes an interest in an entity that might itself be defined as a qualified pension benefit plan.

The only case cited by the moving defendants in support of their position, *Hurn v. Retirement Fund Trust*, 424 F. Supp. 80 (C.D.Cal. 1976), does not require a contrary conclusion. In that case, the plaintiff brought a claim under ERISA as a participant in the defendant trust, alleging, *inter alia*, that the defendant’s administration of the trust constituted fraud in the sale of a security. *Id.* at 81. The court held, without discussion and without stating its reasons for the holding, that the plaintiff’s interest in the trust was not a security. *Id.* The court also held that ERISA provided the exclusive remedy for disputes over benefits between participants and employee pension benefit plans. *Id.* at 82. There is no sense in which the instant action can be construed as a dispute over pension benefits allegedly due to an employee. In the absence of any further information in the *Hurn* opinion providing any possible basis for finding that claim comparable in any way to the claims at issue here, that opinion provides no persuasive support for the plaintiffs’ position.

⁴(...continued)

subject matter jurisdiction over them with respect to the securities counts. Defendants’ Reply to Objection to Motion to Dismiss (Docket No. 147) at 4-5. This argument was not raised in the defendants’ initial memorandum in support of their motion. Arguments raised for the first time in reply memoranda will not be considered by this court. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991). Even if that were not the case, the argument assumes that the plaintiffs rely solely on these agreements as the securities at issue. A brief review of the fifth amended complaint demonstrates that such a conclusion is not accurate.

Here, the plaintiffs have alleged that they were motivated to invest in the Fund by the possibility of financial returns on their investments. At least for purposes of subject-matter jurisdiction, that appears to be sufficient under section 77b. See *SEC v. World Radio Mission, Inc.*, 544 F.2d 535, 538 (1st Cir. 1976). The moving defendants are not entitled to dismissal of Counts I, II, IV and VI under Fed. R. Civ. P. 12(b)(1).

B. Personal Jurisdiction

The moving defendants next argue that this court lacks personal jurisdiction over them because they do not have minimum contacts with the state of Maine. However, the court has jurisdiction over them as to the federal securities claims so long as they have minimum contacts within the United States, 15 U.S.C. § 78aa, *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315-16 (9th Cir. 1985), *909 Corp. v. Village of Bolingbrook Police Pension Fund*, 741 F.Supp. 1290, 1292 (S.D.Tex. 1990), and the moving defendants do not contend, nor could they, that the necessary minimum contacts do not exist within the United States. As I noted in my recommended decision on the moving defendants' earlier motion to dismiss, Recommended Decision on Certain Defendants' Motions to Dismiss ("Recommended Decision") (Docket No. 45), at 17-18, all of the federal circuit courts that have addressed the question whether supplemental jurisdiction exists over state-law claims for which the state-specific minimum-contacts standard would not be met when the federal court properly exercises jurisdiction over the federal claim to which they are appended have upheld the exercise of supplemental jurisdiction. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 628 (4th Cir. 1997); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1057 (2d Cir. 1993); *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1, 4-5 (D.C.Cir. 1977). I continue to find the reasoning of these courts to be persuasive. The moving defendants are not

entitled to dismissal of the state-law claims in Counts VII-XVIII on the basis of Fed. R. Civ. P. 12(b)(2).

C. Estoppel

The moving defendants go on to argue that because the plaintiffs contend that they invested in the Fund, they are bound by a particular term of the trust document that provides that the trustee shall not be subject to claims arising in connection with that document or any trust created thereby, with the exception of instances of gross negligence or malice. Defendants' Memorandum at 16. The moving defendants do not provide a copy of the cited document with their motion, nor does their motion identify the trustee mentioned in the cited passage. The plaintiffs do not respond at all to this argument and must therefore be deemed to have waived objection, but the defendants have not provided sufficient information to allow the court to determine the applicability of this term to each of them. More significantly, they do not indicate how this alleged contractual immunity deprives this court of subject-matter jurisdiction, and it is not apparent to me. If they mean to suggest that this immunity results in the failure of the complaint to state a claim upon which relief may be granted, their failure to identify any or all of themselves as the trustee at issue or the relationship of the trust document to the Fund, and their failure to provide the cited document, prevent this court from granting their motion.

D. Venue

Finally, the moving defendants contend that venue in this court is improper. They acknowledge that this court has already found that venue is proper based on the federal securities allegations, Recommended Decision at 7-8, but assert that they may again challenge venue "because

those claims have now been dismissed,” Defendants’ Memorandum at 17 n.14. That optimistic assumption has not in fact come to pass, and the moving defendants have not suggested any reason why this court’s earlier ruling on this issue should be reversed.

IV. Conclusion

For the foregoing reasons, I recommend that the motion of defendants Shawver, Emerald Green Pension Fund, Commercial Mortgage & Associates, and Auman Jobe 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 29th day of March, 2000.

*David M. Cohen
United States Magistrate Judge*