

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**MAINE RUBBER INTERNATIONAL,** )

*Plaintiff* )

v. )

*Docket No. 02-226-P-H*

**ENVIRONMENTAL MANAGEMENT** )

**GROUP, INC., et al.,** )

*Defendants* )

**RECOMMENDED DECISION ON MOTIONS OF DEFENDANTS  
MAGLIETTA AND PFEFFER TO DISMISS**

The two individual defendants, David Maglietta and Felicia Pfeffer, move to dismiss the claims against them that were recently added to the complaint in this action. I recommend that the court grant the motions.

**I. Applicable Legal Standard**

Both motions invoke Fed. R. Civ. P. 12(b)(2). Defendant David Maglietta’s Motion to Dismiss (“Maglietta Motion”) (Docket No. 29) at 1; Defendant Felicia Pfeffer’s Motion to Dismiss (“Pfeffer Motion”) (Docket No. 30) at 1. A motion to dismiss for lack of personal jurisdiction, governed by this rule, raises the question whether a defendant has “purposefully established minimum contacts in the forum State.” *Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992) (citation and internal quotation marks omitted). The plaintiff bears the burden of establishing jurisdiction; however, where (as here) the court rules on a Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing

suffices. *Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). Such a showing requires more than mere reference to unsupported allegations in the plaintiff's pleadings. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). However, for purposes of considering a Rule 12(b)(2) motion the court will accept properly supported proffers of evidence as true. *Id.*

## **II. Factual Background**

The amended complaint includes the following relevant factual allegations. Maglietta, an employee of the corporate defendant, Environmental Management Group, Inc. ("EMG"), resides in Maryland. First Amended Complaint, etc. (Docket No. 20) ¶¶ 2-3. Pfeffer is a former employee of EMG who lives in Wisconsin. *Id.* ¶ 4. In 1998 the plaintiff retained EMG to perform an environmental inspection of property located in Portland, Maine that the plaintiff had contracted to purchase. *Id.* ¶¶ 9-11. Maglietta and Pfeffer, in their capacities as EMG employees, performed the services provided by EMG to the plaintiff. *Id.* ¶ 13. They represented in a written report dated November 2, 1998 that no adverse environmental conditions or hazards were present on the property and that its environmental condition was acceptable in all respects. *Id.* ¶ 14. In fact, contrary to the report, the property was in violation of numerous environmental laws, rules and regulations. *Id.* ¶ 15.

The amended complaint asserts that Maglietta and Pfeffer violated the standard of care applicable to professionals in their line of work and made negligent misrepresentations to the plaintiff (Counts I and III).

## **III. Discussion**

### **A. Defendant Maglietta**

Maglietta contends that this court lacks jurisdiction over him both because he did not have sufficient contacts with the state of Maine and because the fiduciary-shield doctrine bars the claims asserted against him. Maglietta Motion at 1-2.

In order to show that this court may exercise personal jurisdiction over Maglietta, the plaintiff must make a *prima facie* showing of jurisdiction by “citing to specific evidence in the record that, if credited, is enough to support findings of all facts essential to personal jurisdiction.” *New Life Brokerage Servs., Inc. v. Cal-Surance Assocs., Inc.*, 222 F.Supp.2d 94, 97 (D. Me. 2002) (citation and internal quotation marks omitted). When no evidentiary hearing is held,

the plaintiff must make the showing as to every fact required to satisfy both the forum’s long-arm statute and the due process clause of the Constitution. In so doing, the plaintiff must make affirmative proof beyond the pleadings. When determining whether the plaintiff has made the requisite *prima facie* showing, the court considers the pleadings, affidavits, and exhibits filed by the parties. For the purposes of such a review, plaintiff’s properly supported proffers of evidence are accepted as true and disputed facts are viewed in a light favorable to the plaintiff[;] however[,] unsupported allegations in the pleadings need not be credited.

*Id.* (citations and internal quotation marks omitted). Personal jurisdiction over the employee of a named corporate defendant cannot be obtained simply by reason of the fact that the court has jurisdiction over the employer. *In re Sterling Foster & Co. Sec. Litig.*, 222 F.Supp.2d 289, 302 (E.D. N.Y. 2002).

The plaintiff does not appear to contend that this court has general personal jurisdiction over Maglietta; such jurisdiction arises when a defendant has continuous and systematic general business contacts with the forum state. *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 619 (1st Cir. 2001). In this case, the plaintiff relies on contacts that cannot reasonably be described as continuous and systematic. Plaintiff’s Memorandum in Opposition to Motions to Dismiss, etc. (“Opposition”) (Docket No. 39) at 6-11.

The issue must accordingly be analyzed on the basis of specific personal jurisdiction, which has three elements.

First, an inquiring court must ask whether the claim that undergirds the litigation directly relates to or arises out of the defendant's contacts with the forum. Second, the court must ask whether those contacts constitute purposeful availment of the benefits and protections afforded by the forum's laws. Third, if the proponent's case clears the first two hurdles, the court then must analyze the overall reasonableness of an exercise of jurisdiction in light of a variety of pertinent factors that touch upon the fundamental fairness of an exercise of jurisdiction.

*Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999).

Maglietta contends that he has had "no contacts whatsoever with Maine" in connection with the services EMG performed for the plaintiff, having received only two telephone calls from persons who may have been in Maine. Maglietta Motion at 5. The question of actual contact goes to the "purposeful availment" prong of the personal jurisdiction test. Maglietta admits that he reviewed and commented on a report that another EMG employee prepared for the plaintiff but asserts that this activity is insufficient to subject him to jurisdiction of the courts in Maine. *Id.* at 6. The plaintiff offers no evidence that Maglietta was ever in Maine, but contends that he intentionally directed his activities into Maine by performing professional services for a Maine client, initiating and supervising work that was done in Maine, editing and signing the report which he authorized to be sent into Maine and continuing to transmit communications into Maine after the report was transmitted. Opposition at 9-10. The only evidence offered by the plaintiff on the last point concerns a telephone call that Maglietta returned to a person in Maine "who was working with" the plaintiff and a conversation that he had with a representative of the plaintiff's lender who called him. *Id.* at 8; Maglietta Deposition (Exh. A to Opposition) at 128-30.

The plaintiff asserts two tort claims against Maglietta: professional malpractice and negligent misrepresentation.

Minimum contacts are particularly important to a jurisdictional analysis of tort claims: In contradistinction to contractual cases, specific jurisdiction in tort cases depends largely on the strength of the connection between the tortious conduct and the contact with the forum, rather than the purposeful availment of benefits in the forum. . . . By knowingly initiating contact with and shipping a product into Maine, this Court has previously held that[] a defendant could have anticipated invoking the benefits of Maine law.

*Forum Fin. Group v. President & Fellows of Harvard College*, 173 F.Supp.2d 72, 89 (D. Me. 2001) (citations and internal quotation marks omitted). Mere awareness that one's product will end up in the forum state is not enough to foresee being subject to jurisdiction there. *Id.* at 90. Here, the plaintiff offers no evidence that Maglietta, as opposed to EMG, targeted or initiated an ongoing business relationship, *id.*, with the defendant. Maglietta was undoubtedly aware that the report which he signed, and which might reasonably be characterized as his product, given the plaintiff-favorable view of the evidence that is required at this point in the proceedings, was going to end up in Maine, but that is not enough.

The plaintiff relies, Opposition at 10, on language in this court's opinion in *New Life Brokerage* quoting a First Circuit case that stated that the unwitting transmittal of a misrepresentation into the forum state has been held to represent substantial contacts for the purpose of finding personal jurisdiction over a corporation. 222 F.Supp.2d at 108. In *New Life Brokerage*, the corporate defendant knowingly directed misrepresentations into Maine. Here, the plaintiff only alleges negligent misrepresentation by Maglietta, and this argument at best addresses only Count III. In addition, the corporate defendant in *New Life Brokerage* solicited business from the plaintiff and annually requested its renewal business. *Id.* at 106. These facts distinguish *New Life Brokerage* from the instant case, in which the plaintiff seeks to recover against an individual employee who engaged in no such conduct. Contacts that result fortuitously as a result of another

party's decisions, as is the case with any contacts Maglietta is shown to have had with Maine, do not satisfy the purposeful availment prong of the specific personal jurisdiction test. *Telford Aviation, Inc. v. Raycom Nat'l, Inc.*, 122 F.Supp.2d 44, 47 (D. Me. 2000). The fact that the results of Maglietta's alleged negligence were felt in Maine is not enough to constitute minimum contacts for this purpose. *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 36 (1st Cir. 1998). The plaintiff has not established that Maglietta purposefully availed himself of the protections of Maine law and Maglietta is accordingly entitled to dismissal of the claims against him because this court lacks specific personal jurisdiction over him.

This conclusion makes it unnecessary to consider Maglietta's additional argument based on the fiduciary shield doctrine, but in the event that the court disagrees with my recommendation on this point, my discussion of that doctrine, as asserted by both Maglietta and Pfeffer, appears below.

### **B. Defendant Pfeffer**

Pfeffer does not assert that she lacks minimum contacts with the state of Maine. She relies solely on the fiduciary-shield doctrine, which "generally precludes a court from exercising personal jurisdiction over a non-resident corporate agent for acts performed on behalf of his employer." *LaVallee v. Parrot-Ice Drink Prods. of Am., Inc.*, 193 F.Supp.2d 296, 301 (D. Mass. 2002). It has been disregarded in cases in which the defendant was in the forum to serve personal interests, was the alter-ego of the corporate employer or had an identity of interest with the employer, *id.*, none of which has been alleged in this case with respect to Pfeffer or Maglietta. The doctrine has not been accepted or rejected by the Supreme Court, *id.* The *LaVallee* court noted in dicta that

an employee acting solely at the behest of his employer is not a primary participant in the alleged wrongdoing, i.e., if a court exercises jurisdiction over the corporation, it gilds the lily to exercise jurisdiction over the employee when his

activities in the forum[] were not torts independently directed toward the forum. The fiduciary shield doctrine is not an absolute bar to personal jurisdiction over a corporate employee, but it is relevant to a court's consideration of the propriety of exercising such jurisdiction.

*Id.* at 302, n.2 (citation omitted). *See also Darovec Mktg. Group, Inc. v. Bio-Genics, Inc.*, 42 F.Supp.2d 810, 819 (N.D. Ill. 1999) (Illinois fiduciary-shield doctrine denies personal jurisdiction over individual whose presence and activity in state in which suit is brought were solely on behalf of employer). The doctrine is a matter of state law. *Hardin Roller Corp. v. Universal Printing Mach., Inc.*, 236 F.3d 839, 842 (7th Cir. 2001). Pfeffer and Maglietta rely on the doctrine to support their motions to dismiss in this case.

The plaintiff states correctly that the doctrine has not been adopted by the Maine Law Court<sup>1</sup> and contends that it could not be adopted in Maine because the state already has a long-arm statute that extends the jurisdiction of its courts to the limits of due process under the federal constitution. Opposition at 3-4.<sup>2</sup> Courts which have considered this issue have differed. *Compare, e.g., Darovec*, 42 F.Supp.2d at 818-19 (applying doctrine; Illinois state court has jurisdiction if it “comports with . . . the United States Constitution”), and *LaVallee*, 193 F.Supp.2d at 301 (same; Massachusetts law), *with Torchmark Corp. v. Rice*, 945 F. Supp. 172, 176-77 (E.D. Ark. 1996) (fiduciary-shield doctrine incompatible with state long-arm jurisdiction statute reaching to full extent provided by federal law); *MCA Records, Inc. v. Highland Music, Inc.*, 844 F. Supp. 1201, 1204 (M.D. Tenn. 1993) (same). I am not persuaded that a

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<sup>1</sup> Nor has the First Circuit discussed the doctrine as such.

<sup>2</sup> The plaintiff also contends that the Law Court's statement that the sole inquiry under Maine's long-arm statute, 14 M.R.S.A. § 704-A, is whether the exercise of personal jurisdiction will be constitutional as a matter of due process, citing *Suttie v. Sloan Sales, Inc.*, 711 A.2d 1285, 1286 (Me. 1998), and *Architectural Woodcraft Co. v. Read*, 464 A.2d 210, 212 (Me. 1983), necessarily means that the fiduciary-shield doctrine has been rejected. Opposition at 4. This interpretation places far more weight on the language of those decisions than they may reasonably be deemed to bear. The doctrine was not considered in those cases.

state long-arm statute extending jurisdiction to the limits of federal due process is necessarily inconsistent with an exception for individual defendants otherwise within the scope of the fiduciary-shield doctrine. *See Saktides v. Cooper*, 742 F. Supp. 382, 385 (W.D. Tex. 1990) (doctrine is “important sub-issue under a due process analysis when it is raised”).

In this case, the plaintiff has not alleged that either Maglietta or Pfeffer’s alleged tortious acts occurred other than in the course of their employment by EMG. Here, as was the case in *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899 (2d Cir. 1981),

there is a dichotomy between the principles governing the personal liability of corporate agents for torts committed in their corporate roles and the principles governing the amenability of such agents to personal jurisdiction solely on the basis of those acts.

*Id.* at 902. Here, Maglietta and Pfeffer may be liable to the plaintiff for professional malpractice committed in the course of their work for EMG but not necessarily subject to personal jurisdiction in Maine solely on the basis of those alleged actions. The *Marine Midland* court cited cases which

have recognized that if an individual has contact with a particular state only by virtue of his acts as a fiduciary of the corporation, he may be shielded from the exercise, by that state, of jurisdiction over him personally on the basis of that conduct. Thus, his conduct, although it may subject him to personal liability, may not form the predicate for the exercise of jurisdiction over him as an individual. The underpinning of this fiduciary shield doctrine is the notion that it is unfair to force an individual to defend a suit brought against him personally in a forum with which his only relevant contacts are acts performed not for his own benefit but for the benefit of his employer.

*Id.* I do not find persuasive the rejection of *Marine Midland* by the Fourth Circuit in *Columbia Briargate Co. v. First Nat’l Bank in Dallas*, 713 F.2d 1052, 1058-60 (4th Cir. 1983), which is based on the assertion that application of the doctrine would “in effect, . . . provide the non-resident agent who has come into the state and committed a tort but then left the state with actual immunity from liability for his tort.” The

plaintiff is not precluded, should its recovery, if any, from EMG prove unsatisfactory, from suing Maglietta and Pfeffer in a jurisdiction which may properly exercise personal jurisdiction over them; application of the fiduciary-shield doctrine does not differ in this practical sense from application of the basic constitutional principles of specific personal jurisdiction discussed above in reference to Maglietta. The fiduciary-shield doctrine deals only with jurisdiction, not with liability.

The plaintiff contends that two “well recognized” exceptions to the fiduciary-shield doctrine should apply if the doctrine is applicable in this case. Opposition at 5. It asserts that the doctrine does not apply “if a corporate employee commits a tortious act in the forum” or if the defendant’s actions at issue were discretionary. *Id.* The former exception is allowed by a minority of courts that have addressed the issue. *Saktides*, 742 F. Supp. at 385. The exception is not consistent with the purpose of the doctrine and unnecessary because the plaintiff still has a cause of action against the individual defendant in a forum in which the assertion of personal jurisdiction is appropriate. As the defendants note, Defendants David Maglietta and Felicia Pfeffer’s Response to Plaintiff’s Memorandum in Opposition to Their Motions to Dismiss (Docket No. 40) at 3, application of such an exception would have the practical effect of swallowing up the doctrine.<sup>3</sup> The plaintiff’s reliance on an exception for discretionary acts is equally unavailing. The plaintiff cites *Darovec* in support of its argument on this point, Opposition at 5, but the case relied upon by the *Darovec* court, *Brujis v. Shaw*, 876 F. Supp. 975 (N.D. Ill. 1995), makes clear that the court in that case found that Illinois law was likely to recognize such an exception only when the defendant “was in a position to decide whether or not to perform acts in Illinois,” *id.* at 979. In a sense, all acts performed by a professional for his or her employer may be characterized as discretionary, and in that

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<sup>3</sup> Nothing in *McCarty v. Azure*, 22 F.3d 351, 359-61 (1st Cir. 1994), an opinion carefully limited by the First Circuit to its (continued on next page)

sense, the proposed exception would again eviscerate the doctrine. The plaintiff has not alleged that either Maglietta or Pfeffer was in a position to decide whether they would perform acts in Maine, the basis of the discretionary exception recognized in the Northern District of Illinois. Accordingly, that exception is not applicable here.

I conclude that the fiduciary-shield doctrine is applicable to Pfeffer and Maglietta, *see generally Clipp Designs, Inc. v. Tag Bags, Inc.*, 996 F. Supp. 766, 768-69 (N.D. Ill. 1998), and that the Maine Law Court would adopt it were the issue presented to it directly, *see, e.g., Jackson v. Weaver*, 678 A.2d 1036, 1039-40 (Me. 1996) (discussing fairness of exercise of personal jurisdiction); *Christiansen v. Elwin G. Smith, Inc.*, 598 A.2d 176, 178 (Me. 1991) (same).

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the motions of defendants Maglietta and Pfeffer to dismiss be **GRANTED**.

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facts, requires a different conclusion.

**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 and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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 October, 2003.

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David M. Cohen  
United States Magistrate Judge

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